

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
(Judicial Department)

"ITR No. 168 of 2010"

Commissioner Inland Revenue (Legal), RTO, Rawalpindi.

Versus

Appellate Tribunal Inland Revenue, Islamabad, etc.

For the Applicant: Sheikh Anwar-ul-Haq, Advocate.

For Respondent No.3: Mr. Riaz Ahmad Khan, Advocate.

Date of Decision: 21.09.2020.

Ghulam Azam Qambrani, J.:- This Tax Reference, has been filed against decision of the Appellate Tribunal, Inland Revenue, Islamabad, dated 05.12.2009, whereby the appeal filed by respondent No.3 was accepted and the departmental action has been declared as *ab-initio* void and of no legal effect.

2. The facts, in brief, are that respondent No.3 filed the return declaring net income at Rs.151,026/-, which was deemed to be assessed under Section 120 of the Income Tax Ordinance, 2001; that the taxpayer also declared profit on Regular Income Certificate and Special Saving Certificates as separate block of income in the chart. However the Taxation Officer did not agree with the return of income filed by the taxpayer and amended the assessment after issuing notice under Section 122(9) of the Income Tax Ordinance, 2001 by adding the entire profit on both type of deposit certificates. The assessing officer also disallowed and added back medical charges Rs.4,46,550/- in the P&L account resulting into total assessed income at Rs. 785356/-. Being aggrieved and dissatisfied with the treatment of Taxation Officer, respondent No.3 filed appeal against the said order before CIR(A), which was disposed of vide order dated 16.12.2008, endorsing the action of Taxation Officer with the following observation:-

"The AR contested the disallowance of medical expenses to the tune of Rs.4,46,550/-. The case was discussed with the AR and he was confronted with the assessment order whereby the assessing officer has mentioned that it is evident from the assessment order that for assessment year 2002-2003 the entire expenses incurred on account of medical charges was disallowed in toto considering the change of immigration Rules with effect from 21.02.2001 but the AR failed to furnish any plausible explanation in this regard. In view of the forgoing I endorse view of the assessing officer regarding disallowance of medical expenses at Rs.4,46,550/- as per his finding on page 2 of the order."

Being dissatisfied, respondent No.3 filed second appeal against the said order, which was accepted with the following observations:-

"Assessment order dated 16.12.2008 revealed that notice under Section 122 of the Income Tax Ordinance 2001 was issued to the taxpayer and no where in that notice sub section (5) or (5a) of section 122 has been mentioned. Such omission legal infirmity found to be so glaring and important by this appellate forum and also by the superior courts that such assessments made in this regard have been declared ab-initio and void and no legal consequences. The basic concept in this regard is that is legal rights of a taxpayer to at least know as under what law he is being proceeded against. Undoubtedly, it is legal obligation of the assessing authorities to communicate to the taxpayer as under which clause of sub-section (1) of Section 111, he is being required furnish Such to his explanation. Without fulfilling the requisite legal formalities/requirements, the higher appellate forums have declared such action null and void. The same legal infirmity was also found floating on the surface of the assessee case. Thus, the notices issued for assumption of Jurisdiction by the authority below in this case was defective, therefore, when the initial action is defective one, how the subsequent action in this regard can be termed as legal. I am fortified in my views in (2007) 96 Tax 310(Trib). The said lawfully applicable to the facts and circumstances of this case. The relevant para is reproduced as under:-

"There are three clear situations wherein sources of investment are required to be explained by a taxpayer and if he is not able to furnish evidence to the satisfaction of the assessing officer, about sources of investment, the investment or part there of which remained unexplained, is liable for addition. At the same time we are of the opinion that is legal right of a taxpayer to know as under what law he is being proceeded against. It is legal obligation of the

*assessee authorities to communicate to the taxpayer as under what clause of sub-section (1) of Section 111, he is being required to furnish his explanation. The higher appellate forums have conclusively held that whereas assessee is deprived of his right to know about the law being applied to him, the proceedings taken against him will be of no legal consequence. In this case, the Additional Commissioner completed proceedings under Section 111 but he did not indicate to the assessee as of what clause of sub-section (1) of Section 111 was being applied to him. In this manner the taxpayer was deprived of his legal right. Hence all the actions taken by the assessing authority and the Consequential orders passed by them are legally not maintainable. In view of this legal position of the matter action of the Additional Commissioner and CIR(A) being legally defective is hereby vacated. **Conclusion** In the light of foregoing discussion the impugned orders of both the authorities below are hereby vacated being legally not maintainable. Other points/grounds raised by learned AR of the assessee are not being adjudicated for being not necessary. The appeal is disposed of in the manner and to the extent as indicated above."*

3. Learned counsel for the applicant appearing on behalf of the department submits that the order of learned ATR is not justified as adverse view has been drawn by the learned Tribunal on issuance of notice under Section 122 of the ITO, 2001 to the taxpayer whereas, there is no mention of either subsection (5) or (5A) of said Section in the said notice. He has further contended that in fact it is to be drawn from the very language of the notice with reference to concerned law and its application and it should not have been discussed. In view of the same, the following two legal questions of law were formulated by this Court vide order dated 30.11.2015:-

(a) *"Whether the Learned ATIR was justified in holding that order passed under section 122 was ab initio void and of no legal effect in the presence of Judgment of Supreme Court of Pakistan where it has been held that the determining factor is the subject matter and substance of a document (notice) irrespective of the section/referred to therein (2007 PTD 967: Commissioner of Income Tax Vs Abdul Ghani). "*

(b) *"Whether on the facts and in the circumstances of the case the Learned ATIR was justified in holding that order passed under Section 122 was ab-initio void and of no legal effect merely on the grounds that sub-section of Section 122 was not mentioned in the notice issued under section 122 of*

the Income Tax Ordinance, 2001 despite the clear provisions of clause (a) & (b) of Section 126 of the Income Tax Ordinance, 2001."

4. We have carefully perused the order passed by the learned Appellate Tribunal Inland Revenue. It reveals from the record that respondent No.3 filed income tax return for the charge year, declaring his net income @ Rs.1,51,026/-, which was deemed to be assessed under Section 120 of the Income Tax Ordinance, 2001 and further he also declared profit on regular Income Certificate and Special Saving Certificate, upon which the Taxation Officer being not agree with the Income Tax Return, issued notices under Section 120 (9) of the Income Tax Ordinance, 2001 to the assessee, respondent No.3 by adding the entire profit on both type of deposit certificate. The Taxation Officer also disallowed and added back medical charges @ Rs.4,46,550/- in the P&L account, which resulted into total assessed income at Rs.7,85,356/- and tax demand of Rs.1,48,874/- credit of Rs.11,988/- on account of tax deducted from profit of regular income certificate. On receipt of notice, the assessee preferred an appeal before CIT (Appeals), which was dismissed vide order dated 16.12.2008. Being aggrieved of the said order, the assessee/ respondent No.3 filed appeal before the Appellate Tribunal, Inland Revenue, Islamabad Bench, Islamabad, which was allowed vide order dated 05.12.2009 whereby, both the impugned orders passed by the authorities below were vacated.

5. Assessment order dated 16.12.2008, issued by the Taxation Officer does not reflect sub-Section (5) or (5a) of Section 122 of the Income Tax Ordinance, 2001, which is a legal infirmity because the assessment made in this regard have been declared ab-initio void and of no legal consequences by the Superior Courts of the country. It is the basic right of the taxpayer to at least know under what law he is being proceeded against, as such, the assessing authority is required to communicate the taxpayer as under which clause of sub-section (1) of Section 111, he is being required to furnish his explanation and without fulfilling the requisite legal formalities. The

higher appellate forums have declared such action null and void. Same is the case of respondent No.3 that he has been issued notices under Section 122 of the Income Tax Ordinance, 2001 without mentioning sub-section (5) or (5a) of Section 122, therefore, the said notice was defective. In the cases 2006 PTD (Trib) 673 and 2008 PTD (Trib) 1549, this issue has already been settled, as such, the learned Appellate Tribunal Inland Revenue has rightly vacated the impugned orders passed by the authorities below.

6. Arguments advanced by learned counsel for the department have no force and the instant reference is misconceived, therefore, the questions proposed for our consideration are accordingly answered in affirmative.

(AAMER FAROOQ)
JUDGE

(GHULAM AZAM QAMBRANI)
JUDGE

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