# IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

**PRESENT:**
MR. JUSTICE MAQBOOL BAQAR
MR. JUSTICE MAZHAR ALAM KHAN MIANKHEL

**CIVIL APPEAL NO. 723 OF 2013**
(Against the judgment dated 29.05.2009 of the Lahore High Court, Lahore passed in WP No. 1363/2003)

The Taxation Officer/Deputy Commissioner of Income Tax, Lahore — *Appellant(s)*

VERSUS

M/s Rupafil Ltd & others — *Respondent(s)*

For the Appellant(s) : Mr. Ibrar Ahmed, ASC

For Respondents No. 1-3 : Mian Ashiq Hussain, ASC

Date of Hearing : 31.10.2017

## JUDGMENT

**MAQBOOL BAQAR, J.** Through the impugned judgment, a writ petition preferred by the respondents challenging the legality and propriety of notices under sub-section (2) of Section 221 of the Income Tax Ordinance, 2001 ("**ITO 2001"**) issued, by the appellant, requiring the respondents to show cause as to why their assessment orders for the assessment years 2000-2001 and 2001-2002 be not amended/rectified by levying surcharge on the tax levied under section 80-D of the Income Tax Ordinance, 1979 (**"ITO 1979"**), has been allowed by a learned Single Judge of the Lahore High Court.

2. The learned Single Judge through the impugned judgment, whilst overruling the objections to the maintainability of the petition, held that Section 221 of ITO 2001 does not apply to the

orders passed under the provisions of repealed Ordinance i.e. "ITO 1979". Through Order dated 18.06.2013, this Court was pleased to grant leave to appeal in this case, *inter alia*, to consider the following points:

> 1. Whether the provisions of Section 221 of the Income Tax Ordinance 2001 can be applied to the assessment orders passed under the provisions of the repealed ordinance;
>
> 2. Whether surcharge can be levied on the "minimum tax" payable under Section 80-D and other paramateria sections of the repealed ordinance; and
>
> 3. Whether writ petition is maintainable against the notice issued under section 221 of the Ordinance 2001 without availing departmental remedies.

3. In order to appreciate the issue with regard to the legality and propriety of invoking Section 221 of the ITO 2001, seeking to rectify a mistake in the assessment order made under section 62 of ITO 1979, we first need to examine the nature, scope, extent, purview and implication of the said provisions which, as stood at the relevant time, read as follows:

> 221. **Rectification of mistakes**.---(1) The Commissioner, the Commissioner (Appeals) or the Appellate Tribunal may, by an order in writing, amend any order passed by them to rectify any mistake apparent from the record on their own motion or any mistake brought to their notice by a taxpayer or, in the case of the Commissioner (Appeals) or the Appellate Tribunal, the Commissioner.
>
> (2) ……..
>
> (3) …….
>
> (4) No order under sub-section (1) may be made after five years from the date of the order sought to be rectified.

4. It is indeed true that the above section does not expressly provide for its retrospective application but it can well be seen from the plain reading thereof that it prescribes procedure for

rectification of a mistake in a assessment order and the circumstances under which such can be done. The provisions of Section 221 of ITO 2001 thus neither create, nor take away any right or privilege in/or from anyone, it rather provides for rectification of mistake(s) apparent from the record. It hardly needs to be stated that a benefit or advantage, which accrues to one at the cost of other due to a blatant mistake, does not create any right in the beneficiary to retain the same, unless the act giving rise to such benefit, or advantage, by efflux of time prescribed for its rectification, becomes a past and closed transaction. Furthermore the rectification/amendment under the aforesaid provision may not necessarily be to the disadvantage of the assessee/tax payer, but could also be beneficial for him, thus the remedy under Section 221 can also be invoked at the instance of the assessee/tax payer. It is also relevant to note that subsection (4) of Section 221 of ITO 1979, prescribes a period of limitation, and it is now well settled that the law prescribing period of limitation is to be considered as procedural. The said provision is thus clearly procedural rather than substantive, though where right to commence a proceedings has already become time barred then a subsequent enlargement of time through an amendment can be of no avail, as with the lapse of time prescribed, the transaction becomes a past and closed transaction, vesting a party with a right thus accrued which cannot be taken away by a subsequent amendment.

5. Indeed the assessment order sought to be rectified through the impugned notices were finalized under Section 62 of ITO 1979, between May 2001 and June 2002, whereas ITO 1979

prescribed a period of Four (4) years for rectification of the assessment made under Section 62 of the said Ordinance. ITO 1979 was repealed on 30.06.2002, where after, in July 2002, ITO 2002 came into force. It can therefore be seen, that the period of limitation prescribed through Section 156 of ITO 1979 has not expired at the time of promulgation of ITO 2001, such period during its currency thus stood extended through subsection (4) of Section 221 of ITO 2001, which provided a period of 5 (Five) years for rectification of mistakes, from the date of the assessment order, sought to be rectified. It is now well settled that procedural amendments apply to all cases which have not become past and closed transactions therefore the provisions of section 221 of ITO 1979 have been rightly invoked in the present case.

6. Coming to the next question, as to "whether surcharge can be levied on minimum tax payable under Section 80-D, and other paramateria sections of the repealed Ordinance", it may be noted that under ITO 1979 surcharge was levied and charged in terms of the provision of Section 10 which reads as under:

> 10. **Charge of super tax and surcharge**.--- (1) In addition to the income tax charges for any year, there shall be charged, levied and paid for that year in respect of the total income, or any part thereof, of the income year or years, as the case may be, of every person, an additional duty of income tax (in this Ordinance referred to as 'super tax') and surcharge at the rate or rates specified in the First Schedule; **(emphasis supplied)**
>
> Provided.....
> .....
> .....
>
> (2) Subject to the provisions of this Ordinance, the total income of any person shall, for the purposes of super tax and surcharge, be the total income as assessed for the purposes of income tax, and where an assessment has become final and conclusive for the purposes of income tax for any

> year, the assessment shall also be final and conclusive for the purposes of super tax or surcharge, as the case may be, for the same year.
>
> (3).....
> .....

A perusal of the above provisions makes it clear that, firstly the levy of surcharge was in addition to the income tax charged for the relevant year, secondly, such levy was in respect of the "total income" of the relevant income year as assessed for the purpose of income tax and was to be levied at the rate(s) specified in the First Schedule. Whereas in terms of Section 9 of the aforesaid Ordinance (ITO 1979), income tax was to be levied and charged in respect of the total income of the relevant year and at the rate(s) specified in the First Schedule. For the sake of convenience, section 9 of ITO is reproduced hereunder:

> 9. **Charge of Income Tax**.--- (1) Subject to provisions of this Ordinance, there shall be charged, levied and paid for each assessment year commencing on or after the first day of July, 1979, income tax in respect of the total income of the income year or years, as the case may be, of every person at the rate or rates of specified in the First Schedule. **(emphasis supplied)**

7. It may also be noted here that "total income", as defined by subsection (44) of Section 2 of ITO 1979, "means the total amount of income referred to in section 11, computed in the manner laid down in this Ordinance, (ITO 1979), and includes any income which, under any provision of this Ordinance (ITO 1979), is to be included in the total income of an assessee." It may further be noted that Section 11 of ITO 1979 specifies "total income" as the one which includes all income from whatever source derived.

8. Whereas section 80-D of the said Ordinance, which begins with a non-obstante clause, introduced a distinct concept

of "minimum tax" which in its nature and scope is clearly distinguishable from the nature and scope of "income tax" chargeable under Section 9 of ITO 1979. Section 80-D provided for charging tax, where the assessee was otherwise, i.e. in terms of Section 9 of ITO 1979, either not liable to pay any tax, or the tax payable by him was less than one-half percent of its turnover and at the rate(s) specified therein and with reference to the turnover of the assessee/tax payers. Section 80-D thus reads as under:-

> 80D. **Minimum tax on income of certain persons**.--- (1) Notwithstanding anything contained in this Ordinance or any other law for the time being in force, where no tax is payable or paid by a company or ……
> ……
> …… or the tax payable or paid is less than one-half percent of the amount representing its turnover from all sources, the aggregate of the declared turnover shall be deemed to be the income of the said company or a registered firm, ……
> ……
> …….. and tax thereon shall be charged in the manner specified in subsection (2).
>
> Explanation……
> ……..
>
> (2)…….....
> …….....
> shall pay as income tax-
> (a) an amount, where no tax is payable or paid, equal to one-half percent of the said turnover; and
> (b) an amount, where the tax payable or paid is less than one-half percent of the said turnover, equal to the difference between the tax payable or paid and the amount calculated in accordance with clause (a).
>
> Explanation……
> …….....

9. What emerges from the foregoing is that "income tax" in terms of Section 9 of ITO 1979 is charged and levied in respect of

the total income of the assessee and at the rate specified in the First Schedule, whereas Section 80-D of the said Ordinance deals with a situation where either no tax is payable by the assessee, or the tax payable is less than One-half percent of the amount representing its turnover. It thus provides a legal device to levy and charge "tax"/"minimum tax" where either no tax is payable, or the tax payable is at a specified low percentage, by deeming the aggregate of the assessee's turnover as its income, and at the rates specified in the said section itself, and thus section 80-D, unlike the provision of Section 9 of ITO 1979, provides for levying "minimum tax" where no tax is payable in terms of the later provision, and in a certain specified situation, also provides for levying and charging tax in excess of what may otherwise be payable under Section 9 of ITO 1979. Section 80-D also shifts the very basis of levying tax from "total income" to "turnover", by deeming the same to be the income of the assessee, whereas in terms of section 10 of ITO 1979 surcharge is leviable on the income tax and super tax payable on the income tax. There is no provision for charging surcharge in respect of any tax levied on the basis of turnover of the assessee rather than his total income. As noted earlier, section 80-D provided for levying of "minimum tax"/"tax" where either no tax is payable or where the tax payable is less than one-half percent of the amount representing its turnover. In the former situation, the "minimum tax"/"tax" equal to one-half percent of the said turnover, and in the latter case, equals to the difference between the tax payable or paid and the amount calculated in accordance with the former. Both the above situations do not allow for levying any surcharge, as surcharge is charged on the income tax only, whereas in the first of the above, no income tax is payable, and in the second what is

charged by way of "minimum tax"/"tax", rather than income tax, is already in excess of the income tax payable in terms of Section 9 of ITO 1979, and therefore there is no justification for levying of any surcharge thereon, more so when all and every ingredients essentially required for such levy, as discussed earlier, are clearly missing.

10. Although in view of our answering the question regarding the levy of surcharge in the negative, the question of maintainability of the respondents' petition before the High Court has become redundant, however since leave to appeal was granted in the instant case to consider the latter question also we would therefore, express ourselves on the same by holding that since we have held that Section 221 of ITO 2001 was rightly invoked in the present case and the Department was competent to do so there was no jurisdictional error in issuing the impugned notices, the respondents' petition was therefore not maintainable.

11. The appeal is thus, disposed of in the foregoing terms.

JUDGE

JUDGE

*Announced in open Court on _____*
*at Islamabad*

*JUDGE*

**'APPROVED FOR REPORTING'**
*Rizwan*