Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

ITR No. 91 of 2016

Kissan Support Services Pvt. Ltd.
Vs
Commissioner Inland Revenue, Zone-III, LTU, Islamabad and another

DATE OF HEARING: 05-03-2019.

APPLICANT BY: Mr Mukhtar Ahmad Gondal Advocate.

RESPONDENTS BY: Mr Saeed Ahmed Zaidi Advocate.

ATHAR MINALLAH, CJ.- Through this Income Tax Reference we will consider and answer the questions of law proposed by the applicant Company, which are stated to have arisen out of order, dated 24-02-2016, passed by the learned Appellate Tribunal Inland Revenue, Islamabad Bench, Islamabad (hereinafter referred to as the "***Tribunal***").

2. The facts, in brief, are that the petitioner is a juridical person incorporated under the Companies Ordinance, 1984 (hereinafter referred to as the "***Ordinance of 1984***") and as a tax payer it files tax returns each year under the Income Tax Ordinance, 2001 (hereinafter referred to as the "***Ordinance of 2001***"). The applicant Company filed its return for the tax year 2010 which was treated as an assessment order under section 120 of the Ordinance of 2001. The applicant Company was later selected for audit pursuant to the exercise of powers conferred under section 177 which led to the issuance of a show cause notice. The show cause notice was adjudicated vide order, dated 30-04-2012, by the Assessing Officer. The applicant Company preferred an appeal which was disposed of by the learned Commissioner Inland Revenue Appeals (Appeal-1) Islamabad. The second appeal preferred by the applicant Company under section 132 of the Ordinance of 2001 was dismissed by the learned Tribunal vide order dated 13-03-2015. The applicant Company did not file a reference under section 133 within the prescribed limitation and belatedly filed an application under section 221 of the Ordinance of 2001 seeking rectification of the judgment, dated 13-03-2015. The application was partially allowed by the learned Tribunal, to the extent of correcting some typographical errors.

3. The learned Counsel for the applicant Company was asked regarding the competence of the instant Tax Reference under section 133 of the Ordinance of 2001 for the reason that the questions of law proposed for our consideration have, statedly, arisen out of an order passed under section 221 of the Ordinance of 2001 and not an order contemplated under section 132(7). The learned Counsel has placed reliance on the judgment rendered by a learned Division Bench of the Lahore High Court in the case titled "Commissioner Inland Revenue v. Tariq Mehmood, etc." [(2014) 110 Tax 328 (H.C. Lah.)] in support of his argument that, if an order passed under section 221 of the Ordinance of 2001 has the effect that the judgment earlier passed by the learned Tribunal under section 132 stands merged therein, then an application under section 133 of the Ordinance of 2001 would be competent. The learned Counsel has also referred to another judgment of the learned Division Bench of the Lahore High Court titled "Messrs Hong Kong Chinese Restaurant, Main Boulevard Gulberg, Lahore v. Assistant Commissioner of Income Tax, Circle 6, Lahore and another" [2002 PTD 1878]. Reliance has also been placed on the cases titled "Messrs Pak Saudi Fertilizer Ltd. Karachi v. Commissioner of Income Tax, Karachi" [2006 PTD 1343], "Messrs Habib Credit & Exchange Bank

Limited v. Deputy Commissioner of Income-Tax" [2001 PTD 785], "Mahmood Barni v. Inspecting Additional Commissioner of Income-Tax, Gujranwala and another" [2005 PTD 165], "Messrs Airport Support Services v. The Airport Manager, Quaid-e-Azam International Airport, Karachi and others" [1998 SCMR 2268], "Col.(Retd.) Ayub Ali Rana v. Dr. Carlite S. Pune and another" [PLD 2002 S.C. 630].

4. The learned Counsel for the respondent Department, on the other hand, has placed reliance on a judgment, dated 31-01-2019, passed by a learned Division Bench of this Court in ITR No. 157/2011, titled "Commissioner Inland Revenue v. M/s Compagnie Generale De Deophysique, etc." in support of his contention that a Tax Reference is not competent under section 133 if the questions proposed for consideration have arisen out of an order passed under section 221 ibid.

5. The learned Counsels for the parties have been heard and the record perused with their able assistance.

6. It is an admitted position that the questions of law proposed through the instant Tax Reference, filed under section 133 of the Ordinance of 2001, are stated to have arisen out of an order passed by the learned

Tribunal whereby the application under section 221 ibid was decided. Moreover, while deciding the application, which was filed under section 221 of the Ordinance of 2001, the learned Tribunal has merely corrected some typographical errors and has not decided any question on merit having the effect of reviewing, altering or modifying the judgment communicated under section 132(7). The sole question for our consideration is the competence of the instant Tax Reference i.e. whether the reference could be entertained under section 133 by treating it as competent if the questions of law for consideration have arisen out of an order passed under section 221 ibid.

7. In order to answer the question, it would be beneficial to survey the relevant provisions of the Ordinance of 2001. Part-II of Chapter X of the Ordinance of 2001 deals with assessments made by an Assessing Officer. Part-III provides for the statutory remedies against orders passed by the assessing officers. Sections 127 to 129 provide for the right of appeal before the Commissioner (Appeals) and matters relating thereto. Section 131 describes the procedure and the persons who are competent to prefer a second appeal to the Appellate Tribunal. The latter is a statutory creation under section 130 of the Ordinance of 2001. Section 132 describes the procedure for disposal of appeals by the learned Tribunal.

Clauses (a) and (c) of sub section (3) of section 132 explains the powers vested in the learned Tribunal to make an order while deciding an appeal. Sub section (4) provides that the Appellate Tribunal shall not increase the amount of any assessment or any penalty or decrease the amount of any refund unless the taxpayer has been given a reasonable opportunity of showing cause against such increase or decrease, as the case may be. Sub section (5) empowers the Appellate Tribunal to authorize the Commissioner to amend an assessment order and the eventualities are also described therein. Sub section (6) provides that where an appeal relates to a decision other than an assessment order, the appellate Tribunal may make an order to affirm, vary or annul the decision and issue such directions as the case may require. Sub section (7) of section 132 makes it binding on the Appellate Tribunal to communicate its order to the taxpayer and the Commissioner. Sub section (10) further provides that, save as provided in section 133, the decision of the Appellate Tribunal on an appeal shall be final. Section 133 of the Ordinance of 2001 provides an opportunity for filing a tax reference after exhausting two statutory rights of appeal. The aggrieved person or the Commissioner are competent to prefer an application within ninety days from the date of communication of the order of the Appellate Tribunal under sub section (7) of section 132.

Section 221, inter-alia, empowers the Appellate Tribunal to amend any order so as to rectify any mistake apparent from the record, either on its own motion or any mistake brought to the latter's notice by a taxpayer. Sub section (4) of section 221 explicitly provides that no order under sub section (1) can be made after five years from the date of the order sought to be rectified.

8. A combined reading of the abovementioned provisions of the Ordinance of 2001 makes it obvious that the legislature has provided rights of appeal before two forums i.e. the Commissioner (Appeals) and the Appellate Tribunal. A taxpayer or the Commissioner, as the case may be, aggrieved from an order passed by the Commissioner (Appeals) under section 129, has been given a statutory right to prefer an appeal before the Appellate Tribunal. Section 132 provides for the procedure and the manner for disposal of an appeal by the Appellate Tribunal. The powers are described in sub section (3) of section 132. Sub section (7) of section 132 explicitly provides that the Appellate Tribunal shall communicate its order to the taxpayer or the commissioner. Sub section (7) of section 132 obviously refers to an order or judgment whereby an appeal filed under section 131 has been decided or, in other words, it necessarily has to be read in the context of sub sections 3 to 6. Sub section

(10) of section 132 further affirms that, unless the order communicated under sub section (7) of section 132 has not been modified, annulled or otherwise interfered with by a High Court under section 133, it shall be final. The limitation for filing a reference relating to a question of law arising out of an order communicated under sub section (7) of section 132 is ninety days. The reference under section 133 is, therefore, expressly confined to an order communicated under sub section 7 of section 132 and not to an order passed under some other provision of the Ordinance of 2001. Section 221 of the Ordinance of 2001, on the other hand, is a distinct provision and the remedy there under has a limited scope and its language can, by no stretch of the imagination, be construed as having a nexus with sub section (1) of section 133. The restricted scope of the remedy there under is confined to rectification of a mistake, and that too, if it is apparent from the record. The limitation provided under sub section (4) of section 221 is five years from the date of passing of the order which is sought to be rectified. Section 221 is restricted to rectifying a mistake which must be apparent from the record and its scope cannot be construed as that of a statutory right of appeal provided under sections 131 and 132 of the Ordinance of 2001. Any order or judgment passed under section 221 is distinct and definitely cannot

be treated as an order referred to in sub section (7) of section 132 of the Ordinance of 2001.

9. The learned Counsel for the applicant Company has argued at length on the basis of the doctrine of merger. He has contended that if an order passed under section 221 has the effect that the order communicated under section 132 has merged therein then it would be treated as an order communicated under sub section 7 of section 132. We are afraid that this argument, if accepted, would stretch the interpretation to such an extent that it would render some provisions of the Ordinance of 2001 as redundant and simultaneously negate the settled principles of interpretation of fiscal statutes, as will be discussed later. In the case at hand, the Appellate Tribunal vide order, dated 24-02-2016, has merely rectified some typographical mistakes and, therefore, any discussion on the basis of the doctrine of merger may not be relevant. It is noted that the doctrine of merger is based on the principle that at one and the same time not more than one order can be operative. The august Supreme Court in the case titled "Sahabzadi Maharunisa and another v. Mst. Ghulam Sughran and another" [PLD 2016 S.C. 358] has dealt with and eloquently explained the doctrine of merger in great detail and has observed and held as follows:

> *"From the ratio of the case law cited above (from both jurisdictions), it is clear that the doctrine of merger has been duly applied to the reversal and modification cases and also to all those cases in which the judgment etc. of a lower forum has been affirmed in appeal or revision by a higher forum(s) (Note: though there are certain exceptions to this rule which shall be specified in the concluding part of this opinion). We may like to add here that the rule of merger shall also extend to the writ jurisdiction of the learned High Court(s) where the decisions of the lower fora, such as Tribunals and Special Courts etc. when challenged have been affirmed by the court in exercise of its constitutional jurisdiction."*

10. Likewise, in the context of the expression "mistake apparent on record" used in section 156 (1) of the Income Tax Ordinance, 1979 (hereinafter referred to as the "**Ordinance of 1979**") the august Supreme Court in the case titled "Commissioner of Income Tax, Karachi v. Messrs Shadman Cotton Mills Ltd. Karachi through Director" [2008 SCMR 204] has held and observed as follows:

> *"The expression "mistake apparent on record"*

means the error or mistake so manifest and clear which, if is permitted to remain on record, may have material effect on the case. But an error of fact or law, which having direct nexus with the question of determination of rights of parties affecting their substantial rights or causing prejudice to their interest, is not a mistake apparent on the record to be rectified under S.156 (ibid). The mistake must be of the nature, which is floating on the surface of record and must not involve, an elaborate discussion or detailed probe or process of determination."

11. The august Supreme Court in the case titled "Commissioner of Income Tax Company's II, Karachi v. Messrs National Food Laboratories" [1992 PTD 570] has held as follows:

"Section 35 of the repealed Income-tax Act, 1922, hereinafter referred to as `The Act' confers a power to rectify any mistake in the order which is apparent from the record. Such power can be exercised Suo Motu or if it is brought to the notice by an assessee. Therefore, essential condition for exercise of such power is that the mistake should be

apparent on the face of record; mistake which may be seen floating on the surface and does not require investigation or further evidence. The mistake should be so obvious that on mere reading the order it may immediately strike on the face of it. Where an officer exercising power under section 35 enters into the controversy, investigates into the matter, reassesses the evidence or takes into consideration additional evidence and on that basis interprets the provision of law and forms an opinion different from the order, then it will not amount to `rectification' of the order. Any mistake which is not patent and obvious on the record, cannot be termed to be an order which can be corrected by exercising power under section 35. In this regard reference can be made to Shaikh Muhammad Iftikharul Haq v. Income-tax Officer, Bahawalpur, PLD 1966 SC 524 and Pakistan River Steamer Limited v. Commissioner of Income-tax, 1971 PTD 204."

12. It is, therefore, obvious from the above principles and law that the scope of rectification and the powers

conferred under section 221 of the Ordinance of 2001 are limited to an extent that the question of the doctrine of merger will arise only in exceptionally extraordinary circumstances. Moreover, even if it does arise and, assuming for the sake of argument that the order referred to under section 132(7) has merged in an order passed under section 221, then a reference under section 133 would still not be competent because in such an eventuality one will have to read something therein which the legislature has not intended nor provided for by using clear and unambiguous language. Needless to mention that such an interpretation will render subsections 7 and 10 of section 132 and section 133(1) as redundant. It is settled law that redundancy cannot be attributed to the legislature.

13. 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.

14. When the provisions discussed above are analyzed in the light of the principles of interpretation of fiscal statutes then sub section (1) of section 133 cannot be interpreted otherwise than holding that a tax reference is competent only against an order communicated by the learned Tribunal to the taxpayer and the Commissioner as mandated under sub section (7) of section 132 of the Ordinance of 2001. Any other interpretation would tantamount to reading into the Ordinance of 2001, particularly sub section (1) of section 132 thereof, something not provided therein.

15. With humility and great respect we have not been able to persuade ourselves to concur with the judgment rendered by a learned Division Bench of Lahore High Court in the case titled "Commissioner Inland Revenue v. Tariq Mehmood, etc." [(2014) 110 Tax 328 (H.C. Lah.)] for the reasons discussed above.

16. We, therefore, declare that a Tax Reference under sub section (1) of section 133 of the Ordinance of

2001 is competent within the prescribed limitation if the question(s) of law arise out of an order communicated by the Appellate Tribunal under sub section (7) of section 132 and not an order passed under section 221 ibid notwithstanding the doctrine of merger. In the case in hand the tax reference purported to have been filed under section 133 of the Ordinance of 2001 is not competent.

17. A copy of this order is directed to be sent to the Registrar of the learned Tribunal under the seal of this Court.

(CHIEF JUSTICE)

(MIANGUL HASSAN AURANGZEB)
JUDGE

Announced, in open Court, on 03-*06-2019*.

JUDGE CHIEF JUSTICE

Approved for reporting.

Tanveer Ahmed.