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JUDGMENT SHEET

IN THE LAHORE HIGH COURT, MULTAN BENCH MULTAN

JUDICIAL DEPARTMENT

Income Tax Reference No.36 of 2022

Commissioner Inland Revenue Versus Zia-ur-Rehman

JUDGMENT

DATE OF HEARING **22.05.2024**

APPLICANT BY **Agha Muhammad Akmal Khan, Advocate**

RESPONDENT BY **Mr. Niaz Ahmed Khan, Advocate**

RAHEEL KAMRAN, J. – In this reference application under Section 133(1) of the Income Tax Ordinance, 2001 ('Ordinance'), the following questions of law have been proposed for our opinion which are asserted to have arisen from the order dated 06.04.2022 passed by the Appellate Tribunal Inland Revenue, Multan Bench, Multan ('Tribunal') in ITA No.150/MB of 2022:-

1. *Whether the Appellate Tribunal has erred in law to cancel the orders of authorities below by holding that issuance of audit report and its confrontation to the appellant is mandatory without appreciating that audit proceedings in this case were initiated before substitution of sub section (6) and insertion of sub section (6A) in section 177 of the Income Tax Ordinance, 2001 through Finance Act.2019?"*

2. *Whether on the facts and circumstances of the case the Appellate Tribunal was justified to ignore that for tax year 2017 the issuance of audit report was not required by law as the provisions of sub section (6) and sub section (6A), requiring the issuance of audit report, were substituted and inserted respectively in section 177 through Finance Act.2019?"*

3. *Whether the provisions of sub section (6) and sub section (6A), requiring the issuance of audit report,*

> *substituted and inserted respectively in section 177 through Finance Act. 2019 are applicable for the audit proceedings initiated prior to the said amendments in section 177 of the Income Tax Ordinance, 2001?"*

2. Relevant facts of the case briefly are that the respondent-taxpayer, who is an individual deriving income from business and property, filed his return for the tax year 2017 declaring net income at Rs.18,00,000/-. Subsequently, he revised his return declaring the income from business at Rs.18,00,100/- and income from property amounting to Rs.4,32,000/-. Such return is deemed assessment order in terms of Section 120 of the Ordinance. The case of the respondent was selected for audit under Section 214C of the Ordinance and intimation of the said selection was sent to him on 09.05.2019. On 18.06.2019, representative of the respondent submitted power of attorney alongwith Bank statement, however, when despite various reminders the respondent failed to produce documents required from him, show cause notice dated 25.02.2021 was issued to the respondent and vide order dated 30.09.2021 passed under Section 122(4) of the Ordinance, the assessment order was amended whereby total income of the respondent was determined at Rs.229,747,705/- and an amount of Rs.79,395,075/- was determined to be payable as income tax.

3. The respondent preferred an appeal against the aforementioned order before the Commissioner Inland Revenue (Appeals), Sahiwal ('CIR (Appeals'), which was disposed of vide order dated 09.02.2022 resulting in remand of the case with the direction to provide proper opportunity of hearing as per FBR's Circular Letter No.7(2) dated 01.02.1994 and examine the documents and explanation of the respondent with respect to the Bank credit entries. The respondent, still being aggrieved, preferred second appeal before the Tribunal against the aforementioned order passed by the CIR(Appeals) being ITA No.150/MB of 2022, which was allowed vide order dated 06.04.2022 in the terms as follows:

> *"After considering the facts, perusing the available record and case law's referred by the learned AR mentioned supra,*

> *reported as 2018 PTD 1444(S.C Pak), ITA No.2522/LB/2020 dated 07.04.2021 & ITA No.1597/LB/2011 dated 27.05.2021, we came to the conclusion that order passed under section 122(4) of Income Tax Ordinance, 2001 without issuance of audit report under section 177(6) of Income Tax Ordinance 2001 is not maintainable in the eye of law therefore by following these judgments referred above, orders passed by the authorities below are hereby cancelled."*

4. Arguments heard. Record perused.

5. In the instant case, the respondent was selected for audit on 09.05.2019 whereas show cause notice proposing to amend assessment under Section 122 of the Ordinance was issued to the respondent on 25.02.2021. Perusal of the show cause notice clearly indicates that audit proceedings were still pending and no audit report was issued by the department till the amendments in question were made in Section 177 of the Ordinance through Finance Act, 2019. There is nothing available on record to show what substantive right, if any, had accrued in favour of the applicant on 01.07.2019 when the amendment made through Finance Act, 2019 in Section 177 of the Ordinance in the form of substitution of sub-section (6) and insertion of sub-section (6A) became effective which adversely affected the applicant.

6. In order to determine applicability or otherwise of the substituted sub-section (6) and newly inserted sub-section (6A) of Section 177 of the Ordinance introduced through the Finance Act, 2019 (V of 2019) to the cases selected for audit prior to the said amendments where audit reports were still pending, it would be advantages to refer to the test of the aforementioned provisions which read as follows:

> *(6) After completion of the audit, the Commissioner shall, after obtaining taxpayer's explanation on all the issues raised in the audit, issue an audit report containing audit observations and findings.*
>
> (6A) *After issuing the audit report, the Commissioner may, if considered necessary, amend the assessment under sub-section (1) or sub-subsection (4) of section 122, as the case may be , after providing an opportunity of being heard to the taxpayer under sub-section (9) of section 122.*

7. There is no cavil that the aforementioned provisions became effective from 01.07.2019. Sub-section (6) *ibid* makes it mandatory for the Commissioner, upon completion of the audit, to obtain taxpayer's explanation on all the issues raised in the audit and after that issue an audit report containing audit observations and findings. There is nothing in the language of the said provision which suggests retrospective application of the same. It means that cases where vested rights had accrued or transaction had been closed because of completion of audit prior to the aforementioned amendment, the requirements stipulated through substituted sub-section (6) cannot be pressed into service. There is, however, nothing in the language of sub-section (6) *ibid* which restricts application of the said provision to cases where audit was pending completion or still underway on 01.07.2019, which is the case here. Likewise, there is nothing in the text of the said provision that restricts its application to the cases selected for audit after any particular tax year. Indeed, the date of selection for audit hardly provides any basis for regulating applicability of the amended sub-section (6) of Section 177 of the Ordinance, which clearly would apply to all cases where audit was yet to be completed after the aforementioned enactment. This renders plea of the applicant qua retrospective application of sub-section (6) *ibid* wholly misconceived thus untenable.

Sub-section (6A) of Section 177 of the Ordinance empowers the Commissioner to amend the assessment under sub-section (1) or sub-section (4) of Section 122 of the Ordinance, after issuing the audit report and providing an opportunity of being heard to the taxpayer under sub-section (9) of Section 122 *ibid*. Issuance of the audit report is a pre-condition or *sine qua non* for the exercise of authority to amend the assessment under sub-section (6A) *ibid* and the requirement to grant opportunity of hearing is meant to ensure satisfaction of the due process requirement guaranteed under Article 10A of the Constitution of Islamic Republic of Pakistan, 1973. Again, there is nothing in the language of the said provision which suggests retrospective application of sub-section (6A) of Section 177 of the Ordinance. It means that cases where audit exercise

was already completed and proceedings to amend the assessment were completed or initiated with the issuance of show cause notice prior to the aforementioned legislative enactment, sub-section (6A) *ibid* cannot arguably be pressed into service. There is, however, nothing in the language of sub-section (6A) *ibid* which restricts application of the said provision to cases where audit was pending completion or still underway on 01.07.2019, which is the case here as manifest from the facts narrated herein above. Again, there is nothing in the text of the said provision that restricts its application to the cases selected for audit after any particular tax year. Indeed, the date of selection for audit hardly provides any basis for regulating applicability of the amended sub-section (6A) of Section 177 of the Ordinance, which clearly would apply to all cases where audit was to be completed after the aforementioned enactment and proceedings for the amendment of assessment were yet to commence. This renders plea of the applicant qua retrospective application of sub-section (6A) *ibid* equally misconceived and untenable.

8. The impugned order of the Tribunal is based on the determination that no audit report was issued in the instant case and that the amended assessment order passed under Section 122(4) of the Ordinance without issuance of audit report under Section 177(6) of the Ordinance was not sustainable in the eye of law, which finding is unexceptionable. Reliance is placed on the cases of *Commissioner Inland Revenue, Lahore Vs. Asif Kamal* **(2022 PTD 965)** and *Commissioner Inland Revenue, Sialkot and others Vs. Messrs Allah Din Steel and Rolling Mills and others* **(2018 SCMR 1328)**.

9. It is trite law that in the absence of any stipulation to the contrary, any change in substantive law which adversely affects vested rights of the parties should always have prospective application. It is equally well settled that the Courts lean against giving retrospective operation where the same would prejudicially affect vested rights or past transactions. A prospective statue operates from date of its enactment conferring new rights whereas a

retrospective statute, on the other, operates backwards and takes away or impairs vested rights acquired under existing laws. Reliance in this regard is placed on the cases of *Nagina Silk Mill, Lyallpur Vs. The Income Tax Officer, A-Ward Lyallpur and another* **(PLD 1963 SC 322)**, *Adnan Afzan Vs. Capt. Sher Afzal* **(PLD 1969 SC 187)**, *Nabi Ahmed and another Vs. Home Secretary. Government of West Pakistan, Lahore and 4 others* **(PLD 1969 SC 599)**, *Province of East Pakistan Vs. Sharafatullah and 87 others* **(PLD 1970 SC 514)**, *Sona and another Vs. The State and others* **(PLD 1970 SC 264)**, *Hassan and others Vs. Fancy Foundation* **(PLD 1975 SC 1)**, *The Collector, Customs and Central Excise, Peshawar and others Vs. M/s. Rais Khan Limited through Muhammad Hashim* **(1996 SCMR 83)**, *Malik Gul Hasan and Co. and 5 others Vs. Allied Bank of Pakistan* **(1996 SCMR 237)**, *Manzoor Ali and 39 others Vs. United Bank Limited through President* **(2005 SCMR 1785)**, *Commissioner of Income Tax Vs. Messrs Eli Lilly Pakistan (Pvt.) Ltd.* **(2009 PTD 1392)**, *Muhammad Tariq Badr and another Vs. National Bank of Pakistan and others* **(2013 SCMR 314)**, *Badshah Gul Wazir v. Government of Khyber Pakhtunkhwa through Chief Secretary and others* **(2015 SCMR 43)**, *Commissioner Inland Revenue, RTO, Rawalpindi Vs. Messrs Trillium Pakistan (Pvt.) Ltd., Rawalpindi and others* **(2019 SCMR 1643)** and *The Commissioner Inland Revenue, Zone-II, Regional Tax Office, Lahore Vs. Shazia Zafar* **(2022 PTD 1942)**. However, a statutory provision cannot be termed to have been given retrospective effect merely because a part of the requisites for its action is drawn from a time antecedent to its passing or operation thereof is based upon the status that arose earlier. Reliance in this regard is placed on the *Halsbury's Law of England* **(4th Edn., Vol.44 at Para 921)**, judgment of the supreme Court of India in the case of *Vineeta Sharma Vs. Rakesh Sharma* {(**2020) 9 SCC 1}** and *Kashif Mahmood Vs. Additional District Judge and others* **(2022 MLD 1762)**.

10. For the foregoing reasons, Question No.1 referred for our opinion is answered in *negative* whereas Questions No.2 and 3 referred above are

answered in *affirmative* i.e. against the applicant-Department and in favour of the respondent. This reference application is ***decided*** accordingly.

11. Office shall send a copy of this order under seal of the Court to the Appellate Tribunal as per Section 133(5) of the Income Tax Ordinance, 2001.

(MUHAMMAD SAJID MEHMOOD SETHI) ***(RAHEEL KAMRAN)***
JUDGE ***JUDGE***

Approved for Reporting.

JUDGE ***JUDGE***

****Z.A.Manzoor ****