JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

Income Tax Reference No.221 of 2011

Commissioner Inland Revenue (Zone-II), Regional Tax Office, Islamabad.

Versus

M/s Toyota Islamabad.

Applicant's by : Dr. Farhat Zafar, Advocate.

Respondent's by : Mirza Saqib Siddiq, Advocate

Date of decision : 11.03.2020.

LUBNA SALEEM PERVEZ, J. The applicant department, being aggrieved with order dated 25.02.2011, passed by learned Appellate Tribunal Inland Revenue, Islamabad, *(hereinafter referred to "the ATIR")*in ITA No. 122/IB/11, pertaining to tax year 2007, has filed the present reference application u/s 133(1) of the Income Tax Ordinance, 2001, *(hereinafter referred to "the Ordinance, 2001").* The applicant has referred following questions of law said to arise out of the impugned order:-

Questions of law:-

i. *Whether on the facts and circumstances of the case, the learned Tribunal was justified to hold that no tax u/s 113 was leviable on the AOP taxpayer whereas, the taxpayer was only confronted on nonpayment of tax under section 113 in the notice and the amendment of assessment made u/s 122(5A) was not based on this issue?*

ii. *Whether on the facts and circumstances of the case, learned Tribunal was justified to decide the appeal by ignoring the only ground of appeal taken before it.*

2. Brief facts of the case are that the respondent tax payer which is an AOP filed its return u/s 114 the Ordinance, 2001 *(hereinafter the Original Return)* by declaring the following result:

Taxable income as per original return:	*Rs. 2,700,409/-*
Income tax payable:	*Rs. 675,102/-*
Less already paid:	*Rs. 43,700/-*
Balance tax payable:	*Rs. 631,402/-*

Add tax payable under PTR as declared:	*Rs. 9,388/-*
Total tax payable:	*Rs.640,790/-*

Subsequently, the respondent/tax payer filed revised return *(hereinafter referred to as the 1st Revised Return)* on 19.02.2009, and declared the following result:-

Gross income:	*Rs. 1,000,000/-*
Less operating expenses:	*Rs. 740,300/-*
Net income:	*Rs. 259,700/-*

The return for the tax year 2007 was further revised *(hereinafter the 2nd Revised Return)* on 02.04.2009 declaring loss of Rs. 3,760,085/- in the following manner:-

Income from workshop not covered u/s 115(4)		*Rs. 55,110,824/-*
Less		
Cost of sales:	*Rs. 34,602,043/-*	
Operating expenses:	*Rs. 24,268,866/-*	
		Rs. 58,870,909/-
Net loss declared:		*Rs. 3,760,085/-*

The learned Assessing Officer after scrutinizing the Original Return issued show-cause notice dated 29.04.2009, to confront defects in said return. Thereafter, the assessment was finalized on the basis of Original Return by imposing additional tax at the rate of 12 % on the tax of Rs. 640,790/- which became Rs. 76,895/-, resultantly, tax liability of Rs. 717,685/- was worked out. Against the said order, the Respondent Taxpayer filed appeal before the Commissioner Inland Revenue (Appeal-III Islamabad) *(hereinafter referred as the CIRA-III),* who vide order No. 02/2010, dated 01.11.2010 passed in Appeal No. 643, annulled the order passed by the Assessing Officer holding it to be illegal and without any lawful authority. The findings of the CIRA-III are an under:

> *"The impugned order has also been examined and it has been observed that the learned Additional commissioner (Audit-III), while completing the assessment under section 122 (5A), has rejected the revised return filed by the appellant on the plea that it suffers from various defects/deficiencies without elaborating and establishing the same. The relevant portion of the impugned order is reproduced hereunder for the ease of reference:-*
>
> > *"The loss declared in the revised return filed by the taxpayer is not acceptable, hence the assessment is amended under section 122(5A) to the extent of tax payable on declared income of original return."*
>
> *The taxpayer has revised his return under section 114 (6) of the Income Tax Ordinance, 2001. No restriction or bar can*

> *be put on the right of the taxpayer granted to him by the statute. The tax authorities can amend the revised return if it is erroneous and prejudicial to the interest of revenue. However, the tax authorities cannot refuse to accept the revised return, under any circumstances. In this case the action of the Additional Commissioner (Audit-III) not to accept the revised return is illegal because she has amended the assessment under section 122(5A), taking the figures of original return which was no more in field. She could have further amended the revised return establishing that it was erroneous and prejudicial to the interest of revenue which she has failed to do in the instant case.".*

The Applicant department being aggrieved with the above appellate order preferred appeal before the learned ATIR on the following grounds:-

> *(a) That the order of the learned CIR (Appeals-I), Islamabad is bad in law and contrary to the facts of the case.*
>
> *(b) That the worthy CIR (Appeal-I), Islamabad annulled the case on the grounds that the case has been decided instead of "revised return" on original return" not accepting revised return is illegal.*
>
> *(c) That the appellate may be allowed to add, amend or alter any grounds of appeal on or before the date of hearing.*

Before the learned ATIR, the departmental representative (DR) argued their case on the point that the revised return filed by the taxpayer for the tax year 2007 lacked requirement and conditions as per provisions of section 114(6) and it did not pay the minimum tax u/s 113 of the Income Tax Ordinance, 2001. It appears that the learned ATIR has dismissed the appeal on the basis of arguments of the DR as actual grievance could not be deciphered from the ground taken in appeal. The findings of ATIR are as under:-

> *"Admittedly, taxpayer is an AOP and section 113 of the Income Tax Ordinance, 2001 does not apply in the instant case being an AOP. The taxpayer had filed the revised returns and if the assessing officer had any objection regarding filing of required return he must have confronted the taxpayer, which he failed. It is also imperative to mention that AOP filed normal tax return and not liable to pay turnover tax u/s 113(a) of the Ordinance.".*

Hence, against the said order present reference application has been filed while referring the questions mentioned above.

3. Learned Counsel for the Applicant Department assailed the above findings of the ATIR and argued that the learned ATIR has erred in law while dismissing the appeal. Learned counsel submitted that order passed by the CIT (Appeals-III) was passed without proper application of mind. Learned counsel argued that the Additional Commissioner (Audit-III) has amended the original return under the provision of Section 122(5A) as the revised return filed by the taxpayer were deficient of legal requirements, and therefore, due to the discrepancies in original return its amendment was necessary u/s 122. She submitted that wrong mention of section does not vitiate the entire proceedings. Learned Counsel contended that the impugned order dated 25.02.2011 is not legally sustainable and is liable to be set aside.

4. Learned Counsel for Respondent No. 2/taxpayer vehemently contested the arguments advanced by learned counsel for Applicant Department and submitted that without cancelling the revised return in the field which takes form of an amended order u/s 122(3), the amendment of original return is legally not possible. He further submitted that no question of law arises out of the order dated 25.02.2011, passed by the learned ITAT requiring opinion of this Hon'ble Court. Moreover, no substantial question of law has been framed in this reference application requiring consideration of this Court, hence, prayed for dismissal of the present application filed by the Applicant Department.

5. Perusal of the record appended with memo reveals that Respondent/taxpayer filed return for the tax year 2017 by declaring tax of Rs. 6,40,490/- and thereafter revised its return twice u/s 114(6) of the Ordinance 2001, first time by declaring net income at Rs. 26,59,700/- and second time by declaring loss of Rs. 37,60,085/-. The Additional Commissioner, Audit-III, Islamabad, *(hereinafter referred to as the "Assessing Officer")* initiated the proceedings by issuing show cause notice confronting defects in the original return and non-payment of admitted liability as per original return. She concluded the show cause notice by observing that in case of noncompliance, the assessment would be amended under section 122(5A) of the Ordinance, 2001. The Assessing Officer has passed assessment order by mentioning the

Section 122(5A) of the Ordinance, 2001, on the basis of show-cause notice for imposing additional tax u/s 205 at Rs. 76,895/- on the non-paid admitted liability of Rs. 6,40,490/-with the original return. By doing so the Assessing Officer has acted contrary to law as no proceedings can be initiated u/s 122(5A) unless; firstly, the order is considered to be erroneous and prejudicial to the interest of revenue and secondly, without issuing mandatory notice u/s 122(a) for providing opportunity of hearing to the taxpayer for amendment of assessment order for that very tax year. In the present case neither the original return or subsequent revised return were considered to be erroneous and prejudicial to the interest of revenue by the Assessing Officer nor any notice u/s 122 (9) was issued to the tax payer confronting the grounds for considering the return /deemed order to be erroneous and prejudicial to the interest of revenue. The Assessing Officer moved on to amend the original return without first rejecting the revised returns on the grounds; as argued before the ATIR, for lacking the requirements of Section 114(6) of the Ordinance, 2001, and by not doing so, the revised return took the field in the form of deemed amended order u/s 122(3)(a). The CIRA-III, on appeal filed by the Respondent taxpayer, has rightly annulled the impugned Assessment Order for the tax year 2007 as at the relevant time, the taxpayer was provided with the benefit of furnishing revised return within five years of the date of the original return on the ground of discovery of any omission or filing of wrong statement. Section 114(6) of the Ordinance, 2001, before amendment in 2009 is reproduced below:

> *Section 114(6):*
> *Any person who, having furnished a return, discovers any omission or wrong statement therein, may furnish a revised return within five years of the date that the original return was furnished.*

Section 122(3)(a)(b) is also reproduced hereunder:-

"122. Amendment of assessments.-

(3) Where a taxpayer furnishes a revised return under sub-section (6) of section 114 –

(a) the Commissioner shall be treated as having made an amended assessment of the taxable income and tax payable thereon as set out in the revised return; and

(b) the taxpayer's revised return shall be taken for all purposes of this Ordinance to be an amended

> assessment order issued to the taxpayer by the Commissioner on the day on which the revised return was furnished." .

The learned CIRA-III, therefore, accepted the appeal of the Respondent / Taxpayer as the impugned Assessment Order passed by the Assessing Officer for the tax year 2007 was without jurisdiction as was passed without establishing the revised return/amended assessment u/s 122(3)(a) was erroneous and prejudicial to the interest of revenue. The findings of CIRA-III, vide order dated 01.11.2010, were challenged before the ATIR, where the departmental representative argued the case on the point that requirement of revised return was not fulfilled and minimum tax u/s 113 of the Ordinance, 2001, was not paid by the taxpayer. Since, the case was argued on the ground that minimum tax/turnover tax u/s 113 of the Ordinance, 2001, was not paid. The learned ATIR decided the appeal by limiting its findings to this extent and justifiably held that the provisions of Section 113 of the Ordinance, 2001, do not apply in case of the AOPs. It would not be out of place to mention that scope of payment of minimum tax u/s 113 of the Ordinance, 2001, was extended to the individual and association of persons (AOPs) vide Finance Act, 2010 and the case pertained to the year 2007. The arguments of learned counsel for the respondent department that the proceedings of assessment are not vitiated by mentioning wrong section by the Assessing Officer is not convincing as it has now been well settled that precondition / prerequisite for invoking the provisions of section 122 (5A) of the Ordinance, 2001, are that the return / deemed assessment order should be "erroneous" and "prejudicial" to the interest of revenue. The simultaneous presence of these two prerequisites are mandatory for amendment of assessment u/s 122 (5A). Reliance in this regard is placed on case titled as *Glaxo Laboratories Limited versus Inspecting Assistant Commissioner of Income-Tax and others (1992 PTD 932 SC)* wherein the Hon'ble Apex Court while interpreting section 66A of the Income Tax Ordinance, 1979, which is *parimateria* to section 122 (5A) of the Income Tax Ordinance, 2001, has held as under:-

> *It may be clarified that subsection (1-A) was inserted by Finance Act, 1991, after the impugned notice under section 66-A had been issued by the IAC. Subsection (1) of section 66-A authorises Inspecting Assistant Commissioner to issue a notice for reopening the case if he considers that any*

> *order passed by the Income Tax Officer is erroneous causing prejudice to the interest of the revenue. A mere erroneous order of the Income Tax Officer without causing any prejudice to the interest of the revenue will not authorise Inspecting Assistant Commissioner to exercise power under section 66-A. These two ingredients must be satisfied before invoking it.*

6. In view of the discussion hereinabove, question No. 1 proposed by the applicant department is answered in **affirmative** in favour of the respondent taxpayer. Answer to question No. 2 is **declined** as it is not a question of law which requires interpretation of provision of Income Tax Ordinance, 2001, relating to facts and circumstances of the case. Hence, this reference application is decided against the applicant department and in favour of the respondent taxpayer.

7. Office shall send a copy of this order under seal of the Court to the learned Appellate Tribunal, Inland Revenue as per Section 133(5) of the Income Tax Ordinance, 2001.

(MOHSIN AKHTAR KAYANI)
JUDGE

(LUBNA SALEEM PERVEZ)
JUDGE

Announced in the Open Court on 30.03.2020.

JUDGE **CHIEF JUSTICE**

Adnan