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REGISTERED
No. C.As. 481-482/2015 - SCJ
SUPREME COURT OF PAKISTAN.

Islamabad, dated 30.04.2019, 2019.

The Registrar,
Supreme Court of Pakistan,
Islamabad.

The Registrar,
High Court of Sindh,
Karachi.

6475
R19
02/05/19

Subject: **CIVIL APPEAL NOS. 481 & 482 OF 2015.**

1. M/s Super Engineering and another. (App. in C.A.481/15).
2. M/s Faraz Industries, Karachi. (App. in C.A.482/15).

Versus

The Commissioner of Inland Revenue, Income Tax House,
Karachi. (Res. in both cases).

On appeal from the Judgment/Order of the High Court of
Sindh, Karachi dated 14.04.2015, in I.T.R.A. Nos.189 &
190/2010.

Sir,

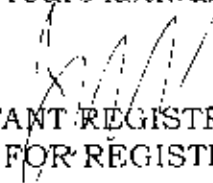
In continuation of this Court's letter of even number dated
02.02.2009 and in accordance with the provisions contained in Order X,
Rule 9, Supreme Court Rules, 1980, a certified copy of the short Order of
this Court dated 24.04.2019 allowing the above cited civil appeals, in
the terms stated therein, is enclosed for further necessary action.

The original record of the High Court received under the
cover of your letter No. I.T.R.A.189 & 190/2010; dated 08.07.2015, will
be returned alongwith detailed Judgment.

Please acknowledge receipt of this letter along with its
enclosure immediately.

Encl: short Order:

Yours faithfully


ASSISTANT REGISTRAR (IMP)
FOR REGISTRAR

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE YAHYA AFRIDI

CIVIL APPEAL NO. 481 OF 2015 AND
CIVIL APPEAL NO. 482 OF 2015

[On appeal against Order dated 14.04.2015
of the High Court of Sindh, Karachi passed
in I.T.R.A. Nos. 189 & 190 of 2010.]

M/s. Super Engineering
M/s. Faraz Industries

(in CA 481/2015)
(in CA 482/2015)
...Appellants

VERSUS

The Commissioner Inland Revenue, Karachi

...Respondent
(in both cases)

For the Appellants: Syed Naveed Amjad Andrabi, ASC.

For the Respondent: Ms. Misbah Gulnar Sharif, ASC.
Mr. Abdul Hameed Amjum, Chief
(Legal) FBR.

Date of Hearing: 24.04.2019

ORDER

Umar Ata Bandial, J. - For reasons to be recorded
later, these appeals are allowed.

ISLAMABAD,
24th April, 2019
Naveed Ahmad/*

Not approved for reporting

REGISTERED
No. C.As. 481-482/2015 - SCJ
SUPREME COURT OF PAKISTAN.

Islamabad, dated 16.8.2019, 2019.

The Registrar,
Supreme Court of Pakistan,
Islamabad.

The Registrar,
High Court of Sindh,
Karachi.

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I.T.R.A
22-08-2019

CIVIL APPEAL NOS. 481 & 482 OF 2015.

M/s Super Engineering and another. (App. in C.A.481/15).
M/s Faraz Industries, Karachi. (App. in C.A.482/15).

Versus

The Commissioner of Inland Revenue, Income Tax House,
Karachi. (Res. in both cases).

On appeal from the Judgment/Order of the High Court of
Sindh, Karachi dated 14.04.2015, in I.T.R.A. Nos.189 &
190/2010.

In continuation of this Court's letter of even number dated
20.04.2019 and in accordance with the provisions contained in Order X,
Supreme Court Rules, 1980, a certified copy of the detailed
Judgment of this Court dated 24.04.2019 allowing the above cited civil
appeals, in the terms stated therein, is enclosed for further necessary
action.

The original record of the High Court received under the
cover of your letter No. I.T.R.A.189 & 190/2010; dated 08.07.2015, are
returned herewith.

Please acknowledge receipt of this letter along with its
enclosure immediately.

Encl: detailed Judgment:
2. original Record:

Yours faithfully

ASSISTANT REGISTRAR (IMP)
FOR REGISTRAR

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE YAHYA AFRIDI

CIVIL APPEAL NO. 481 OF 2015 AND
CIVIL APPEAL NO. 482 OF 2015

(On appeal against Order dated 14.04.2015
of the High Court of Sindh, Karachi passed
in I.T.R.A. No. 189 & 190 of 2010)

M/s. Super Engineering
M/s. Faraz Industries

(in CA 481/2015)

(in CA 482/2015)

...Appellants

versus

The Commissioner Inland Revenue, Karachi

...Respondent
(in both cases)

For the Appellants:

Syed Naveed Anjad Andrabi, ASC

For the Respondent:

Ms. Misbah Gulnar Sharif, ASC
Mr. Abdul Hameed Anjum, Chief (Legal)
FBR

Date of Hearing:

24.04.2019

JUDGMENT

YAHYA AFRIDI, J. - These two direct appeals have been filed by M/s Super Engineering and M/s Faraz Industries (**appellants**), challenging the common judgment of the High Court of Sindh, Karachi dated 14.04.2015 passed in ITRAs No. 189 and 190 of 2010, whereby the orders of the Appellate Tribunal, Inland Revenue, Karachi (**Tribunal**) dated 20.11.2009 were set aside.

2. The facts regarding the present appeals are that the appellants were engaged in the business of manufacturing and supplying auto. parts, and had registered as an Association of Persons (**AOPs**) with the Income Tax Authorities (**Revenue**) under the enabling provision of the Income Tax Ordinance, 2001 (**Ordinance**).

They filed their income tax returns for the tax year 2008 (per section 2(28) read with section 74 *supra*, i.e. 1st July 2017 till 30 June 2018) under the normal tax regime provided under section 114 of the Ordinance, wherein they had claimed refund/adjustments of withholding tax under section 153 of the Ordinance. The Additional Commissioner Income Tax, Karachi, exercising his jurisdiction under section 122(5A) of the Ordinance, questioned the appellants' legal status to avail the normal tax regime, by serving notices upon them, asserting therein that their cases would fall under the presumptive tax regime, whereby the tax deducted at the time of making payments would be deemed their final tax liability under sub-section 6 of section 153 of the Ordinance. For ease of reference, and to contextualise the issue in hand, we may consider the notice issued to M/s. Faraz Industries (Civil Appeal No. 482 of 2015), which was in terms that:

"Kindly refer to above, you filed return declaring loss of Rs. (8,924,770/-) and claimed a refund of Rs.9,583,057/-. The assessment is deemed to have been finalized u/s. 120 of the Income Tax Ordinance, 2001.

Perusal of Annex-C of return shows the tax deduction of Rs.8,016,354/- u/s.153 of Income Tax Ordinance, 2001. As per subsection 6B of Section 153 of Income Tax Ordinance, 2001, tax deducted under this section i.e. 153 shall be final tax on the income, arising from such transaction. Moreover P&L expenses have not been prorated between PTR and Non PTR income as per section 67 read with Rule 13 of the Income Tax Rules.

In view of the deemed assessment is found to be erroneous and prejudicial to the interest of revenue, the deemed assessment is intended to be amended by treating the tax deducted u/s. 153 as final tax. Explanation, if any, may be filed by 18.03.2009.

Notice under Rule 68 enclosed."

3. The appellants vehemently contested the above notices. The stance taken by the appellants was that they, for the relevant period, would qualify within the purview of sub-section 6A


section 153 of the Ordinance, and thus, fall out of the scope of presumptive tax regime provided under sub-section 6 of section 153 of the Ordinance. While on the other hand, the Revenue contended that the appellants were to be considered under the presumptive tax regime provided in subsection 6 of section 153 of the Ordinance, insisting that they did not fall within the exceptions to the presumptive tax regime, as the same was restricted to companies and not AOPs, in view of the amendment introduced in subsection 6A of section 153 of the Ordinance *vide* the Finance Act, 2008.

4. The stand taken by the Revenue prevailed before the first two adjudicatory forums provided under the Ordinance. However, the said decisions were set aside by the Tribunal, which was challenged by the Revenue before the High Court on the sole question of law, as to:

"Whether the Learned appellate Tribunal Inland Revenue was justified in holding that the income of the taxpayer not covered under presumptive tax regime in the light of provisions of Section 153(6A)?"

5. The High Court answered the above question in the negative, declaring that the appellants were to declare their income under the presumptive tax regime, as provided under subsection 6 of section 153 of the Ordinance. It was further explained that the amendment introduced in sub-section 6A *vide* the Finance Act, 2008 would apply to the cases of the present appellants, and they would thereby not fall within the exceptions to the presumptive/final tax regime provided under subsection 6A of section 153 of the Ordinance. Hence, the instant appeals.

6. In order to appreciate the contested claims of the parties, it would be pertinent to first review the relevant provisions



section 153 of the Ordinance prior to the amendments introduced therein *vide* the Finance Act, 2008. The relevant provision then read as:

"153. Payments for goods and services

(1) Every prescribed person making a payment in full or part including a payment by way of advance to a resident person or permanent establishment in Pakistan of a non-residential person.

- (a) for the sale of goods;
 - (b) of the rendering of or providing of services;
 - (c) on the execution of a contract, other than a contract for the sale of goods or the rendering of or providing of services,
- shall, at the time of making the payment, deduct tax from the gross amount payable at the rate specified in Division III of Part-III of the First Schedule.

(6) The tax deducted under this section shall be a final tax on the income of a resident person arising from transactions referred to in of subsection (1) [and (1A)].

(6A) The provisions of subsection (6) in so far as they relate to payments on account of supply of goods from which tax is deductible under this section shall not apply in respect of any person being a manufacturer of such goods. The provision of this subsection shall be deemed always to have been so enacted and shall have had effect accordingly."

(emphasis provided)

7. A careful reading of section 153 of the Ordinance, *inter alia*, mandates the following: firstly, under sub-section 1, every "prescribed person" (duly defined in subsection 7 of section 153) is to deduct tax at the time of making payments in regards to sale of goods, or providing, or rendering service, or on execution of certain contracts, at the rate specified in Division III of Part III of the First Schedule to the Ordinance. Secondly, sub-section 6 provides that taxes so deducted under sub-section 1 would be deemed to be the final tax of the income arising from the said transactions, and would thereby exclude the "prescribed person" from the normal tax regime, and thus bring their case within the purview of the

presumptive tax regime. Thirdly, in view of subsection 6A, the application of the presumptive tax regime does not apply to a person who was the manufacturer of the goods being supplied, and he would be entitled to file his returns under the normal tax regime under the enabling provisions of the Ordinance.

5. Now, when we consider the case of the present appellants in light of the above pre-amended provisions of the Ordinance, it is clear that they are "prescribed person" registered as AOPs with the Revenue, engaged in the manufacturing of auto. parts, and that their income generated from the supply made thereof would bring their cases within the scope of sub-section 6A, and thus entitle them to submit their returns under the normal tax regime, and not the presumptive tax regime provided under sub-section 6 of Section 153 of the Ordinance.

9. The crucial point of divergence between the parties is the applicability of the amendment introduced in sub-section 6A of section 153 of the Ordinance vide Finance Act, 2008 (**the Amendment**), and in simple terms, the contest is: whether the same would apply to the case of the appellants for the tax year 2008 (period commencing from 1st July 2007 till 30th June 2008) or otherwise?

10. The Finance Act, 2008 introduced, *inter alia*, the Amendment, which read as follows:

"(19) in section 153,

(a) in subsection (5), clause (c), shall be omitted;

(b) in subsection (6A),

(i) for the words "any person" the words "a company" shall be substituted; and

(ii) the words and full stop "The provision of this subsection shall be deemed always to have been so enacted and shall have had effect accordingly." shall be omitted;

(emphasis provided)



The Amendment has substituted the words "any person" with that of "a company", and thereby restricted the scope of "prescribed person", who could be excluded from declaring their return under the presumptive tax regime mandated in sub-section 6A of section 153 of the Ordinance. With the Amendment, only a company that was manufacturing the goods generating the income would be excluded from the purview of the presumptive tax regime. As far as the distinction between the terms "person" and "company" is concerned, it is noted that the definition of the said terms has been stipulated in Section 80 read with sub-sections 28 and 42 of section 2 of the Ordinance, which reads:

"80. Person

(1) The following shall be treated as person for the purposes of this Ordinance, namely:

- (a) An individual;
- (b) a company or association of persons incorporated, formed, organized or established in Pakistan or elsewhere;
- (c) The Federal Government, a foreign government, a political subdivision of a foreign government, or public international organization."

(2) For the purposes of this Ordinance-

(a) "association of persons" includes a firm, a Hindu undivided family, any artificial juridical person and anybody of persons formed under a foreign law, but does not include a company;

(b) "company" means-

- (i) a company as defined in the Companies Ordinance, 1984 (XLVII of 1984);
- (ii) a body corporate formed by or under any law in force in Pakistan;
- (iii) a modaraba;
- (iv) a body incorporated by or under the law of a country outside Pakistan relating to incorporation of companies;
- (v) a co-operative society, a finance society or any other society;
- (va) a non-profit organization;
- (vb) a trust, a entity or a body of persons established or constituted by or under any law for the time being in force;]
- (vi) a foreign association, whether incorporated or not, which

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the [Board] has, by general or special order, declared to be a company for the purposes of this Ordinance;

(vii) a Provincial Government; [***]
 (viii) a [Local Government] in Pakistan; [or]
 [(ix) a Small Company as defined in section 2;]"

12. A careful reading of the above definitions reveals that a "person" is a wider term, which includes a company and AOPs. While "company" has been rendered a narrow scope by excluding AOPs.

13. It is a settled principle of statutory interpretation that the applicability of an enactment can best be adjudged from its expressed content and implied intent. When the enactment itself provides for the same to have effect from a particular point in time, the express command of the legislature is to be abided, interpreted and applied accordingly. In the present case, the Finance Act, 2008 provides:

"1. Short title, extent and commencement

- (1) This Act may be called the Finance Act, 2008.
 (2) It extends to the whole of Pakistan.
 (3) It shall, unless otherwise provided, come into force on the first day of July, 2008."

(emphasis provided)

14. Sub-section 3 of section 1 of the Finance Act, 2008, highlighted above, clearly provides for its provisions to take effect from 1st July 2008. This being so, there can be no cavil to its applicability commencing from 1st July 2008 and not for any period prior thereto.

15. With regards to the contention of the Revenue that the Amendment related to the procedure, and would thus have retrospective effect to the case of the applicant, we are afraid this

line of argument, though attractive, is not applicable to the facts of the present case.

16. Like any other fiscal enactment, the Ordinance provides for three general yet distinct types of provisions: the charging provisions; the assessment provisions; and finally, the recovery provisions. The above categorisation of provisions of fiscal statutes has been very aptly explained in detail by Rustam S. Sidhwa, J. in **Messrs Friends Sons and Partnership Concern v. The Deputy Collector Central Excise and Sales Tax, Lahore and others** (PLD 1989 Lahore 337) in terms that:

"There are three distinct types of provisions generally in every fiscal enactment. The charging provisions, which date to the levy or charge of the tax, which usually states that tax is to be levied and on what matter, or goods or income and in which manner and at what rate and matters relevant thereto. The assessment provisions, which deal with the assessment, calculation or quantification of the tax for the purposes of determining the amount of tax due and payable or which has escaped collection or has been under assessed for assessed at a lower rate or on which excessive relief or refund has been allowed. The collection provisions, which relate to the mode and manner of receipt or collection of the tax. The charging sections have to be strictly construed and any benefit found therein has to be given to the tax-payer. However, the assessment and collection provisions are merely the machinery sections and they can be liberally construed."

(emphasis provided)

17. Now, to the crucial issue of applicability of amendments introduced in fiscal statutes. It was in 1905, when Lord Macnaghten, in **The Colonial Sugar Refining Company v. Irving** (1905 AC 369) case, speaking for the Privy Council, opined that:

"As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express

enactment or by necessary intendment. And therefore the only question is, Was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case, there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

(emphasis provided)

18. The above principle of interpretation of statutes was followed and further developed in our jurisdiction. Some of the early leading cases are **Muhammad Ishaq v. State** (PLD 1956 SC 256), **Nagina Silk Mill, Lyallpur v. Income Tax Officer, A-Ward, Lyallpur** (PLD 1963 SC 322), **The State v. Muhammad Jamel** (PLD 1965 SC 681) and **Abdul Rehman v. Settlement Commissioner** (PLD 1966 SC 362). It was the case of **Adnan Afzal v. Capt. Sher Afzal** (PLD 1969 SC 187) that the said principle was articulated by this Court in terms that:

"Nevertheless, it must be pointed out that if in this case process any existing rights are affected or the giving of retroactive operation cause inconvenience or injustice, then the Courts will not even in the case of a procedural statute, favour an interpretation giving retrospective effect to the statute. On the other hand, if the new procedural statute is of such a character that its retroactive application will tend to promote justice without any consequential embarrassment or detriment to any of the parties concerned, the Courts would favourably incline towards giving effect to such procedural statutes retroactively."

(emphasis provided)

19. The opinion of this Court, rendered in the above referred cases, has remained un-wavered, as can clearly be seen from decisions that followed, in particular **Ch. Safdar Ali v. Malik Ikram Elahi and another** (1969 SCMR 166), **Muhammad Abdullah v. Inayat Ali** (1972 SCMR 173), **Bashir v. Wazir Ali** (1987 SCMR 978), **Mst. Nighat**

Yasmin v. National Bank of Pak. (PLD 1988 SC 391), *Yusuf Ali Khan v. Hongkong & Shanghai Banking Corporation, Karachi* (1994 SCMR 1007), *Malik Gul Hasan & Co. and 5 others v. Allied Bank of Pakistan* (1996 SCMR 237) and *Commissioner of Income Tax, Peshawar v. Islamic Investment Bank Ltd.* (2016 SCMR 816). In the more recent case of *Additional Commissioner Inland Revenue, Audit Range, Zone-I v. Eden Builders Limited* (2018 SCMR 991), where the question was whether or not the provisions of section 122(2) of the Income Tax Ordinance, 2001, being procedural in nature, would have retrospective effect, and whether pursuant to the amendment brought about in section 122(2) of the Income Tax Ordinance, 2001 through Finance Act, 2009 consequential extension in date of expiry of the limitation period would operate prospectively or otherwise, this Court held that prospective applicability:

“... was not permissible as certain rights had already come to vest in the respondents on the date on which they had filed their tax returns under the original section...”

The Court also went on to reiterate the view taken earlier in the

Nagina Silk Mill case (supra):

“The Courts must lean against giving a statute retrospective operation on the presumption that the Legislature does not intend what is unjust. It is chiefly where the enactment would prejudicially affect vested rights, or the legality of past transactions, or impair existing contracts, that the rule in question prevails ... Even if two interpretations are equally possible, the one that saves vested rights would be adopted in the interest of justice, especially where we are dealing with a taxing statute.”

(emphasis provided)

20. Thus, the judicial consensus, as it stands today, is this: firstly, unless the statute expressly provides otherwise, charging provisions are to be applied prospectively; secondly, the assessment and recovery provisions are to be considered

retrospectively unless the enactment expressly or impliedly provides otherwise.

21. When we revisit the provisions contained in section 153, and in particular sub-section 6A of the Ordinance in light of the above discussed settled principles of interpretation, it is noted that sub-section 1 mandates the withholding of the taxes at the time of making payments in regard to certain stipulated income-generating activities, while sub-section 6A specifically relates to the procedure for filing tax returns, and the assessment of the tax due on the income so generated. In the case in hand, the Amendment had transposed the appellants, being AOPs, from normal tax regime to a presumptive tax regime, resultantly having negative tax implications. In the circumstances, even if we regard the Amendment to be procedural in nature, it would not have retrospective effect, as valuable rights had already accrued and matured in favour of the appellants at the culmination of the tax year 2008 i.e. on 30.06.2008.

22. In view of the above deliberation, we find that the High Court erred by not considering the settled principle of interpretation of fiscal statutes while rendering its impugned common judgment dated 14.04.2015. Hence, the same warrants correction in terms that the Tribunal was legally correct in holding that the income of the appellants for the tax year 2008 was to be assessed under the normal tax regime and not the presumptive tax regime, and the opinion rendered by the High Court in the Tax References filed by the Revenue *vide* impugned common judgment dated 14.04.2015 was not correct in law, and is thus set aside.

13. Accordingly, above are the detailed reasons for our short order of even date, where these appeals were allowed, which read as under:

"For the reasons to be recorded later, these appeals are allowed."

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ISLAMABAD
24th April 2019

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