

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Tax Reference No.32/2004

Commissioner of Income Tax
Vs
Gammon Pakistan Limited

DATE OF HEARING 10.02.2015

APPLICANT BY Dr.Farhat Zafar & Sheikh Anwar ul Haq
Advocates.

RESPONDENT BY Mr.Sohaib Abbas.

Aamer Farooq, J.- Through the instant application/reference the following question of law has been referred to this Court for interpretation of law:-

Whether on the facts and in the circumstances of the case the learned ITAT was justified to hold that provisions of Section 66A could not be invoked in cases covered by presumptive tax under section 80C?

2. The facts, in brief, are that Inspecting Assistant Commissioner while examining the record of the assessee found discrepancies between receipts declared under section 143B of Income Tax Ordinance 1979 and the Company's 5th annual report relating to assessment year 1997-98. A show cause notice was issued to the assessee

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on the above mentioned grounds which was duly replied and contested by the assessee. The reply filed by the assessee was found not to be satisfactory, therefore, the Inspecting Assistant Commissioner held that the assessee had concealed the actual receipts and was liable to be proceeded accordingly. Feeling aggrieved, the assessee namely M/s Gammon Pakistan Limited filed an appeal before Income Tax Appellate Tribunal which was allowed vide order dated 29.5.2002, wherein it was held that the provisions of Section 66A Income Tax Ordinance 1979 could not be invoked in cases which are covered under section 80-C of Income Tax Ordinance 1979. It was also held by the learned Appellate Tribunal that Inspecting Assistant Commissioner did not appreciate the assessee's explanation regarding accounting methodology adopted by it. The learned Income Tax Appellate Tribunal concluded that order of the Inspecting Assistant Commissioner, under section 66A ibid, was not maintainable. The department made an application to the learned Income Tax Appellate Tribunal (under the repealed Income Tax Ordinance, 1979) for framing questions of law and referring the same to the High Court. In this regard the department requested for framing of the following questions:-

- i) Whether on the facts and in the circumstances of the case the learned ITAT was justified to hold that provisions of section 66A could not be invoked in cases covered by presumptive tax u/s 80C?

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- ii) Whether on the facts and in the circumstances of the case the learned ITAT was justified in holding that gain on sale of machinery used in generating income was liable to tax u/s 80C?

3. The Income Tax Appellate Tribunal vide order dated 30.4.2003 referred question No.1 to this court for interpretation of the law and declined to refer the second question.

4. The learned counsel for the applicant, inter alia, submitted that the Inspecting Assistant Commissioner has ample powers to open and examine the record of any case and revise assessments if need be. It was further contended that the decision rendered by learned the Income Tax Appellate Tribunal is not in consonance with the law as there is no bar in 66A ibid for re-opening of any case including the assessment made u/s 80C of Income Tax Ordinance, 1979.

5. Learned counsel for respondent defended the decision and submitted that assessment made u/s 80C could not have been opened even u/s 66A of 1979 Ordinance.

6. The issue before this court, by way of reference, is that whether an assessment made u/s 80C of Income Tax Ordinance, 1979 could have been opened and re-assessed by Inspecting Assistant Commissioner u/s 66A of the Ordinance ibid. It is appropriate that the relevant provisions of law be reproduced, for the sake of brevity. In this behalf section 80C reads as follows:-

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80-C. Tax on income of certain contractors and importers: (1) Notwithstanding anything contained in this Ordinance or any other law for the time being in force, where any amount referred to in sub-section (2) is received by or accrues or arises or is deemed to accrue or arise to any person 36-A[.], the whole of such amount shall be deemed to be income of the said person and tax thereon shall be charged at the rate specified in the First Schedule.].

Likewise section 66A reads as follows:-

66A. Powers of Inspecting Assistant Commissioner to revise Income Tax Officer's order. (1) The inspecting Assistant Commissioner make call for and examine the record of any proceedings under this Ordinance, and if he considers that any order passed therein by the Income Tax Officer is erroneous is so far as it is prejudicial to the interest of revenue, he may, after giving the assessee an opportunity of being heard and after making , or causing to be made, such enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or canceling the assessment and directing of fresh assessment to be made.

(2) No order under sub section (1) shall be made after the expiry of four years from the date of the order sought to be revised.

7. Section 66A of Income Tax Ordinance, 1979 empowers Inspecting Assistant Commissioner to call for and examine the record of any proceedings, under the Ordinance of 1979, and if he is of the opinion that the Income Tax Officer

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has made any order erroneously in a manner which is prejudicial to the interest of the revenue he can revise the assessment after providing an opportunity of hearing to the assessee and making enquiry as he deems appropriate. Section 80C allows the assessee to make an assessment on the basis of presumptive regime i.e return filed by the assessee is presumed to be the Income earned by him and liable to be taxed accordingly. In order to encourage filing of Income Tax Returns under the presumptive regime the legislature provided a protection to an assessee filing return under the referred section by making it absolute. The intention of legislature to make the assessment filed under section 80C as absolute is borne out from the plain reading of the said section, as it contains a non obstante clause which is as follows:-

“Notwithstanding any thing contained in this Ordinance or any other law for the time being in force”

8. The opening part of the section show that Section 80C is to prevail over any other provision of 1979 Ordinance which is inconsistent with it, as it starts with word notwithstanding any thing provided in this ordinance. The very purpose of non obstante clause is that the provision shall prevail over any other provision and that other provision shall be of non consequence (Interpretation of Statutes by Bindra. In the case of Elahi Cotton Vs

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Commissioner of Income Tax (**PLD 1997 SC 582**), the Honourable Supreme Court observed as follows:-

Non obstante clause in section 80-D of the Income Tax Ordinance, 1979 is for the purpose of liability to pay minimum tax of half per cent on the annual turnover. This will exclude any provision of the Ordinance which may be inconsistent with it. But the same does not exclude the application of other provisions of the Ordinance which are not inconsistent with section 80-D.

In the case of Arif Hussain Shah Vs Operative Director, Administration, Electric Equipment Manufacturing Co.Ltd etc (**PLD 1979 Lahore 603**) it was observed as follows: =

The precise question which calls for determination in this case is the effect of "non obstante" clause used in subsection (6). The word "non obstante" means "notwithstanding". It means "despite" or "in spite of" A "non obstante" clause is used in a provision to indicate that the provision should prevail despite anything to the contrary in any provisions. No doubt one of the object is to indicate that despite any repugnancy between the provision containing a "non obstante" clause and another provision the former should prevail. This clause owes its origin to the fact that in the year 1950 a British king began to issue licences to do such and the such thing "non obstante" any law to the contrary.

(While interpreting "non obstante" clause, it should first be ascertained what the enacting part of the section provides on a fair construction of words used according to their natural and

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ordinary meaning as a "non obstante" clause is to be understood as operating to set-aside as no longer valid any thing contained in relevant existing law which is inconsistent in the new enactment. The enacting part of the Statute must, where it is clear, be taken to control the non obstante clause where both cannot be read harmoniously for, even apart from such clause a later law abrogates an earlier law clearly inconsistent with it.

In the case of Muhammad Mohsin Ghummon etc Vs Government of Punjab etc (**2013 SCMR 85**) it was observed as follows:-

One of the foundational principles governing the interpretation of non obstante clause is that it has to be read in the context of what the legislature intended in the enacting part of the provision. In 'interpretation of Statutes' by NS Bindra, the author with reference to specific precedent case law precisely addresses this issue and comments as follows:-

It has to be read in the context of what the legislature conveys in the enacting part of the provision. It should first be ascertained what the enacting part of the section provides on a fair construction of words used according to their natural and ordinary meaning and the non obstante clause is to be understood as operating to set aside as no longer valid anything contained in relevant existing law which is inconsistent with the new enactment. The enacting part⁵ of a Statute must, where it is clear, be taken to

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control the non obstante clause where both cannot be read harmoniously , for even apart from such clause a later law abrogates earlier laws clearly inconsistent with it.

The proper way to construe a non obstante clause is first to ascertain the meaning of the enacting part on a fair construction of its words. The meaning of the enacting part which is so ascertained is then to be taken as overriding anything inconsistent to that meaning in the provisions mentioned in the non obstante clause. A non obstante clause is usually used in a provision to indicate that that provision should prevail despite anything to the contrary in the provision mentioned in such non obstante clause. In case there is any inconsistency between the non obstante clause and another proviso one of the objects of such a clause is to indicate that it is non obstante clause which would prevail over the other clauses. It does not, however, necessarily mean that there must be repugnancy between the two provisions in all such cases. The principle underlying non obstante clause may be invoked only in the case of 'irreconcilable conflict.

9. The protection provided to assessment made under section 80C means that the same could not have been opened under any other provision of Income Tax Ordinance 1979 including section 66A thereof.

10. In view of what has been discussed above, it is held that the decision of Income Tax Appellate Tribunal dated 29.5.2002 was correct and that Inspecting Assistant Commissioner could not have opened the assessment made

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under section 80C ibid. It is further held that section 66A Income Tax Ordinance 1979 cannot be invoked in cases covered under 80C ibid of the Income Tax Ordinance, 1979.

(ATHAR MINALLAH)
JUDGE

(AAMER FAROOQ)
JUDGE

M.S.ZAKI

Approved for reporting.