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Judgment Sheet

IN THE LAHORE HIGH COURT, MULTAN BENCH MULTAN.

(JUDICIAL DEPARTMENT)

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I.T.R No. 48/2022

Commissioner Inland Revenue Multan Zone,
Regional Tax Office, Multan.

Versus

Muhammad Kashif.

JUDGMENT

Date of hearing: **20.11.2025**

Appellant by: Malik Muhammad Shahzad Awan, Advocate.
Mr. Muhammad Suleman Bhatti, Advocate in ITR No. 29/2024.

Respondent by: Mr. Muhammad Imran Ghazi, Advocate.

ASIM HAFEEZ, J. This and Income Tax Reference applications bearing I.T.R Nos. 49/22 and 29/2024 ('Applications') are heard and decided though this single judgment, in wake of commonality of the questions of law raised for soliciting our opinion, which questions read as follows,

i) *"Whether on the facts and in the circumstances of the case, the learned Appellate Inland Revenue (ATIR) was justified to ignore that gift received otherwise through banking channel is rightly treated as income of the taxpayer?"*

ii) *Whether on the facts and in the circumstances of the case, the learned Appellate Tribunal Inland Revenue was justified to ignore the requirements of Section 39(3) of the Income Tax Ordinance, 2001, is mandatory in nature?"*

2. Incidentally, there is an element of commonality of facts as well – in these cases son(s) had claimed gifts from father(s) and explained those transaction(s), either as source of investment or payments received in cash. Plea of the Applicant department is that amounts received as gift(s), otherwise than by a crossed cheque drawn on a bank or through banking channel, are *per se* treatable / taxable as 'Income from other Sources' and no further explanation is essential to determine the taxability of those gifts, which are non-compliant in terms of section 39(3) of the Income Tax Ordinance 2001 ('**Ordinance'**).

3. Conversely, learned counsel representing respondent(s) – donee(s) – submit that taxpayer(s) is entitled to an opportunity to explain and substantiate that why transaction of gift was not effected as per the requirement(s) of section 39(3) of the Ordinance. Adds that provision(s) for offering explanation is inbuilt in the mechanism provided for amendment of assessment, either by way of mandatory notice under section 122(9) of the Ordinance, read with sub-section (5) or (5A) of section 122 of the Ordinance, as the case may be and factum of taxability of the receipt of gift(s) and treatment thereof is subject to factual explanations under section 111 of the Ordinance. It is emphasized that gifts effected between close relations, like, parents and offspring(s) and spouses, create as exception to the categorization of gift done through section 39(3) of the Ordinance.

Analysis.

4. Notably, one of the Reference applications bearing I.T.R No.49/2022, which arose out of ITR No.60/MB/2020, relates to Tax

year 2020, and preceded amendment made in section 39(l) of the Ordinance by virtue of Finance Act 2019, whereby clause (la) was inserted and it reads as;

> *"subject to sub-section (3), any amount or fair market value of any property received without consideration or received as gift, other than gift received from relative as defined in sub-section (5) of section 85*.

5. Fundamental issue is whether classification and taxability of alleged transaction of gift would be determined on the basis of factual explanation(s) offered by the taxpayer **or** the Ordinance, in terms of section 39(3) thereof, had predetermined the taxability of non-compliant gift(s) as income from other source(s). We are dealing with machinery provision and not a charging one - Section 39 of the Ordinance.

There is no cavil that what constitutes an income; manner of categorization of income and conditionalities to be met for determining the taxability of transaction of gift are determinable under statutory dispensation – Income Tax Ordinance 2001, in present context. Section 39(3) of the Ordinance prescribes that the amounts received as gift(s), otherwise than by a crossed cheque drawn on a bank or through banking channel, are *per se* taxable as income from other sources. Statutory conditions always determine the taxability of transaction, either as income or otherwise. And taxpayer was not the arbiter of such determination. Courts / tribunals have always treated statutory characterization of transaction(s) by law as conclusive and final. Notwithstanding, these settled principles, governing the gift(s), conventionally our courts had extended benefit

of convenience to the transactions of gift, between spouses and parents / children, rather a special treatment, i.e., an exception to the otherwise regimented classification of transaction of gift under section 39(3) of the Ordinance – conventional wisdom was based on the presumption that gift by a husband to wife is not and cannot always be routed through the banking channel – [and if letter of the law is strictly applied then every obligation of dower gift in shape of cash, has to be performed through the banking channel]. Context of the gift between prescribed relations, for the purposes of present enactment, is a relevant and crucial fact. Cultural set-up, social norms, dwindling literacy ratios and limited familiarity or ease with banking procedures are few factors that led to the concessions extended vis-à-vis gifts between spouses – only concession extended was that notwithstanding non-compliant to the conditionalities of section 39(3) of the Ordinance, transaction was treated as gift, which certainly was subjected to review / scrutiny.

6. Evidently, the benefit(s) extended by the courts / tribunals, in lieu of gifts exchanged between spouses was granted statutory recognition by legislature upon addition of clause (la) to section 39(1) of the Ordinance – scope of relatives was extended in terms of sub-section (5) of section 85 of the Ordinance. This statutory recognition, vis-à-vis and to the extent of receiving gifts from certain classes of relatives, has created an exception to mechanism provided for qualifying gifts under section 39(3) of the Ordinance, whereby statutory classification of gift, subject to the manner of performance, was conclusively determined. After introduction of clause (la) of

section 39(1) of the Ordinance, an exception / nonconformity has been created in context of receiving of gifts from the relations prescribed. For the purposes of clarity, clause (la) of section 39(1) of the Ordinance has changed position qua classification of gift, from statutory classification to factual classification - [opportunity extended to the taxpayer to establish factum of gift, between permitted relations, outside the banking channel]. Pertinently mentioned, gifts outside the circle of relatives, defined in sub-section (5) of section 85 of the Ordinance, are and would continue to be subjected to the conditionalities prescribed in section 39(3) of the Ordinance.

7. Now the question is what is the scope of the amendment, by way of clause (la) of Section 39(1) of the Ordinance, brought through Finance Act 2019 [applicable from 1st July 2019], and whether same can be read retrospectively?

Section 39(3) of the Ordinance and exception created by virtue of clause (la) of section 39(1) of the Ordinance fall within the category of machinery provision(s) – providing for assessment of tax -, and especially the latter one being beneficial, hence, has to be construed accordingly. There is no cavil that retrospective effect could be extended to machinery provisions, where context and legislative intent so permit. Additionally, provisions under reference are procedural in scope and effect, which provides a mechanism for determining the liability and not creating liability – In case of *"Commissioner of Income Tax, Peshawar Vs. Messrs Islamic Investment Bank Ltd"* **(2016 SCMR 816)** Hon'ble Supreme Court observed that

"……*When a provision is incorporated in any statute through an amendment that is procedural in nature then the retrospective rule of construction is to be applied to such provision.*"**.**

Even otherwise clause (la) of section 39(1) of the Ordinance in fact introduces uniformity, brings clarity in the context of gifts received under parental and spousal relations and indicates an apparent intent to remove inconsistency – at times legislature(s) introduces laws to address mischief, harmonize it with existing provisions, intending conformity with and to concretize judicial precedents. Is branding of clause (la) of section 39(1) of the Ordinance as remedial provision permissible. This can be explained in the context of decision in the case of *"Collector of Sales Tax and Central Excise, LTU, Karachi Vs. Messrs Pak Suzuki Co. Ltd., Karachi*" **(2016 PTD 867)**, whereby Hon'ble Supreme Court, while dilating upon the rule of interpretation of Remedial and Curative enactments, relied upon an excerpt from Corpus Juris Secundum, Vol. 82, which reads as,

> *"In construing remedial statutes, regard should be had to the former law, the defects or evils to be cured or abolished, or the mischief to be remedied, and the remedy provided; and they should be interpreted liberally to embrace all cases fairly within their scope, so as to accomplish the object of the legislature, and to effectuate the purpose of the statute; by suppressing the mischief and advancing the remedy, provided it can be done by reasonable construction in furtherance of the object."*

8. There is no cavil that clause (la) of section 39(1) of the Ordinance, upon purposive interpretation, intended redressal of mischief – difficulty encountered in context of gifts received from parents or between spouses. This brings amendment within the scope of a remedial statutes. Ordinarily, section 39(3) of the Ordinance

prescribes mechanism for effecting gifts, for the purposes of Ordianance, and clause (la) of section 39(1) of the Ordinance creates an exception – [that is the only purpose intended to be achieved otherwise there was no occasion for providing exclusion through clause (la) of section 39(1) of the Ordinance].

Is there any prejudice caused by expanding the effect of clause (la) of section 39(1) of the Ordinance, retrospectively. We see no prejudice being caused by reading clause (la) of section 39(1) of the Ordinance, in the context of gifts received from relatives, explained in sub-section (5) of section 85 of the Ordinance, retrospectively. Extending retrospective effect to clause (la) of section 39(1) of the Ordinance would neither suggest nor imply that mere assertion on the part of taxpayer or inclusion of any amount as gift in declaration / return of income would absolve the taxpayer, or for that matter the donor, collaterally, – within the sphere of relatives explained in sub-section (5) of section 85 of the Ordinance – from otherwise substantiating factum/transaction of gift, legality thereof and otherwise its genuineness. Whether amount(s) received is a gift or income, it still depends upon the factual characterization of the transaction, subject to inquiry conducted under assessment-review jurisdiction – Assessing officer would still be competent to recharacterize transaction if gift, outside banking channel, as income if same was not proved / substantiated. There is no escape from a fact-based inquiry, to be undertaken by the department to determine that whether transaction claimed is a gift or not?

9. We, therefore, dismiss the argument that gifts between the prescribed relations, defined in clause (la) of section 39(1) of the Ordinance, would *per se* be treated or taxable as income from other sources and add a *caveat* that gift(s) claimed in the context of amended clause would still be subject to inquiry / scrutiny and upon being unsatisfied, Assessing officer is competent to re-characterize receipt of amount as income, instead of gift.

10. Now we examine the order(s) of Appellate Tribunal to see whether transactions claimed as gift(s), are actually gifts or tool(s) to conceal their true character. We found that element and extent of fact-based inquiry, in each case, is conspicuous by its absence - Tribunal though declared transactions as gift(s) but without any reasoning or justification qua the obligation of taxpayer to substantiate that transactions were in essence gift(s); provisioning of proper documents; proof that donor(s) has had the financial capacity / resources to make gifts to the extent of the sums involved – records pertaining to tax records and business accounts - and primarily the intention to gift and documents establishing irrevocability of gift, etc. So many questions surfaced but remained unanswered, let alone attended. Additionally, there are no specific findings qua the conduct of the taxpayer/donee, that whether transaction of gift was disclosed, voluntarily, and if not, the effect thereof. These findings are essential to factually establish that transactions of gifts were genuinely transacted inter se donor and donee, as gifts.

11. In these circumstances, we set aside the order(s), respectively passed by the Tribunal, and remand matters for redetermination that

whether factum of gift(s) is established / substantiated by the taxpayer. Tribunal shall consider claim of gift(s) received in the context of retroactive application of clause (la) of section 39(1) of the Ordinance, but subject to proof of conducting transaction and genuineness thereof. Instant and connected reference applications are allowed in aforesaid terms.

12. Office shall send a copy of this order, under seal of the Court, to learned Appellate Tribunal, in terms of sub-section (8) of section 133 of the Ordinance.

(Abid Hussain Chattha)
Judge

(Asim Hafeez)
Judge

Approved for reporting

Judge **Judge**

M. Nadeem Saleem/*