

Form No: HCJD/C-121
ORDER SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

ITR No.77156/2022

The Commissioner Inland Revenue, RTO, Lyalpur Zone, Faisalabad. **Versus** M/s M.M Enterprises (Munir Ahmad), Faisalabad.

S.No. of order/ Proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of parties of counsel, where necessary
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18.09.2023. Ms. Riaz Begum, Advocate for the Applicant - Department.
M/s Mian Waseem Khurshid and Syed Moazzam Roheel, Advocates for respondent taxpayer.

This and connected Income Tax Reference Applications bearing ITR No.77160/2022, ITR No.77159/2022 and ITR No.77158/2022 are directed against order dated 17.05.2022 of Appellate Tribunal Inland Revenue Lahore (**Appellate Tribunal**) and Reference Applications bearing ITR No.76429/2022, ITR No.76417/2022, ITR No.76436/2022, ITR No.76426/2022 are directed against order dated 04.03.2022 of Appellate Tribunal. All these references are collectively decided through single order since common questions of law, statedly arisen out of orders, *supra*, are pressed for determination, and reproduced *infra*,

“i). Whether on the facts and under the circumstances of the case, the learned Appellate Tribunal has not erred in law by vacating the orders of lower fora wrongly relying on SRO 333(1)/2011 and Clause 45A of Part IV of 2nd Schedule ignoring the legal provision contained in Section 113 of the Ordinance?

ii). Whether on the facts and circumstances of the case, the learned Appellate Tribunal was justified to allow the appeal of the Taxpayer ignoring the fact that the Taxpayer admittedly did not fulfill the criteria given in SRO 333(1) of 2011 by not filling withholding statements and pay tax @ 1% on monthly basis?

iii) Whether on the facts and under the circumstances of the case, the Learned Tribunal has not erred in law by blending two different provisions of law having different scope i.e., Minimum Tax payable u/s 113 and Minimum Tax payable by virtue of Clause 45A which can't be interchanged with each other?

iv) Whether the learned ATIR has not erred in law by equating "Minimum Tax" as mentioned in clause 45A of Part II of the Second Schedule to Ordinance with the "Minimum Tax" payable u/s 113 of the Ordinance ignoring the fact that "Minimum Tax" under various provisions of the Ordinance, such as section 113, 153 and section 148, has different meanings, interpretations and scope?"

2. Learned counsel for applicant department contends that concessions claimed in terms of clause 45A of Part IV of Second Schedule of the Income Tax Ordinance, 2001, as amended through SRO No.333(1)/2011 dated 2nd May 2011, simply relate to concessional rates for withholding tax deductions in terms of subsection (1) of section 153 of Ordinance of 2001, which concessional rates have neither substituted rate applicable qua minimum tax liability, and nor any deduction otherwise made for withholding purposes was available for claiming adjustment of minimum tax liability, latter being determinable independently under section 113 of the Ordinance of 2001. Adds that where exemptions / concessional rates for the purposes of section 113 of the Ordinance, 2001 were intended, such intent was specifically manifested in clauses 11A, 16 and 19 of Part IV of Second Schedule, however, no such intent was intended or embodied in clause 45A, thereof. Further submits that Circular No.06/2011 provided requisite conditionality of necessary registration,

before 30th June 2011, which requirement remained unfulfilled, hence, taxpayer is not entitled to claim any concession qua concessional rates. Learned counsel referred to determination of questions in ITR No.73045/2022 titled “Commissioner Inland Revenue vs. M/s Ch. Khushi Muhammad Prop. TAX Reference No. 09-P of 2016, decided by Hon’ble Peshawar High Court vide order of 05.04.2018 and the case of “Commissioner Inland Revenue, Zone-II Regional Tax Office, Lahore vs. M/s Daewoo Pakistan Motor Way Services (Pvt.) Ltd.” (2022 PTD 1019).

3. Learned counsel for the taxpayer defended the order of the Appellate Tribunal.

4. Matters in issue relate to Tax years 2016 to 2019, therefore provisions of Ordinance of 2001, applicable and relevant for Tax years in question, are appreciated for answering the questions, *supra*.

5. Apparently the questions proposed suggest contradictions, on one hand exclusion of section 113 of Ordinance, 2001 is claimed, in the context of clause 45A, and conversely plea of non-fulfilment of conditionalities, requisite for availing concessional rate, is raised.

6. Be that as it may, the context of the controversy needs to be contextualized for sake of clarity. Respondent taxpayer had not disputed applicability of section 113 of the Ordinance of 2001 and payment of minimum tax thereunder,

which claimed that minimum tax due was paid, while computing minimum tax liability on concessional rates – 0.1% of the annual turnover. Hence, difference is not regarding applicability of section 113 of the Ordinance of 2001, for the purposes of taxing income of taxpayer but whether the concessional rate, prescribed through clause 45A was exclusively applicable to the withholding tax deductions, in terms of clause (a) of sub-section (1) of section 153 of the Ordinance of 2001 or the taxpayer was obligated to pay minimum tax at concessional rate under the proviso to clause 45A - as substituted in terms of SRO No.333(1)/2011 dated 02.05.2011 and remained available till Tax Laws (Second Amendment) Ordinance 2001. Status of the taxpayer as trader of yarn was settled by the Tribunal and we are not inclined to embark upon an exercise of reviewing factual findings / determinations.

Key to resolve the controversy is inherently provided by the proviso to clause 45A itself, which clause and proviso, during the period of relevant tax years, read as,

“Clause-45A of Part IV of Second Schedule

The rate of deduction of withholding tax under clauses (a) and (b) of subsection (1) of section 153 shall be one percent on local sales, supplies and services provided or rendered to the [taxpayer falling in the] following categories namely:-

- f) *Textile and articles thereof;*
- g) *Carpets;*
- h) *Leather and articles thereof including artificial leather footwear;*

- i) Surgical goods; and
- j) Sports foods.

Provided that withholding tax under clauses (a) and (b) of sub-section (1) of section 153 shall not be deducted from sales, supplies and services made by traders of yarn to the above mentioned categories of taxpayers. Such traders of yarn shall pay minimum tax @ 0.1% on their annual turnover on monthly basis on 30th day of each month and monthly withholding tax statement shall be e-filed under the provisions of section 165 of this Ordinance.”

[Emphasis Supplied]

7. Evidently, the concession in terms of proviso was exclusively extended to the traders of yarn. Now whether those traders of yarn, who claimed and intended to take advantage of proviso were entitled to claim benefit of withholding tax deductions against sales. Answer is inherently provided in the proviso. *No deduction of withholding of tax under clauses (a) and (b) of sub-section (1) of section 153 of the Ordinance of 2001 was permissible.* This restraint imposed specifically excludes incidence of withholding tax deductions under clause (a) of sub-section (1) of section 153 of the Ordinance of 2001. Since no deduction was permissible therefore no question of classification of such deduction as final tax, in terms of sub-section (3) of Ordinance, 2001 arises. It is evident that taxpayer had claimed income from both streams, covered under normal and final tax regime(s). Incidence of deduction of withholding tax under clause (a) of sub-section (1) of section 153 of Ordinance of 2001 and claiming benefit of proviso are mutually exclusive. The allegations,

therefore, that withholding tax deductions were claimed as corresponding adjustment of minimum tax liability are misconceived. Hence, no question of ignoring the applicability of section 113 of the Ordinance of 2001 arises and in fact order of Appellate Tribunal is not fully comprehended.

8. Second portion of proviso is indubitably clear, which extends concessional rate for traders of yarn for the purposes of computing minimum tax liability. We, in exercise of jurisdiction extended, are not the court of fact and will not proceed to determine question of fulfilment of conditionalities – a fact-question. It is otherwise evident from the perusal of orders in both set of references that Commissioner had acknowledged factum of applicability of clause 45A, *supra*, for the purposes of computation of minimum tax liability but alleged that conditions were not met, which findings of fact was reversed by the Appellate Tribunal, which had recorded findings that taxpayers were eligible for the concessional rates. Judgments referred had no application in the context of the facts and controversy at hand. We are unable to find any adjudication in the context of applicability of SRO 06/2011 by the Tribunal. Hence, any reference is misconceived. We are not dilating upon allegations of non-fulfillment of conditions, which issue was adjudicated and rejected by the Tribunal.

9. Question (i) is proposed in negative format, therefore same is answered in negative and we hold that Appellate Tribunal had neither ignored the import of section 113 of the Ordinance of 2001 nor committed any error of law. Question (ii) is factual, and this court will not hold an inquiry to ascertain factum of compliance of the conditions prescribed for the purposes of availing concessional rates. Question (iii) is answered in negative, Tribunal has not committed any illegality, which rightly construed the scope and effect of proviso to clause 45A and correctly allowed concessional rates for the purposes of minimum tax liability. Question (iv) is answered in negative, and no error was committed by the Appellate Tribunal while construing section 113 of the Ordinance and clause 45A – for the purposes of relevant tax years. All Reference Applications are decided against the department and in favour of the taxpayer(s).

Office shall send a copy of this order, under seal of the Court, to learned Appellate Tribunal, in terms of sub-section (5) of section 133 of the Ordinance, 2001.

(Muhammad Sajid Mehmood Sethi)
Judge

(Asim Hafeez)
Judge

M.S.Aleem

APPROVED FOR REPORTING

Judge

Judge