

JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD.

W.P. No.1978/2016

Irfan Babar Khan

Versus

Assistant Commissioner Inland Revenue, Islamabad, etc.

Petitioner By : Ch. Naeem ul Haq, Advocate.
Respondents By : Mr. Saeed Ahmed Zaidi, Advocate.
Date of Decision : 20.10.2022.

AAMER FAROOQ, J. – The petitioner is aggrieved of notices dated 16.05.2016 and 20.05.2016, issued by respondent No.1. The referred notices are under section 122 (9) of the Income Tax Ordinance, 2001 (**the Ordinance**), whereby a show cause notice has been issued for amending the assessment order with respect to tax year 2010.

2. Learned counsel for the petitioner, *inter alia*, contended that notices are barred by limitation and also that in the previous round of litigation, the matter stands settled by the judgment of the Appellate Tribunal Inland Revenue dated 14.04.2015 with respect to tax year 2007. It was submitted that in light of the referred position, the impugned notices are not maintainable and are liable to be set-aside. In support of contentions, learned counsel placed reliance on case reported as Messrs Bisma Textile Mills Limited versus Federation of Pakistan, etc. (2016 PTD 1790).

3. Learned counsel for the respondents, *inter alia*, contended that there is no bar under the law for issuance of notice for amendment in the assessment order for a subsequent tax year even if previously the matter stands settled.

4. Arguments advanced by learned counsel for the parties have been heard and the documents placed on record examined with their able assistance.

5. The basis for challenge of the impugned notices is primarily the earlier round of litigation with respect to tax year 2007, pertaining to the same subject matter. This Court while dealing with similar issue in case titled "M/s Askari Bank Limited versus Federation of Pakistan, etc." (Writ Petition No.1154/17 and other petitions) regarding applicability of decision in the earlier round of litigation by the Appellate Tribunal, Inland Revenue, categorically held that principle of *res judicata* as provided in section 11 of the Code of Civil Procedure, 1908, is not applicable in the proceedings before the tax authorities. In this behalf, it was observed as follows:-

8. *The question as to the decision of Appellate Tribunal Inland Revenue was binding on FBR or the authority, is clear inasmuch as this Court has held in a case reported as PKP Exploration Limited Vs. Federal Board of Revenue (2021 PTD 1644) that under section 132 of the Income Tax Ordinance, 2001, the reasoning of Tribunal in one case can be treated by tax authorities as a persuasive precedent in a subsequent case where subject matter is same or similar. It was added in the said judgment that persuasive quality or cogent reasoning of a decision of Tribunal does not transform it into a legally binding precedent for officials exercising executive or adjudicatory authority under tax statutes.*

9. *Moreover, this Court was informed that tax reference has been filed against the decision of Appellate Tribunal Inland Revenue which is pending adjudication. The decision of the Appellate Tribunal, on the same question of law for the subsequent years, is not a bar for the Department for proceeding in the matter.*

10. *The principle of res judicata as enshrined in Section 11 of Code of Civil Procedure, 1908 is not applicable in letter inasmuch as the Code of Civil Procedure is not applicable before tax authorities, however, principles of res judicata may be applicable in certain cases only and the extent to which, they are applicable, were laid down in case reported as 'Commissioner of Income Tax Vs. Pakistan Industrial Engineering Agencies Limited' (PLD 1992 Supreme Court 562), wherein the Hon'ble Supreme Court of Pakistan observed that principles of res judicata cannot be applied to the cases of assessments under Income Tax Act (the case related to Income Tax Act, 1922) and it was observed that res judicata was restricted in following cases:-*

"Applicability of principles of res judicata has been restricted as follows:-

A previous decision of an Income Tax Authority will not be a bar in the following cases:

(i) where the earlier decision is clearly open to some objection;

- (ii) *if it is a decision which is not reached after proper inquiry;*
- (iii) *if it is a decision as could not reasonably have been reached on the material before the authority;*
- (iv) *it is a decision which suffers from such a defect which fall within the purview of the grounds mentioned in section 100, CPC and liable to correction thereunder in second appeal, if it were a decision of civil Court; and*
- (v) *if fresh evidence having a material bearing on the point decided in the previous decision is available"*

The said rationale was based on the earlier decision of the Hon'ble Supreme Court in case reported as Commissioner of Income Tax, East Pakistan, Dacca Vs. Wahiduzzaman' (PLD 1965 Supreme Court 171). Two other decisions, which almost say the same are BP Pakistan Exploration and Production INC. Karachi Vs. Additional Commissioner Inland Revenue Enforcement Collection Division, Karachi (2011 PTD 647) and Rajab Ali Hamani Karachi Vs. Commissioner Income Tax, Karachi (2011 PTD 925) In the latter case, the Hon'ble Division Bench of Sindh High Court observed that principles of res judicata and estoppel would not apply to proceedings under the Income Tax Act of 1922, as assessing officer on knowing fact subsequently, could take a decision different that was taken earlier by him or by his predecessor. In case reported as 'M/s Riaz Bottlers Pvt. Ltd. Lahore Vs. Commissioner of Income Tax, Companies Zone-I, Lahore (2008 PTD 877), the Hon'ble Division Bench of Lahore High Court, Lahore recorded the principles mentioned hereinabove, however, in case reported as Sultan Paper Board Mills Ltd. Vs. Federation of Pakistan and others' (1982 PTD 359), a different view was taken. It was held that the petitioner producing the same articles as produced in the previous years and judicial determination made in petitioner's favour up to the level of Income Tax Appellate Tribunal and since there is no change in law, the Central Board of Revenue could not issue instructions contrary without there being any change in law or in nature of product.

11. *The sum-total of the above judgments is that principle of res judicata would not apply except in circumstances as quoted in case reported as PLD 1992 Supreme Court 562 supra."*

In light of above judgment of this Court, though the principle of *res judicata* is not applicable *per se*, however, subsequent notice received can be questioned on the touchstone of principles laid down in case reported as Commissioner of Income Tax versus Pakistan Industrial Engineering Agencies Limited (PLD 1992 Supreme Court 562) *supra*. The petitioner can question the impugned notice on the basis of the referred principle (if they are attracted in the facts and circumstances) and also the question of limitation. In recent judgment, the Hon'ble Supreme Court of Pakistan laid down principles for challenging the show cause notice; reference is

made to Commissioner Inland Revenue and others versus Jahangir Khan Tareen and others **(2022 SCMR 92)**. In the said judgment, the august Apex Court after discussing the case law on the subject held that a show cause notice is delivered to a person by an authority in order to get the reply back with a reasonable cause as to why a particular action should not be taken against him with regard to defaulting act. It was further observed that the Court may take up writs to challenge the show cause notice if it is found to be barred by law or abuse of process of the Court or is *coram non judice*. In this behalf, abuse of process was explained as the use of legal process for an improper purpose incompatible with the lawful function of the process by one with an ulterior motive. It was also observed that in its broadest sense, abuse of process may be defined as misuse or perversion of regularly issued legal process for a purpose not justified by the nature of the process. The august apex Court went on to hold that the word '*coram non judice*' meant for '*not before a judge*' is a legal term typically used to indicate a legal proceeding that is outside the presence of a judge or with improper venue or without jurisdiction. The principles laid down in the above judgment on the basis of which writ petition is maintainable are not applicable in the facts and circumstances. However, there is no bar on the petitioner to raise all the legal and factual objections to the show cause notice impugned in the instant petition. The case law cited by learned counsel for the petitioner is not relevant in the facts and circumstances.

6. In view of the above, no interference is required, however, the petition is **disposed of** with observation that the petitioner may file reply to the notices by taking all factual and legal objections to the same which when agitated shall be decided by the competent authority in accordance with law.

(AAMER FAROOQ)
JUDGE

M.Shah/.