

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

I.T.R No. 24 of 2009

M/s Askari Bank Limited, Rawalpindi

VS

Commissioner of Income Tax (Legal), Large Taxpayer Unit, etc.

I.T.R No. 25 of 2009

M/s Askari Bank Limited, Rawalpindi

VS

Commissioner of Income Tax (Legal), Large Taxpayer Unit, etc.

I.T.R No. 26 of 2009

M/s Askari Bank Limited, Rawalpindi

VS

Commissioner of Income Tax (Legal), Large Taxpayer Unit, etc.

I.T.R No. 27 of 2009

M/s Askari Bank Limited, Rawalpindi

VS

Commissioner of Income Tax (Legal), Large Taxpayer Unit, etc.

Applicant : M/s Muhammad Mohsin Nazir & Hafiz Muhammad Idrees, Advocates.

Respondents : Mr. Saeed Ahmed Zaidi, Advocate.

Date of hearing : 19.05.2020.

LUBNA SALEEM PERVEZ J. Through this common judgment we intend to dispose of the above referred applications filed u/s 133 of the Income Tax Ordinance, 2001, filed by the applicant bank, whereby, various questions have been proposed said to arise out of the common order dated 21.01.2009, impugned herein, passed by the Income Tax Appellate Tribunal in ITA

Nos.484/IB/2008, 485/IB/2008, 486/IB/2008 & 487/IB/2008, relating to tax year 2003-2004-2005 & 2006: However, the following questions/grounds were admitted to regular hearing by the Court, vide order dated 09.06.2009:-

- i. *That the CIT(A) was not justified in confirming the disallowance of initial allowance on buildings put to use for the purpose of the Bank business during the year by holding that initial allowance is not permissible on buildings that were old and used;*
- ii. *That the CIT(A) has misdirected himself by restricting his observations only to the term “whereas under the provisions of the section 23(1) the aforesaid terms should be read in conjunction with the term “used by the person for the purpose of his business” which in view of the facts and circumstances of the case is illegal and unwarranted.”*

2. After going through the impugned orders passed by the ITAT, it appears necessary to rephrase the above questions for interpretation of section 23 of the Ordinance, 2001, therefore, following questions have been determined as questions of law requiring opinion of the High Court:-

1. *Whether the Appellate Tribunal was justified in confirming the disallowance of initial allowance claimed on building put to use for the Bank's business “for the First Time” in the tax year under reference by restricting the observations only to the term “whereas under the provisions of the section 23(1) the aforesaid terms should be read in conjunction with the term “used by the person for the purpose of his business”?”*
2. *Whether under the facts of the case the Appellate Tribunal was justified in narrowing/restricting the definition of initial allowance u/s 23 to a new building and not to every building used by the person for the first time in a tax year for the purposes of his business?*

3. The common facts in all the tax references under adjudication are that the applicant bank filed income tax returns for the year 2003, 2004, 2005 and 2006 u/s 114 of the Income Tax Ordinance, 2001 (*hereinafter referred to as “the Ordinance”*) which were assessed u/s 120 and were amended u/s 122(5A) of the Ordinance. The said amended assessments were further amended u/s 122(5A) on the ground that the initial depreciation allowance claimed u/s 23 of the Ordinance by the applicant bank on the buildings purchased during the tax years have been wrongly allowed as the buildings were old and used and the applicant bank was not entitled for claim of initial allowance on these buildings under the provisions of Section 23 of the Ordinance. The taxation officer, thus disallowed the claim of initial allowance while further amending the assessments for all the tax years

under reference, vide order dated 29.04.2008. The said orders were assailed before the Commissioner Income Tax (Appeal-I), Islamabad, who vide order Nos. 44 to 47/2008 dated 07.10.2008 dismissed the appeals of the appellant on the following reasons:-

“The facts of the case were examined in light of arguments advanced by the learned AR vis-a-viz the record. All the buildings against which initial depreciation allowance have been claimed were old and were previously used in Pakistan whereas Section 23(1) of Income Tax Ordinance 2001 states in clear terms that initial allowance is admissible in respect of assets used for the purposes of business for the first time. The rationale behind this conditionality is to encourage investments by providing the incentive of initial allowance in respect of new assets. It is correct that only plant and machinery already used in Pakistan have been excluded from the list of assets eligible for initial allowance but on the same analogy previously used buildings are also not entitled to initial allowance. There appears no contradiction in this respect as the provisions of section 23(1) of Income Tax Ordinance 2001 clearly states that only those assets used for the first time for the purposes of business are eligible for initial allowance. The conditions that the assets should have been put to use for the first time and for the purposes of business are cumulative in nature as both these two conditions are required to be fulfilled for referring an asset eligible for initial depreciation allowance. As stated earlier all the buildings added to fixed assets during all the relevant tax years were not new as these were previously used and as such these were not eligible for initial allowance in terms of provisions of Section 23(1) of Income Tax Ordinance 2001. The treatment meted out by the taxation officer in this respect in all the impugned orders is therefore confirmed being legally correct.”

4. Against the orders dated 07.10.2008, passed by Commissioner Appeals, the applicant Bank preferred second appeal before the Appellate Tribunal Inland Revenue (*hereinafter referred to as ITAT*), who vide a common judgment dated 21.01.2009, passed in ITA Nos.484/IB/2008 to 487/IB/2008, relating to tax year 2003 to 2006, confirmed the findings of the Commissioner Appeals and dismissed the appeals while also observing as under:-

We have considered arguments of both the sides in the light of relevant law and material laid before us. The taxpayer purchased commercial buildings during the years under appeal. These buildings were not new. These were previously used for business purposes and put into operation in Pakistan in previous years. The company claimed initial depreciation on these buildings on the plea that commercial buildings were used for the first time by it in Pakistan and therefore it is entitled to initial depreciation. We are not inclined to subscribe to this view point. In our opinion, initial depreciation is a “one time deduction” which is admissible when the asset is put into operation for the first time in Pakistan. The word “initial” is very significant. It certainly means the ‘beginning’. “Beginning” is always made once only. Therefore, initial depreciation can be claimed only at the beginning of use of a depreciable asset put into operation for the purposes of business. It cannot be claimed again and again. If a taxpayer has

already claimed initial depreciation on any asset used for the first time in Pakistan, the subsequent purchaser(s) of the same asset will not be entitled to claim initial depreciation again on the same asset. Normal depreciation will, however, be admissible to subsequent purchaser(s) of the asset in accordance with relevant provisions of law.”.

5. Being aggrieved by the above judgment dated 21.01.2009, passed by the ITAT, present Reference Applications have been preferred for interpretation of provision of section 23 of the Ordinance.

6. Learned counsel for the applicant Bank submitted that the applicant Bank purchased the buildings during the relevant tax years for opening of branches and claimed initial depreciation allowance on the said buildings u/s 23 of the Ordinance, in the relevant tax years as used for the first time after their purchase, however, the respondent department, on the pretext that initial depreciation allowance, as provided vide section 23 of the Ordinance, is not applicable for the reason that the said buildings purchased by the Bank were old and used buildings added as fixed assets to the annual accounts. Learned counsel contended that the interpretation of section 23 of the Ordinance, as construed by the respondent department is against the intention of the legislature and the principles of interpretation of taxing statutes by the superior courts; that section 23(5) of the Ordinance, 2001, specifies the eligible depreciable assets which does not exclude the “building” while specifying the assets which have been excluded from the definition/category of eligible depreciable asset u/s 23 (1) of the Ordinance. Learned counsel stated that there is no ambiguity in language of provision of section 23 (1) of the Ordinance, and , in respect of interpretation of statutes, relied on the case law reported as *A & B Food Industries Limited vs. Commissioner of Income Tax/Sales, Karachi* (1992 PTD 545 Supreme Court of Pakistan), *A & B Food Industries Limited vs. Commissioner of Income Tax/Sales, Karachi* (1992 PTD 663 Supreme Court of Pakistan) *M/s Pakistan Services LTD., Karachi vs. Commissioner of Income Tax, Central Zone ‘C’ (COS-1), Karachi* (1999 PTD 2901 Karachi High Court), *Nishat Mills Ltd., Lahore vs. Collector of Customs, Karachi and another* (2006 PTD 2726 Karachi High Court), *Commissioner of Agricultural Income Tax East Bengal vs. B.W.M. Abdur Rehman* [(1974) 29 Tax 212 (S.C.)], *Commissioner of Income Tax vs. Muhammad Kassim* (2000 PTD 280 Karachi High Court), *M/s Al-Rai Flour*

Mills, Lahore vs. Commissioner of Income Tax/Wealth Tax, Companies Zone-I, Lahore (2008 PTD 838 Lahore High Court), M/s Micropak (Pvt.) Ltd., Lahore vs. Income Tax Appellate Tribunal, Lahore and 2 others (2001 PTD 1180 Lahore High Court), B.P. Biscuit Factory Ltd., Karachi vs. Wealth Tax Officer and another (1996 SCMR 1470 Supreme Court of Pakistan), Collector of Customs (Appraisalment) Karachi and others vs. M/s Abdul Majeed Khan and others (1977 SCMR 371), Commissioner Inland Revenue, Zone-II, Karachi vs. M/s Kassim Textile Mills (Pvt.) Limited, Karachi (2013 PTD 1420 Sindh High Court), M/s Colibrative Heavy Industries (Pvt.) Ltd., Lahore vs. C.I.T/W.T., Coys Zone-II, Lahore (2005 PTD 2525 Lahore High Court) and M/s Al-Rai Flour Mills, Lahore vs. Commissioner of Income Tax/Wealth Tax, Companies Zone-I, Lahore (2008 PTD 838). Learned counsel submitted that the applicant Bank has used the fixed assets (the buildings) for the first time for the purposes of its business i.e. by opening new branches in those buildings; therefore, the applicant Bank is legally entitled for initial allowance u/s 23 of the Ordinance, 2001.

7. Learned counsel for the respondent submitted that the initial allowance u/s 23 of the Ordinance, is admissible for new assets added during the tax year for the purposes of business use for the first time; that the depreciation is a concession and not a personal allowance; that absurdity is not the intention of the legislature; that it is a one-time deduction and the words “for the first time” has been used by the legislature which clearly show the intention that the initial depreciation allowance is allowed to the new assets as the word “initial” means the beginning and submitted that since, admittedly the buildings purchased by the applicant bank were old constructed buildings, in view of the clear language of section 23 of the Ordinance, 2001, were not entitled for initial depreciation allowance. Learned counsel supported the concurrent findings of the forums below and prayed for dismissal of titled reference applications.

8. Arguments heard. Record perused.

9. The controversy in all the reference applications revolves around the interpretation of section 23 of the Ordinance, 2001, which provides for deduction of depreciation as initial allowance to the eligible depreciable assets of the person placed into service in Pakistan for the “first time in a tax year” in

accordance with the rate specified in part II of the 3rd Schedule to the Ordinance, against the cost of asset. The case of the applicant Bank is that the initial depreciation allowance is allowable on old constructed buildings added to the fixed assets during the year it was purchased. However, the respondent department is of the view that said initial depreciation allowance is not admissible in respect of the old buildings/fixed assets though purchased during the year as it is admissible for the new assets in view of the words “for the first time” used in section 23 of the Ordinance.

10. Depreciation is always an allowable deduction while computing taxable income under the head of income from business or profession under the tax laws enacted in the country from time to time. It was allowed u/s 10(2)(vi) under the Income Tax Act, 1922; under section 23(1)(v) of the Income Tax Ordinance, 1979, and now under section 22 and 23 of the Income Tax Ordinance, 2001, under the heading “Deduction: Special Provisions”. Bare perusal of the above cited provisions relating to depreciation deduction shows that it is non-cash expenditure allowable in a tax year for a depreciable asset used for deriving income from business chargeable to tax. It is thus, a mandatory statutory deduction to be claimed by the taxpayer. The depreciable asset has been mentioned in **22(15)** of the Ordinance, and the following are the assets on which the depreciation u/s 22 of the Ordinance, is allowed under 3rd Schedule of the Ordinance, at the prescribed rates:-

- I. Building (all types).
- II. Furniture (including fittings) and machinery and plant (not otherwise specified), motor vehicles (all types), ships, technical or professional books.
- III. Computer hardware including printer, monitor and allied items, machinery and equipment used in manufacture of I.T. products, aircrafts and aero engines.
- IV. In case of mineral oil concerns the income of which is liable to be computed in accordance with the rules in Part-I of the Fifth Schedule.
 - a. Below ground installations
 - b. Offshore platform and production installation
- V. A ramp built to provide access to persons with disabilities not exceeding Rs. 250,000 each.

11. In addition to the normal depreciation allowable u/s 22 of the Ordinance, deduction of depreciation as initial allowance u/s 23 of the Ordinance, has also

been made admissible to the taxpayer on the addition of assets in the fixed business assets during the tax year. For convenience Section 23 of the Ordinance is reproduced as under:-

23. Initial allowance.—(1) *A person who places an eligible depreciable asset into service in Pakistan for the first time in a tax year shall be allowed a deduction (hereinafter referred to as an “initial allowance”) computed in accordance with sub-section (2), provided the asset is used by the person for the purposes of his business for the first time or the tax year in which commercial production is commenced, whichever is later.*

(2) *The amount of the initial allowance of a person shall be computed by applying the rate specified in Part II of the Third Schedule against the cost of the asset.*

(3) *The rules in section 76 shall apply in determining the cost of an eligible depreciable asset for the purposes of this section.*

(4) *A deduction allowed under this section to a leasing company or an investment bank or a modaraba or a scheduled bank or a development finance institution in respect of assets owned by the leasing company or the investment bank or the modaraba or the scheduled bank or the development finance institution and leased to another person shall be deducted only against the leased rental income derived in respect of such assets.*

(5) *In this section, “eligible depreciable asset” means a depreciable asset other than —*

- (a) *any road transport vehicle unless the vehicle is plying for hire;*
- (b) *any furniture, including fittings;*
- (c) *any plant or machinery that has been used previously in Pakistan;*
or
- (d) *any plant or machinery in relation to which a deduction has been allowed under another section of this Ordinance for the entire cost of the asset in the tax year in which the asset is acquired.”.*

12. The Taxation Officer while passing order u/s 122(5) of the dated 29.04.2008, has disallowed the claim of initial depreciation emphasizing on the phrase “for the first time” as used in section 23(1) of the Ordinance and in his opinion it conveys the intention that only the new assets used for the first time are eligible for initial allowance. The Commissioner Appeals, vide its order dated 07.10.2008, has affirmed the interpretation applied by Taxation Officer while adding that *the rationale behind the conditionality is to encourage investments by providing the incentive of initial allowance in respect of new assets and that only plant and machinery already used in Pakistan have been excluded from the list of assets eligible for initial allowance u/s 23 (5) of the Ordinance thus, on the same*

analogy previously used buildings are also not entitled to initial allowance. The ITAT while deciding the second appeal through impugned orders upheld the findings of Commissioner Appeals with the observation that depreciation is given on the “asset” and not on the “business” or “taxpayers” and initial means preliminary stage of use of an asset.

13. Perusal of the impugned orders revealed that the factor kept in view by the forums below is the use of the phrase “for the first time” in section 23 for arriving at the opinion that only new assets are eligible for initial allowance. By doing so the other components of section 23 have been ignored. According to the principles of interpretation of statutes the provision should not be interpreted in isolation rather the complete provision should be read to understand the intent of legislature for a particular purpose. The legislature has used the words “placed into service” with the words “for the first time” for the purposes of allowance of initial depreciation u/s 23 of the Ordinance. For arriving at the correct interpretation and for understanding the purpose of this allowance the entire sub-section (1) is to be read in conjunction. Sub-section (1) has been started as “A person who places an eligible depreciable asset into Pakistan for the first time.....” thus the words “places” & “into service” are also of significance and are to be read with the words “for the first time” and thus when read in concomitance, “the eligible depreciable asset placed into service for the first time” would mean “the point in time when the fixed asset is put to use for the first time”. The words placed-in-service, therefore, in context of this provision have been used to determine the starting point of depreciation i.e. date of purchase of the building and its use for the purposes of business for the first time by the taxpayer. As observed by the CIT (A) in its findings, vide order dated 07.10.2008, that initial allowance is an incentive to encourage the taxpayer but if the interpretation as per his order is applied for section 23 of the Ordinance, it would deprive the investors from the incentive of initial allowance on investment in the immovable assets for the purposes of business in Pakistan and use it for the first time after it is purchased. It does not seem to be the intention of the legislature to allow the benefits of section 23 of the Ordinance to the purchasers of newly constructed buildings only and deprive the taxpayer who invests huge amounts in purchase of immovable properties for the purposes of expanding

business operations. Moreover, section 23(5) of the Ordinance, provides only the following assets for exclusion from the definition of the term “eligible depreciable assets”:-

- “(a) any road transport vehicle unless the vehicle is plying for hire;
- (b) any furniture, including fittings;
- (c) any plant or machinery that has been used previously in Pakistan;
or
- (d) any plant or machinery in relation to which a deduction has been allowed under another section of this Ordinance for the entire cost of the asset in the tax year in which the asset is acquired.’

Thus, the immovable properties are included in the definition of the term “eligible depreciable assets” and, therefore, the investment in the immovable assets whether new or old by the person in Pakistan for the purpose of business would be entitled to the benefits of initial allowance u/s 23 of the Ordinance. In accordance with the principles of interpretation of fiscal statutes as has been established by the Hon’ble Supreme Court of Pakistan as well as Hon’ble High Courts, we are of the view that plain language of section 23 of the Ordinance, when read in its entirety and in conjunction with the words/phrases used therein, the provision of section 23 does not exclude from its preview, the old/used building if purchased by the person in a tax year in Pakistan for business purposes and place into service for the first time. It is also well settled that if the provision is capable of two or more interpretations, the one which favours the taxpayer would be adopted. Reliance in this regard has been placed on the following judgments:-

- **Commissioner of Agriculture Income Tax, East Bengal vs. B.W.M. Abdur Rahman [(1974) 29 Tax 212 (S.C.)]**

Statutes—Interpretation of – Fiscal statutes – Question whether or not a particular matter is within a taxing statutes – Whether only the letter of law is to be looked into – Held yes—Whether any room for intendment, equity or presumption.

- **A & B Food Industries Limited vs. Commissioner of Income Tax/Sales, Karachi (1992 SCMR 663).**

We are inclined to hold that reference to the proceedings of the Legislature can be resorted to when the words of a provision of a statute are ambiguous with the object to discover the real intention of the law-makers but when there is no ambiguity in the language employed in the relevant provisions of the statute, recourse to the proceedings of the

Legislature cannot be made in order to construe the same in violation of the language employed therein.

- **B.P. Biscuit Factory Ltd., Karachi vs. Wealth Tax Officer and another (1996 SCMR 1470).**

It is equally well settled that when the language of a fiscal statute is ambiguous and- several interpretations of the same provision are possible, the doubt should be resolved in favour of the citizens.

- **Collector of Customs (Appraisement) Karachi and others vs. M/s Abdul Majeed Khan and others (1977 SCMR 371).**

Moreover, in interpreting a penal or a taxing statute the Courts must look to the words of the statute and interpret them in the light of what is clearly expressed. It cannot imply anything which is not expressed, it cannot import provisions in the statute so as to support assumed deficiency, as held in MessrsHirjina& Co. (Pakistan) Ltd. v. Commissioner of Sales Tax, Central, Karachi (1971 S C M R 128). Last but not the least it is also well established that penal provisions of a statute should be strictly construed and in case of any ambiguity or doubt arising from the construction, the benefit must go to the accused person Muhammad Ali v. State Bank of Pakistan Karachi(1973 S C M R 140).

In addition to the above referred judgments, guidance has also been taken from the following judgments of the superior courts on the points that while interpreting statute, the provision is to be considered in its totality; that ambiguity, if any, in the statute would be resolved in favour of the taxpayer:

- **Saudi-Pak Industrial and Agricultural Investment Company (PVT.) LTD., Islamabad Vs. Messrs Allied Bank of Pakistan and another (2003 C L D 596 Supreme Court of Pakistan).**

It is a fundamental principle of interpretation of documents and statutes that they are to be interpreted in, their entire context following a full consideration of all provisions of the document or statute, as the case may be, that every attempt shall be made to save the document and for this purpose a difference between general statements and particular statements of the document be differentiated properly, to save the document rather to nullify it, that no provision of the document be read in isolation or in bits and pieces, but the entire document is to be read as a whole to gather the intention of the parties, that the Court for this purpose can resort to the correspondence exchanged between the parties, that the Court shall lean to an interpretation, which will effectuate rather than one, which will invalidate an instrument.

- **Kissan Support Services Pvt. Ltd. vs. Commissioner Inland Revenue, Zone-III, LTU, Islamabad and another (2019 PTD 1694 Islamabad High Court).**

The settled principles of interpretation of a fiscal statute are that the provisions are required to be interpreted literally and equity or presumption are alien thereto; if a provision of a taxing statute can have two reasonable explanations then one which is favourable to the taxpayer has to be accepted; any ambiguity is required to be resolved

in favour of the tax payer. Likewise, redundancy cannot be attributed to the lawmaker. Every word and part of the statute has to be given meaning and effect. It is always presumed that the legislature has used every word in a context and for a purpose. The statute has to be read as a whole and the intention of the legislature has to be discovered by paying attention to what has been said.

15. In view of the above the interpretation of section 23 of the Ordinance, as construed by the fora below, vide impugned orders, that the initial allowance u/s 23(1) of the Ordinance is allowable in respect of the newly constructed buildings only is misplaced and not sustainable in the eye of law.

16. For the reasons discussed hereinabove, both the above questions are answered in **negative**. Present reference applications are **allowed** in favour of the applicant. Copy of this order shall be sent to the learned Tribunal under the seal of this Court.

(MOHSIN AKHTAR KAYANI)
JUDGE

(LUBNA SALEEM PERVEZ)
JUDGE

Announced in open Court on this 16th day of July, 2020.

JUDGE

JUDGE