Form No: HCJD/C-121.

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

T.R. No. 29 of 2004

M/s Travel Waljis (Pvt) Limited.
Vs
Commissioner Appeals, Income Tax, Islamabad etc.

APPELLANT BY: Hafiz Muhammad Idrees, Advocate for the applicant.
RESPONDENT BY: Hafiz Munawar Iqbal, Advocate for the respondents.
DATE OF HEARING**:** **06-11-2014**.

ATHAR MINALLAH, J.- Through this judgment we intend to decide the instant Tax Reference filed under Section 133(4) of the Income Tax Ordinance, 2001 (hereinafter referred to as the "Ordinance, 2001"). The applicant is a private company incorporated under the provisions of the Companies Ordinance, 1984.

2. Briefly stated, the facts of the case are that following the show cause notice served on the applicant under Section 61 of the Income Tax Ordinance, 1979 (hereinafter referred to as the "Ordinance, 1979"), the Deputy Commissioner, Income Tax and Wealth Tax, Islamabad, passed an assessment order relating to the assessment year i.e. 1997-98. The assessment officer, inter-alia, made an addition of Rs.3,539,410/- under Section 12(12) of the Ordinance, 1979. The addition was in respect of 14 (fourteen) vehicles, which had been transferred to the applicant on maturity of the respective lease agreement. The assessment order, dated 28-02-1998, was assailed by preferring an appeal before the Commissioner Income Tax (Appeals) Zone-I, Islamabad (hereinafter referred to as the "Commissioner"). It is pertinent to

mention that while the appeal was pending, an amendment was made through the Finance Act, 1998, effective from 01-07-1998. Through the said amendment a proviso was added to Section 12(12) of the Ordinance, 1979, which specifically related to Finance Lease. The Commissioner upheld the assessment order vide order dated 17-06-1998. The order of the Commissioner was impugned by preferring an appeal before the Income Tax Appellate Tribunal, Islamabad (hereinafter referred to as the "Tribunal"). The Tribunal, to the extent of the addition made under Section 12(12) of the Ordinance, 1979, affirmed the order of the Commissioner. The applicant made an application to the Tribunal under Subsection (1) of Section 136 of the Ordinance, 1979, requiring it to refer to the High Court the question(s) of law arising out of the order dated 15-01-2002. The Tribunal, through order dated 27-02-2003, dismissed the application on the ground that no question of law as framed by the applicant arose out of the order. Hence, the present reference was filed by the applicant.

3. The three questions of law, as articulated in the present reference, relate to the interpretation of Section 12(12) of the Ordinance, 1979, and the same are as follows:

i. *Whether, under the law and the circumstances of the case ,the learned Tribunal was justified in holding that the proviso to Sub Section 12 of Section 12 of the Income Tax Ordinance 1997 was not curative/remedial in nature?*

ii. *Whether, under the law and circumstances of the case, the learned Tribunal was justified in holding that the income tax proceedings have attained*

finality (closed transaction) before the insertion of the proviso of Sub Section 12 of Section 12 of the Income Tax Ordinance 1979, whereas in the instant case the matter was pending before the Tribunal?

iii. *Whether, under the law and circumstances of the case, the learned Tribunal was justified in holding that the proviso to Sub Section 12 of Section 12 of the Income Tax Ordinance, 1979 is not applicable retrospectively, whereas the Higher Appellate Authorities, in a number of cases have held that any curative/remedial amendment in fiscal laws is always applicable retrospectively.*

4. The main thrust of the arguments of the learned counsel for the applicant is that the proviso inserted in Section 12(12) of the Ordinance, 1979 was remedial in nature and, therefore, the applicant was entitled to avail the benefit. The learned counsel for the Department contended that the assessment order dated 28-02-1998 had attained finality. The amendment came into force while the appeal was pending and, therefore, the benefit could not be extended to the applicant.

5. It is noted that the questions of law are interlinked and relate to the interpretation of Section 12(12) of the Ordinance, 1979, particularly the effect of the proviso added through the Finance Act, 1998. In order to decide the questions of law, it is inevitable to first determine the nature of the amendment i.e. whether it is remedial and curative in nature and, if so then what would be its effect, when admittedly it came into force after the assessment order was passed, but while the appeal was

pending before the Tribunal. Essentially, we are required to answer whether the benefit of the proviso can be extended in the case of the applicant.

6. Various commentaries on the interpretation of statutes have defined and explained the characteristics and nature of a remedial or curative statutory provision, and reference in this regard may be made to some of these as follows:

i. Corpus Juris Secundum Volume 82, (at pages 918 to 922)

"A remedial statute is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good, and generally is to be liberally construed.

While remedial statutes are those which do not create, enlarge, diminish or destroy vested rights, a remedial statute is designed to correct an existing law, redress an existing grievance, or introduce regulations conductive to the public good, and a law is entitled to be considered remedial whether it remedies a defect of the common law or of a pre-existing statute. Thus statutes enacted for the suppression of fraud, the correction of errors, the supplying or curing of defects, the protection of life and property, the remedy of public evils, the redress of existing grievances, introducing some new regulation or proceeding conducive to the public good, or the granting of remedies for the

recovery or protection of rights, have been considered remedial statutes. However, when a statute has been definitely classified as remedial, it does not necessarily follow that an arbitrary guide has been established by which all cases said to fall under the statute can be decided with mathematical certainty."

ii. Understanding Statutes, Canons of Construction, by S.M. Zafar, (at pages 202-203 of the revised edition, 2008).

"A Remedial Act is defined by Blackstone, as "one made to supply such defects and abridge such superfluities in the common law as arise, either from the general imperfection of all human laws, from change of time and circumstances, from the mistake and unadvised determinations of unlearned (and even learned) Judges, or from any other cause whatever." But this definition is too narrow, says Craies, for the operation of Remedial Acts is not confined to common law, but extends also to prior enactment. What is known as Remedial Act is an Act introduced by parliament to remedy what Parliament perceives to be an existing problem on account of some obscurity in the words of the statute."

iii. Craies on statute law by S.G.G. Edgar, seventh edition (at page 60).

"A Remedial Act is defined by Blackstone as one made to "supply such defects and abridge such superfluities in the common law as arise, either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (and even learned) judges, or from any other cause whatever." But this definition is too narrow, for the operation of remedial Acts is not confined to the common law, but extends also to prior enactments. In earlier Acts the grievance is usually recited in the preamble, and the statute resembles in form a petition for redress of grievances, for which the existing law was insufficient, and in many Acts the words "for remedy whereof" immediately preceded the words of enactment. In modern public Acts preambles are rare and the nature of the grievance, if any, to be remedied is left to be gathered from the tenor of the long title and clauses."

iv. Interpretation of Statutes, by D.M. Bukhshi, reprint edition 2010 (at page 577).

"Meaning of "remedial" statute.—In all this discussion, the crucial word is "remedial". The word "remedy" means the relief accorded by the law, for the violation of a wrong. In a sense, most statutes are remedial, as they are intended to

provide (for the future) for something which is not already provided for, or, to put the matter in different words, to enact a proposition which was not part of the law so far. The proposition so laid down may even be negative. For example, a statute may put an end to an evil or repeal some law, which is considered to be causing injustice."

v. The relevant passage from the Construction of Statutes by Ear I.-T Crawford, 1940 is as follows:

"282. Remedial Statutes.—Even remedial statutes may be subject to the principles heretofore discussed, opposing any construction which will give the enactment retrospective operation. Yet, since remedial statutes are usually looked upon with favour by the Courts, they should be liberally construed. But there appears to be considerable confusion in the cases with reference to giving remedial acts retrospective effect through construction. If the rule of liberal construction is to be applied, as it obviously should, then any doubt should be resolved in favour of retrospective operation, if such operation does not destroy or disturb vested rights, impair the obligations of contracts, create new liabilities, violate due process of law or contravene some other constitutional provision, and if such operation will carry out the intent of the Legislature as ascertained through the

application of the principles of liberal construction. In other words, a statute relating to remedial law may properly, in several instances, be given retrospective operation."

7. There is consensus that a remedial enactment is intended to provide relief which was not already provided for. The remedy is to obviate a defect, anomaly or hardship, and is designed to bring the existing law in line with the intention of the legislature. Such enactments may also be explanatory in nature or may intend to clarify an existing enactment.

8. The other principles enunciated in relation to a 'remedial' enactment are briefly mentioned as follows:

(i). Remedial enactments are liberally construed in favour of the assessee.

(ii). As a general rule, enactments operate prospectively and 'retroactive legislation is looked upon with disfavour', unless the language explicitly indicates the intention of the legislature to be otherwise.

(iii). In case of a declaratory or clarificatory, or remedial enactment any doubt is to be resolved in favour of retrospective operation. Retroactivity cannot operate to destroy, affect or disturb vested rights or if it will cause to create new liabilities.

(iv). The enactment, though remedial in nature, will not apply retrospectively to alter or effect proceedings

and orders which have been determined by having attaining finality.

(v). Unless otherwise provided explicitly, the 'remedial' enactment will operate retrospectively in those cases wherein proceedings are pending at the time of the amendment e.g. if an appeal is pending before the Tribunal or a Reference before a High Court under Sections 131 and 133 respectively. In the absence of express words, passed and closed transactions cannot be reopened by the operation of an amendment which is of a 'remedial' nature.

9. Reference for the above principles may be made to the cases cited at the Bar "Commissioner Inland Revenue Zone-II, Regional Tax Office, Multan vs Mrs. Ambreen Fawad Co. Pak Arab Fertilizers Limited, Mulatan", *2014 PTD 320*, "Commissioner of Income Tax vs Shahnawaz Ltd and others", *1993 SCMR 73*, "Commissioner of Income/wealth Tax Companies Zone-I, Lahore vs Hafeez Valqa Industries (Pvt) Ltd., Lahore", *2005 PTD 2403*, "C.I.T./W.T., Faisalabad Zone vs Shahzad and Company, Faisalabad", (*2007)95 Tax 57 (H.C. Lah.)*, "Dawood Cotton Mills vs Commissioner of Income Tax", *2000 PTD 285* and "Commissioner of Income Tax vs Nasir Ali and Another", *(1999) 79 Tax 428 (S.C.Pak.).*

10. Having discussed the characteristics and nature of a remedial enactment and the settled principles for the interpretation thereof, we now turn to examine Section 12(12) of the Ordinance, 1979 as

amended vide Finance Act, 1998. The said provisions are reproduced as follows:

> *12(12) "Where any assets not being stock-in-trade are purchased by an assessee from any company and the [Deputy Commissioner] has reason to believe that the price paid by the assessee is less than the fair market value thereof, the difference between the price so paid and the fair market value shall, be deemed to be income of the assessee chargeable to tax under this Ordinance.*
>
> *Provided that in the case of an asset leased by a scheduled bank, a financial institution, modaraba or a leasing company the fair market value shall mean the residual value paid by the assessee, being the first lessee, on the maturity of the lease agreement and the amount paid by way of lease rentals and other charges so however that the aggregate of such payments and the residual value is not less than the original cost of the asset."*

11. Section 12 is a deeming provision and specifies the income which accrues or arises in Pakistan for the purpose of charging Income Tax. Sub section 12 gives a discretionary power to the officer of Income Tax to determine the difference between the price paid and the fair market value in case of assets purchased by the assessee from a company. It appears that the legislature, in its wisdom, added the proviso through the Finance Act, 1998, to explain and clarify the application of Section 12(12) in the case of sale of assets by a Finance or leasing company on the basis of an arrangement known as "Finance Lease". A finance lease is a commercial arrangement, where the asset remains in the use of the lessee against payments of rentals or

installments. The lessee has an option to acquire the title of the asset on completion of the term of lease. This is a mode which contemplates documenting sale of an asset on the basis of a lease or borrowing arrangement. Section 12(12) had not provided for the treatment in the case of transactions arising out of the assets leased by a scheduled Bank, a financial institution, modaraba or a leasing company. It is therefore obvious that it was necessary to remove doubts relating to the treatment of assets leased by a financial institution. The proviso is explanatory or clarificatory in nature, designed or intended to bring the provision of Section 12 in consonance with the intention of the legislature. We are fortified in our view as a similar clarification was issued by the then Central Board of Revenue vide circular No.26 of 1988 dated 19-12-1988. The proviso inserted vide the Finance Act, 1998 is a remedial enactment, and at the time when it came into force, the appeal of the present applicant was pending before the learned Tribunal. We are not impressed with the argument of the learned counsel for the Department that the assessment order had attained finality and, therefore, the applicant will not be entitled to the benefit under the proviso. The appeal was, admittedly, pending and, therefore, the benefit of the proviso was applicable in the case of the applicant as the proceedings were pending. It is a settled law that an appeal created by the statute is continuation of the original proceedings.

12. We, therefore, hold that the applicant was entitled to the benefit of being treated in the light of the proviso inserted in Section 12(12) of the Ordinance, 2001 through the Finance Act, 1988.

13. Based on the above discussion, we decide the instant Tax Reference in favour of the applicant and against the Department.

14. As required under Section 133(5) of the Ordinance, 2001, the office shall send a copy of this order under the seal of this Court to the learned Appellate Tribunal, Inland Revenue.

(NOOR-UL-HAQ N. QURESHI)
JUDGE

(ATHAR MINALLAH)
JUDGE

Approved for reporting.

Asif Mughal/*