

**JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT**

ITR No.1255 of 2023

**Commissioner Inland Revenue, Zone-I, Regional Tax Office,
Gujranwala**

Versus

Muhammad Khalid Chaudhry

J U D G M E N T

Date of hearing: 12.10.2023.

Applicant by: Mr. Muhammad Yahya Johar, Advocate.

Respondent by: M/s. Waseem Ahmad Malik, Syed Nawazish Hussain and Zaki Vohra, Advocates.

MUHAMMAD SAJID MEHMOOD SETHI, J.- Through instant Reference Application under Section 133 of the Income Tax Ordinance, 2001 (“**the Ordinance of 2001**”), following question of law, urged to have arisen out of impugned order dated 05.02.2022, passed by learned Appellate Tribunal Inland Revenue, Lahore Bench, Lahore (“**Appellate Tribunal**”), has been pressed and argued for our opinion:-

“Whether under the facts and circumstances of the case, the learned Appellate Tribunal Inland Revenue has not erred in law to hold that Section 214-D of the Income Tax Ordinance, 2001 has been repealed through Finance Act, 2018; therefore, after its repeal, the proceedings against the taxpayer for the tax year 2015 under Section 214-D of the Ordinance cannot be initiated, whereas such repeal cannot be applied retrospectively with respect to audit proceedings for tax year 2015?”

2. Brief facts of the case are that respondent-taxpayer e-filed income tax return for the tax year 2015, declaring income amounting to Rs.2,250,830/-, which was treated as an assessment order in terms of Section 120 of the Ordinance of 2001, however, owing to the late filing thereof, taxpayer’s case was selected for audit under Section 214-D of the Ordinance *ibid*. Later on, on

account of certain discrepancies found in the return and wealth statement, a show cause notice was issued to the respondent-taxpayer, which culminated in passing of amended assessment order dated 30.11.2020 determining income at Rs.56,656,061/-, which included various additions and consequently tax demand was created at Rs.16,870,606/- which was upheld by CIR (Appeals) vide its order dated 16.03.2021. Being dissatisfied, respondent-taxpayer preferred second appeal before the Appellate Tribunal, which was allowed vide order dated 05.02.2022 thereby annulling orders passed by both the authorities below. Hence, instant Reference Application.

3. Learned Legal Advisor for applicant-department submits that the Appellate Tribunal has annulled the orders passed by A/DCIR as well as CIR (Appeals) as a result of undue haste and arbitrariness, thereby ignoring the principle of law enunciated by the Hon'ble Supreme Court in *Commissioner of Income Tax, Peshawar v. Messrs Islamic Investment Bank Ltd. (2016 SCMR 816)* wherein it has been unequivocally held that *it cannot be said that the income years which relate to the period covered under the repealed Income Tax Ordinance, 1979, cannot be brought under scrutiny under its provisions after 30.06.2002 on the strength of Section 239(1) of the Income Tax Ordinance, 2001.* He adds that the Appellate Tribunal was not justified to hold that power to use Section 214-D of the Ordinance after its omission was not available to the DCIR by ignoring the provisions of Article 264 of the Constitution of the Islamic Republic of Pakistan, 1973 (“**the Constitution**”) and Section 6 of the General Clauses Act, 1897. In the end, he submits that impugned order being absolutely illegal and without lawful authority, is liable to be set aside.

4. Conversely, learned counsel for respondent-taxpayer defends the impugned order by contending that learned Legal Advisor for applicant-department has failed to point out any illegality or legal infirmity therein.

5. We have considered the rival arguments of both the parties and perused the relevant record available on file.

6. Perusal of record reveals that the taxpayer defaulted in filing its return of income within time stipulated under the law, as the cutoff date for said purpose was 31.01.2016, whereas same was filed on 29.03.2016 and revised return was filed on 18.01.2017. The case of taxpayer was selected for audit under Section 214D of the Ordinance of 2001 and intimation to this effect was communicated to the taxpayer on 08.11.2018, however, it is a matter of record that the relevant provision of law in this regard i.e. Section 214D of the Ordinance of 2001 was omitted through Finance Act, 2018, passed by the National Assembly of Pakistan, which was to give effect to the financial proposals of the Federal Government for the year beginning on the first day of July, 2018. For facility of reference, Section 214D is reproduced hereunder:-

"214D. Automatic selection for audit.- (1) A person shall be automatically selected for audit of its income tax affairs for a tax year, if --

- (a) the return is not filed within the date it is required to be filed as specified in section 118, or, as the case may be, not filed within the time extended by the Board under Section 214A or further extended for a period not exceeding thirty days by the Commissioner under Section 119; or
- (b) the tax payable under sub-section (1) of section 137 has not been paid.

(2) Audit of income tax affairs of persons automatically selected under sub-section (1) shall be conducted as per procedure given in section 177 and all the provisions of this Ordinance shall apply accordingly:

Provided that audit proceedings shall only be initiated after the expiry of ninety days from the date as mentioned in sub-section (1).

(3) Subject to section 182, 205 and 214C, sub-section (1) shall not apply if the person files the return within ninety days from the date as mentioned in sub-section (1) and—

- (a) twenty-five percent higher tax, than the tax paid during immediately preceding tax year, has been paid by a person on the basis of taxable income and had declared

taxable income in the return for immediately preceding tax year; or

- (b) tax at the rate of two percent of the turnover or the tax payable under Part I of the First Schedule, whichever is higher, has been paid by a person alongwith the return and in the immediately preceding tax year has either not filed a return or had declared income below taxable limit:

Provided that where return has been filed for the immediately preceding tax year, turnover declared for the tax year is not less than the turnover declared for the immediately preceding tax year.

(4) The provisions of sub-section (1) and sections 177 and 214C shall not apply, for a tax year, to a person registered as retailer under rule (4) of the Sales Tax Special Procedure Rules, 2007 subject to the condition that name of the person registered under rule (4) of the Sales Tax Special Procedure Rules, 2007 remained on the sales tax active taxpayers' list throughout the tax year.

(5) Sub-section (4) shall have effect from the date as the Board may, by notification in the official Gazette, appoint."

7. It is crystal clear from available record that learned Single Bench of this Court while dealing with similar proposition with regard to Section 214D of the Ordinance of 2001, vide order dated 27.10.2020, passed in **W.P. No.49412 of 2019** titled *Hamid Mahmood v. Federation of Pakistan etc.*, authoritatively observed that aforesaid provision of law has been omitted by way of Finance Act, 2018, therefore, power is not available to be exercised by the officers subsequent to the omission. The Appellate Tribunal, while allowing taxpayer's appeal, has also referred to the findings of Federal Tax Ombudsman vide judgment dated 26.12.2018, wherein the Commissioner Inland Revenue was directed to withdraw the audit proceedings regarding late filing of return for the tax year 2015 under Section 214D *ibid* – review petition filed by FBR was also dismissed – FBR's representation was also rejected by the President of Pakistan vide order dated 06.01.2020.

8. Needless to say that section 214D, under which the subject notice was issued, was omitted by the Finance Act, 2018 (XXX of 2018), which took effect on 22.05.2018 while the subject notice

was issued on 08.11.2018 when the said provision was no more in field. In these circumstances it cannot be held that any right had accrued in favor of the department at the time of issuance of the notice. The situation might have been different if any such notice was issued prior to 22.05.2018. Moreover, the case of the respondent is also deemed to be concluded under the subsequently inserted section 214E which was made through the Finance Supplementary (Amendment) Act, 2018 (XXXVIII of 2018) which took into effect on 08.10.2018. The explanation to this section clearly provides that an audit initiated as a result of automatic selection under the omitted section 214D shall stand abated.

Although, subsequently, after a lapse of about one and a half year, section 214E was further amended by insertion of sub-section 2 in it through the Tax Laws (Amendment) Act, 2020 (XVII of 2020) which took into effect on 27.03.2020 but this particular amendment cannot affect the case of the respondent because much prior to this amendment a substantial right already stood accrued in favor of the respondent at the time when the un-amended section 214E was in vogue.

9. It is pertinent to mention here that when the legislature, while amending any statute, intends to preserve any inchoate right under a repealed provision, it usually incorporates a saving clause or provision in the amending statute which is not the case in hand. Although, it is also settled law that when any amendment is made in a statute which is procedural in nature then the retrospective rule of construction is to be applied even if it is not specifically given retrospective effect. However, there is an exception to this general rule i.e. when any substantial right stands accrued in favor of a person then this general rule will not be applied. In this regard the Supreme Court of Pakistan observed in *Controller General of Accounts, Government of Pakistan, Islamabad and others v. Abdul Waheed and others* (2023 SCMR 111) as follows:

"It is a well-settled principle of interpretation of statutes that where a statute affects a substantive right, it operates prospectively unless, by express enactment or necessary intendment, retrospective operation has been given. The insertion or deletion of any provision in the rules or the law, if merely procedural in nature would apply retrospectively but not if it affects substantial rights which already stood accrued at the time when the un-amended rule or provision was in vogue."

It was further observed by a Division Bench of Karachi High Court in *Niaz Muhammad through Attorney v. Federation of Pakistan through Secretary, Ministry of Commerce, Islamabad and 2 others* (2008 PTD 1517) as follows:

"Of and on it is expressed by apex Court that while interpreting statute and its retrospectively the material consideration is that whether the statute encroaches upon the vested rights of citizen or not. Statutes dealing with substantive law are prospective and those dealing with procedural law are retrospective, but in certain cases if procedural law affects the vested right it operates prospectively and not retrospectively."

The same view was upheld in by a Division Bench of Islamabad High Court in *Commissioner Inland Revenue, Zone-II, Islamabad v. Messrs Wise Communication System, Islamabad* (2019 PTD 2313).

10. Needless to say that Article 10-A of the Constitution provides that every individual is entitled to a fair trial and due process and Article 4 of the Constitution lays down that every citizen is entitled to be treated in accordance with law, deviation whereof offends due process, logic and rationality and diminishes the legal character of a person under law.

11. It is evident from the facts of the case that selection for audit was not automatic or forthwith triggered upon happening of an event of default, as envisaged by section 214A of the Ordinance of 2001, but upon latest discovery of information, incidentally when relevant provision of law was not available on the statute book. Learned Legal Advisor for applicant-department has failed to point out any illegality or legal infirmity in the order passed by learned Appellate Tribunal, which even otherwise is well-founded, thus,

needs no interference. The case law relied upon by learned Legal Advisor for applicant-department, being on distinguishable facts and circumstances, is not applicable to the present scenario.

12. In view of the above, our answer to the purposed question is in **affirmative** i.e. against applicant-department and in favour of respondent-taxpayer.

This Reference Application is **decided** against applicant-department.

13. Office shall send a copy of this judgment under seal of the Court to learned Appellate Tribunal as per Section 133 (5) of the Ordinance of 2001.

(Asim Hafeez)
Judge

(Muhammad Sajid Mehmood Sethi)
Judge

APPROVED FOR REPORTING

Judge

A.H.S./Sultan