

Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

WRIT PETITION NO. 4793 of 2016

M/s First Micro Finance Bank Ltd.

sVs

Federation of Pakistan, etc.

DATE OF HEARING: 25.02.2021.

PETITIONER BY: Hafiz Muhammad Idrees and Syed Farid Bukhari, Advocate.

RESPONDENTS BY: Raja Saad Sultan, Assistant Attorney General.
Mr. Imdad Hussain, Inland Revenue Officer.

BABAR SATTAR, J.- The petitioner is aggrieved by notice dated 26.03.2016 under section 147 Income Tax Ordinance, 2001 (“**Ordinance**”) for payment of advance tax and notice dated 28.12.2016 under section 138(1) of the Ordinance ordering attachment of property of the petitioner for its failure to pay installment of advance tax due for December Quarter for tax year 2017.

2. Learned counsel for the petitioner states that the petitioner has furnished an estimate of advance tax payable under section 147(6) of the Ordinance which could not be rejected by the department and the only remedy for the department was imposition of surcharge under section 205 of the Ordinance, in the event that there was under

payment on part of the taxpayer in relation to the amount due under section 147 of the Ordinance. The learned counsel placed reliance on Commissioner (Legal) Inland Revenue v. E.N.I Pakistan (M) Ltd., Karachi (2011 PTD 476) and Karachi Port Trust, Karachi vs. Commissioner Inland Revenue, Karachi (2011 PTD 1996) and the judgment passed by this Court dated 05.09.2016 in W.P No. 2426/2016.

3. Respondents No. 2, 3 and 4 filed para-wise comments in relation to the petition and took the position that in the absence of proof of payment of tax paid in the previous year together with entitlement for any refund, the petitioner was obliged to pay advance tax in accordance with the formula provided under section 147(4) read together section 147(1) of the Ordinance. On 16.02.2021 an Inland Revenue Officer appeared on behalf of the department and sought a short adjournment to assist the Court. He was informed that the matter pertains to 2016 and would not be adjourned any further. When the case came up for hearing on 25.02.2021 the department once again sought adjournment which was denied and consequently the petition is being decided on the basis of available record.

4. The relevant provisions of the Income Tax Ordinance are as follows:

147. Advance tax paid by the taxpayer.— (1) *Subject to sub-section (2), every taxpayer whose income was charged to tax for the latest tax year under this Ordinance or latest assessment year under the repealed Ordinance] other than-*

(b) income chargeable to tax under sections 5, 6 and 7;

(c) income subject to deduction of tax at source under section 149; and

(d) income from which tax has been collected under Division II or deducted under Division III [or deducted or collected under

Chapter XIII] and for which no tax credit is allowed as a result of sub-section (3) of section 168,

shall be liable to pay advance tax for the year in accordance with this section.

(4) Where the taxpayer is an association of persons or a company, the amount of advance tax due for a quarter shall be computed according to the following formula, namely:-

$$(A \times B/C) - D$$

Where –

- A is the taxpayer's turnover for the quarter Provided that where the taxpayer fails to provide turnover or the turnover for the quarter is not known, it shall be taken to be one-fourth of one hundred and ten percent of the turnover of the latest tax year for which a return has been filed;*
- B is the tax assessed to the taxpayer for the latest tax year [“Explanation.- For removal of doubt it is clarified that tax assessed includes tax under sections 113 and 113C.”]*
- C is the taxpayer's turnover for the latest tax year; and*
- D is the tax paid in the quarter for which a tax credit is allowed under section 168.*

(6) If any taxpayer who is required to make payment of advance tax under sub-section (1) estimates at any time before the last installment is due, that the tax payable by him for the relevant tax year is likely to be less than the amount he is required to pay under sub-section (1), the taxpayer may furnish to the Commissioner an estimate of the amount of the tax payable by him, and thereafter pay such estimated amount, as reduced by the amount, if any, already paid under sub-section (1), in equal installments on such dates as have not expired.

Provided that an estimate of the amount of tax payable shall contain turnover for the completed quarters of the relevant tax year, estimated turnover of the remaining quarters along with reasons for any decline in estimated turnover, documentary evidence of estimated expenses or deductions which may result in lower payment of advance tax and the computation of the estimated taxable income of the relevant tax year: Provided further that where the Commissioner is not satisfied with the documentary evidence provided or where an estimate of the amount of tax payable is not accompanied by details mentioned in the first proviso, the

Commissioner may reject the estimate after providing an opportunity of being heard to the taxpayer and the taxpayer shall pay advance tax according to the formula contained in sub-section (4).

205. Default surcharge. — (1) *A person who fails to pay –*

(a) any tax, excluding the advance tax under section 147 and default surcharge under this section;

(b) any penalty; or

(c) any amount referred to in section 140 or 141,

on or before the due date for payment shall be liable for default surcharge at a rate equal to [“12”] per cent per annum on the tax, penalty or other amount unpaid computed for the period commencing on the date on which the tax, penalty or other amount was due and ending on the date on which it was paid

Provided that if the person opts to pay the tax due on the basis of an order under section 129 on or before the due date given in the notice under sub-section (2) of section 137 issued in consequence of the said order, and does not file an appeal under section 131, he shall not be liable to pay default surcharge for the period beginning from the due date of payment in consequence of an order appealed against to the date of payment in consequence of notice under sub-section (2) of section 137.]

(1A) A person who fails to pay advance tax under section 147 shall be liable for default surcharge] at a rate equal to [“12”] per cent per annum] on the amount of tax unpaid computed for the period commencing on the date on which it was due and ending on the date on which it was paid or date on which the return of income for the relevant tax year was due, whichever is earlier.

(1B) Where, in respect of any tax year, any taxpayer fails to pay tax under sub-section [(4A), or] (6) of section 147 or the tax so paid is less than 3 [ninety] per cent of the tax chargeable for the relevant tax year, he shall be liable to pay 4 [default surcharge]at the rate of [12] per cent per annum on the amount of tax so chargeable or the amount by which the tax paid by him falls short of the 7 [ninety] per cent, as the case may be; and such [default surcharge] shall be calculated from the first day of April in that year to the date on which assessment is made or the thirtieth day of June of the financial year next following, whichever is the earlier

Provided that in the case of person having a special tax year, the default surcharge shall be calculated on and from the first day of the fourth quarter of the special tax year till the date on which

assessment is made or the last day of special tax year, whichever is earlier.

(2) Any default surcharge paid by a person under sub-section (1) shall be refunded to the extent that the tax, penalty or other amount to which it relates is held not to be payable.

(3) A person who fails to collect tax, as required under Division II of Part V of this Chapter or Chapter XII or deduct tax as required under Division III of Part V of this Chapter or Chapter XII or fails to pay an amount of tax collected or deducted as required under section 160 on or before the due date for payment shall be liable for [default surcharge] at a rate equal to ["12"] per cent per annum] on the amount unpaid computed for the period commencing on the date the amount was required to be collected or deducted and ending on the date on which it was paid to the Commissioner.

Provided that if the person opts to pay the tax due on the basis of an order under section 129 on or before the due date given in the notice under sub-section (2) of section 137 issued in consequence of the said order and does not file an appeal under section 131, he shall not be liable to pay default surcharge for the period beginning from the date of order under section 161 to the date of payment.

(5) The Commissioner shall make an assessment of any 7 default surcharge imposed under this Part in accordance with the provisions of Part II of this Chapter as if the 8 default surcharge were tax.

(6) The provisions of Parts III and IV apply to an assessment of 9 [default surcharge] as if it were an assessment of tax.

(7) Where a person is liable for default surcharge under this Part, the Commissioner may, at his discretion, make assessment of default surcharge for the period of default or part thereof, notwithstanding that the tax due has not actually been paid.

5. The scheme of section 147 was discussed in Commissioner (Legal) Inland Revenue v. E.N.I Pakistan (M) Ltd., Karachi (2011 PTD 476), which held the following:

“A perusal of subsection (1) of section 147 reveals that it provides that every taxpayer subject to the provisions of subsection (2) which provides that those individuals whose latest taxable income

excluding the heads of income mentioned in the exclusions (a) to (d) provided in subsection (1) is Rs.500,000 or more, shall be liable to pay advance tax. Subsection (4) provides how the advance tax payable by a company or an association of persons shall be computed.

Subsection (4A) provides that the companies and association of persons shall estimate their tax payable for the relevant tax year at any time before the last installment is due and in case they find that the tax payable is likely to be more than the amount they are required to pay under the formula provided in subsection (4) then they shall furnish an estimate of the amount of the tax payable by them and thereafter pay such amount after adjustment for the amount if any already paid in terms of subsection (4), whereas subsection (6) provides that if any taxpayer who was required to make payment of advance tax estimates before the last installment is due, that the tax payable by him for the relevant tax year is likely to be less than the amount required to be paid under subsection (1), he may furnish to the Commissioner an estimate of the amount of the tax payable by him and thereafter pay such estimated amount. A comprehensive reading of subsection (6) also leads to the conclusion that all taxpayers who are liable to pay advance tax under subsection (1), are entitled to the benefit provided in this section and companies and association of persons have not been excluded from the benefit given to the taxpayers under this subsection. What the Assessing Officer has done is that he wants to get the benefit of the subsection (4-A) if taxpayer estimates that his tax is likely to be more than the tax payable under subsection (4) but does not want to give benefit to the corporate taxpayer if he estimates that the tax payable by him for the relevant tax year is estimated to be less than the tax payable by him. We may also refer to subsection (7) of section 147 and section 205 of this Ordinance which provide deterrents to the taxpayers for filing a wrong estimate under subsection (6) as subsection (7) of section 147 provides that if there is any shortfall the same may be recovered from the taxpayer as if it was a tax due under an assessment order and subsection (1B) of section 205 provides if the taxpayer fails to pay advance tax under subsection (4A) or subsection (6) of section 147 or the tax paid is less than ninety percent of the tax chargeable for the relevant tax year, he shall be liable to pay default surcharge at the rate of KIBOR plus three percent per quarter.”

6. The question of remedy for taxation authorities under section 147 of the Ordinance came up before the learned Sindh High Court in Karachi Port Trust, Karachi vs. Commissioner Inland Revenue, Karachi (2011 PTD 1996), which held the following:

“Now we will examine if a wrong estimate is filed then what are the options available to the Taxation Authorities to take action for filing such wrong estimate. A perusal of 'section 147 leads to the conclusion that once such estimate is filed whether right or wrong, there is no provision which provides any authority to the Taxation Officer to discard this estimate and ask the taxpayer to continue paying the tax in accordance with the provision of subsection (1) of section 147 read with subsection (4) of section 147. The learned counsel for the respondent has also not been able to point out any provision of law which provides such authority and therefore we are of the considered opinion that once an estimate is filed the only option available to the Taxation Authority is to levy default surcharge under subsection (1B) of section 205 after completing the assessment, if such default surcharge is leviable on the basis of the assessment. The language of subsection (7) of section 147 is also clear which provides an authority to the Taxation Authorities to recover advance tax not paid as if it was a tax due under an assessment order so that provisions of section 137(2) are not violated. However, we are inclined to agree with the learned counsel for the applicant that it does not provide them an authority and jurisdiction to pass any order for the recovery of such tax and therefore we are of the considered opinion that the order passed by the Taxation Officer is without proper jurisdiction and authority and cannot be sustained.”

7. This question also came up before this Court in W.P No. 2462/2016 (M/s Pak Telecom Employees Trust v. Federation of Pakistan, etc.) wherein the following was held:

“The bare reading of section 147 shows that the estimate of the tax payable is to be filed by the taxpayer before the last installment is due. The interpretation awarded to section 147 generally and subsection 6 of section 147 particular is that once the estimate has been

filed, the veracity of the same cannot be questioned by the tax department. It is only when the tax return is filed for that respective year and it is found that the same is not correct, the department is entitled to levy additional surcharge as provided in section 205 of the Income Tax Ordinance, 2001.”

8. In view of the language of section 147 read together with section 205 and the ratio in the aforesaid judgments, a taxpayer has the right to file an estimate of the advance tax payable under section 147(6) of the Ordinance and thereafter pay an amount that the taxpayer deems to be due in accordance with such estimate. The Ordinance, at the time of issuance of the impugned notices, vested no authority in the taxation authorities to affect recovery of the amount that they deem to be due under section 147 of the Ordinance in contradiction of any tax estimate filed by the taxpayer under section 147(6) of the Ordinance. The scheme of the Ordinance is based on self assessment undertaken by the taxpayer. The Ordinance then vested power in taxation authorities to undertake reassessment of the tax return filed by a taxpayer in compliance with provisions of the Ordinance and seek recovery of any non-payment or short payment on the basis of such reassessment. Section 147(6) also enables taxpayer to self-assess advance tax liability to the extent that such taxpayer estimates that the tax payable for the relevant tax year is likely to be less than the amount he is required to pay under section 147(1). In the event that the estimate filed by the taxpayer under section 147(6) is incorrect a remedy is provided under section 205 to impose a surcharge to the extent of short payment to penalize the taxpayer. This was the settled law at the time when the impugned notice was issued.

9. This interpretation of law is further strengthened by the provisions of Finance Act 2018 pursuant to which a proviso was added to section 147(6) of the Ordinance which provides taxation authorities

with the authority erstwhile not extended i.e. to affect recovery if such authorities come to the conclusion that the estimate filed under section 147(6) is misconceived. The amendment in law now confers a power on the taxation authorities which previously did not exist. This change in law is in itself manifestation that the impugned notice issued prior to such change in section 147(6) was devoid of legal authority.

10. In view of the above, the instant petition is allowed and consequently the impugned notices being suffered from jurisdictional defect as having been issued without legal authority are declared to be void ab initio and of no legal effect.

(BABAR SATTAR)
JUDGE