

JUDGMENT SHEET

ISLAMABAD HIGH COURT, ISLAMABAD, (JUDICIAL DEPARTMENT)

I.T.R. No.12/2020

M/s Al-Tehama Hajj and Umra Services (Pvt.) Ltd. through its Director
versus

Commissioner Inland Revenue & 3 others

Applicant by: Ch. Naeem ul Haq, Advocate.

Respondents by: Syed Muhammad Ashfaq Naqvi, Advocate.

Date of Decision: 17.08.2020.

MOHSIN AKHTAR KAYANI, J: Through this income tax reference, the applicant has called in question order of the Appellate Tribunal Inland Revenue, Islamabad, dated 10.03.2020, whereby appeal filed by the Commissioner Inland Revenue, RTO, Islamabad against order of the learned Commissioner Inland Revenue (Appeals-I), Islamabad, dated 26.09.2013, has been accepted and order in original was ordered to be restored.

2. Brief facts referred in the instant income tax reference are that applicant is providing Hajj and Umrah Services, who filed return of income for tax year 2012 declaring loss of Rs.1,195,765/-, however the Additional Commissioner Inland Revenue (**ADIR**) issued show cause notice dated 13.05.2013 to the applicant requiring it to amend the deemed assessment U/S 122(5A) of the Income Tax Ordinance, 2001 (**ITO, 2001**), to which the applicant had filed a detailed reply on 17.05.2013, but the Assessing Officer while ignoring the reply submitted by the applicant and available record had passed the order dated 26.09.2013. The applicant feeling aggrieved thereof preferred an appeal with the learned Commissioner Inland Revenue(A), who passed a summary order considering the actual facts of the case, against which the department had filed an appeal before the Appellate Tribunal Inland Revenue (**ATIR**), which was accepted vide

impugned order dated 10.03.2020, whereby the summary order passed in favour of the applicant was set-aside, while the order in original was restored. Hence, the captioned income tax reference.

3. Learned counsel for appellant contends that impugned order is not a speaking order as having been passed in a summary manner and without giving any basis or grounds, as such, the learned ATIR had totally ignored the arguments advanced by the applicant, therefore, rendering the impugned order nullity in the eyes of law; that it was impossible for applicant to make payment through banking channel in Kingdom of Saudi Arabia against the expenses of residences as the applicant was not allowed to open a bank account in KSA, but the learned ATIR has proceeded against the applicant while ignoring the principle of "*Lex non cogit ad impossibilia*" i.e. law does not compel a person to do that which he cannot possibly perform; that the learned ATIR has not looked into the factual controversy and disputed issues, rather resorted to passing of the impugned order in haste, which is not sustainable in the eyes of law and is liable to be set-aside.

4. Conversely, learned counsel for respondents opposed the filing of instant income tax reference on the grounds that applicant had failed to disclose the mode of payments made in KSA for arranging the accommodation and other facilities for Hujjaj as same were not made through the procedure laid down in Section 21(l) of the Income Tax Ordinance, 2001, even otherwise, applicant had also failed in paying workers welfare fund and minimum tax; that the Assessing Officer has rightly appreciated the record while passing the order in original, which was upheld by the learned ATIR in accordance with law and same is liable to be maintained.

5. Arguments heard, record perused.

6. Perusal of record reveals that the applicant M/s Al Tehama Haj and Umra Services (Pvt.) Ltd. is aggrieved with the order of the Appellate Tribunal Inland Revenue, dated 10.03.2020, whereby the appeal filed by the respondent Commissioner Inland Revenue, RTO, Islamabad has been allowed and order in original has been restored, whereby the fixed tax of Rs.2,750/- per Haji paid by the applicant has been declared against the law as well as in violation of Income Tax Ordinance, 2001. The appellant has submitted his primary claim on the basis of an agreement dated 26.06.2011, whereby the Additional Commissioner HQs, Regional Tax Office, Karachi has agreed to fix the tax of Rs.2,750/- per Haji for tax year 2012-13. The claim of applicant has been perused on the basis of the said letter, which was not accepted by the Appellate Tribunal Inland Revenue, Islamabad. The contents of said letter are as under:

No.CCIR/RTO/A/2011-2012/11104

Dated: 26.06.2011.

MINUTES OF MEETING HELD WITH
HAJJ GROUPS ORGANIZERS COMMITTEE

A meeting was held on May 26, 2012 at Regional Tax Office, Karachi with the representatives of Hajj Organizers Association of Pakistan with the department.

The list of participants of the meeting is enclosed as Annex-A.

I. *The Meeting was convened in continuation of a series of meetings which were held in the past to resolve the issue arising out of proposed addition U/S 21(1) of the Income Tax Ordinance, 2001 in the income of Hajj Group Operators and in light of the understanding reached between the department and the Hajj group operators, RTO, Karachi letter No.6327 dated 11.04.2009, FBR letter C.No.1(23)/WHT/2006 dated April, 13, 2009 and FBR letter C.No.4(68)/ITP/2009/90772-R dated 08.06.2009 and relevant legal provisions were also considered in the meeting.*

II. *The participants were informed that there are 721 private Hajj Group Operators in Pakistan. The Hajj operators were also apprised that the payments made for lodging, boarding and certain other expenses incurred for Hajj through extra banking channels attract the provisions of Section 21(l) of the Income Tax Ordinance, 2001.*

III. *The Hajj Operators explained the procedure and difficulties faced by them in transferring money to Saudi Arabia for making payments against accommodation, mualims, transport, qurbani charges, food, miscellaneous expenses and payment to Khidmat-gaars. They explained that it was not possible for them to send money to Saudia through banking channels because of the restriction imposed by SBP because they were not allowed to open a bank accused in Saudi Arabia. So they were left with no option but to resort to transfer of money through private Channels.*

IV. *After detailed discussion the participants agreed to adopt the following course of action:-*

- a) *FBR will propose insertion of a new clause in IInd schedule to the Income Tax Ordinance, 2001 exempting the Hajj operators from operation of sections 21(l), 113 and 152 subject to the condition that Income Tax will be charged on income arising from their Hajj operations at Rs.2500/- per Haji for tax years 2011 and 2012, along with other amounts, if any due as per provisions of Law. From tax year 2013 onwards this amount will be charged and paid at Rs.3000/- per Haji. The representative of HOAP assured that the tax required to be paid for the tax years 2011 and 2012 as per the proposed formula shall be deposited by 30th June, 2012.*
- b) *The returns shall be revised for the tax year 2011. The returns for Tax Year 2012, onwards shall be filed by the dates prescribed under the law.*

V. *The meeting ended with a vote of thanks to and from the chair.*

7. While considering the above stance it has been observed that a show cause notice was issued in terms of Section 122(9) read with Section 122(5A) of the Income Tax Ordinance, 2001 for amendment in tax year 2012 by the RTO, Islamabad, whereby the primary reason for issuance of show cause notice has been referred as under:

- ii. *This office is in possession of information that you are also working as Hajj Group Operator and your company is enrolled with Ministry of Religious Affairs (MoRA) as Hajj Group Operator and your enrolment No. is 2236. Besides, your company was allotted Hajj quota for 50 Hujjaj in year 2011 and at an average package of Rs.300,000/- per haji, your gross receipts only from Hajj Group Operations comes to Rs.15,000,000/- (50 x 300,000). But these receipts appears to be understand. The resultant loss of revenue is worked out as under:*

I.	Actual Receipts	15,000,000
	(worked by multiplying hajj quota of 50 with average hajj package of Rs.300,000 per haji)	
II.	Declared Receipts	<u>11,280,503</u>
III.	Understated Receipts (I-II)	3,720,000
	Loss of Revenue (III x 35%)	1,302,000

- iii. You failed to disclose the mode of payments made in Kingdom of Saudi Arabia for arranging accommodation and other facilities for hujjaj as the same were not made through the procedure laid down in clause (l) of Section 21 of the Income Tax Ordinance, 2001. In addition to that, you are also required to provide the applicable documents as envisaged in Rule 34(4) of Income Tax Rules, 2002.

8. The applicant has replied the same in the following manner:

"As all Haj Operators are not authorized to open bank account in the Kingdom of Saudi Arabia, therefore, the money for making payments for accommodation and other facilities was transferred through private channels. Resultantly all payments have been made through cash in abroad. To resolve the issue of Section 21(l) of the Income Tax Ordinance, 2001 a meeting was held between FBR and our Association on June 26, 2011. The minutes with reference No.CCIR/RTO/A/2011-2012/11104 has been enclosed. Further, we have recently deposited Rs.2,750 per Hajji total Rs.137,500 (Copy of Tax Deposit Challan enclosed herewith)

9. The plea raised by the applicant was turned down by the Additional Commissioner Inland Revenue in the following manner:

v. Accordingly, any term of the Minutes to the effect that it conveys the FBR's acceptance of a certain interpretation of the provisions relating to the Sections 21, 113 and 152 of the Income Tax Ordinance, 2001 is not binding on the FBR and its field formations. Such terms in the Meeting were envisaged to be part of the consideration from the FBR only if some clause was inserted in the Second Schedule to the Income Tax Ordinance, 2001. Since no final agreement was reached between FBR and HGOs, the said consideration stand withdrawn and unenforceable.

10. Keeping in view this diverse proceedings and orders, we have attended to the proposition while considering the provisions of Section 21(l) of the Income Tax Ordinance, 2001, whereby *deductions were not allowed qua any expenditure for a transaction, paid or payable under a single account head which, in aggregate, exceeds*

Rs.50,000/-, made other than by a crossed cheque drawn on a bank or by crossed bank draft or crossed pay order or any other crossed banking instrument showing transfer of amount from the business bank account of the taxpayer.

11. The said provision is within the notice of the applicant, who has claimed that he is not allowed to open foreign currency account in KSA and all expenses made by him were in cash, but this aspect is not justifiable unless it has been proved by the applicant. Mere submission of expenditure is not enough, rather it is the onus of applicant to prove the fact that certain payments, exceeding Rs.50,000/-, were made through crossed cheque in terms of Section 22(1) of the Income Tax Ordinance, 2001. However, he raised the plea by referring to letter dated 26.06.2011 and claims the fix tax of Rs.2,750/- per Haji as referred in reply of show cause notice.

12. We have attended to the said letter, however its working referred in Para-4(a) clearly spells out the real intention of the Additional Commissioner HQs, RTO, Karachi, who opined that, "FBR will propose insertion of a new clause in IInd schedule to the Income Tax Ordinance, 2001 exempting the Hajj operators from operation of sections 21(1), 113 and 152 subject to the condition that Income Tax will be charged on income arising from their Hajj operations...." This aspect was mere proposal, even it has not been denied by both sides that on the basis of this recommendation the amendment was made in the Finance Act, 2013 in the Income Tax Ordinance, 2001, but previous year i.e. 2012 was not considered to be regulated under this concept.

13. It is well settled that any agreement contrary to law is not acceptable nor agreed to and even could not be applied. The Appellate Tribunal Inland Revenue has rightly observed that *"there is no agreement against the statute and not only must such agreements be rescinded the same should be scrupulously avoided"*. Hence, the

claim submitted by the applicant in this reference is not made out, the Appellate Tribunal Inland Revenue has rightly decided the question, the applicant is liable for payment of tax as the applicant has failed to discharge his onus to prove his case in terms of Section 12(l) of the Income Tax Ordinance, 2001.

14. In view of above discussion, the instant income tax reference is hereby answered in NEGATIVE.

(FIAZ AHMAD ANJUM JANDRAN)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Khalid Z.