ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

JUDICIAL DEPARTMENT.

ITR No.21-2010

Commissioner Inland Revenue (Legal), Regional Tax Office, Rawalpindi

Vs.

Raja Muhammad Younas etc.

ITR No.23-2010

Commissioner Inland Revenue (Legal), Regional Tax Office, Rawalpindi

Vs.

Raja Muhammad Intikhab etc.

ITR No.24-2010

Commissioner Inland Revenue (Legal), Regional Tax Office, Rawalpindi

Vs.

Raja Muhammad Jamshaid etc.

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	26.05.2022	Malik Itaat Hussain Awan, Advocate for applicant. Mirza Saqib Siddeeq and Sheharyar Munir Bhatti, Advocate for respondents.

AAMER FAROOQ J. This order shall dispose of instant Tax Reference as well as ITR Nos.23-2010 & 24-2010, as common questions are involved.

2. The private respondents, in all the Tax References, formed an Association of Persons (AOP) and raised construction for establishing a Hotel at Murree Road, Rawalpindi; they filed their returns for the years in question and the Department, in view of investment made for construction of the Hotel, issued notices for explanation of source of income for investment; the explanation sought was with respect to assessment years 1996-97 to 2001-02 and it categorically stated that explanation of resources for investment, with respect to M/s Hotel Raysons International, be rendered; it was

proposed that in the income, an addition of Rs.13,74,303/- needs to be made under section 13(1)(aa)of the repealed Income Tax Ordinance, 1979; the assessing officer, after providing opportunity of hearing to the respondents, observed that sources, with respect to Rs.10,00,000/- approximately, were justified, however, for the sum of Rs.1.374 million, nothing could be shown; accordingly, assessment was revised vide order dated 30.06.2004. The respondents, feeling aggrieved, filed appeals before Commissioner Inland Revenue (Appeals), who set aside assessment orders on the basis that private respondents provided ample proof for encashment of UK Pounds from Money Exchangers, which they had brought for investment from United Kingdom since they were citizens of said country. The said order was passed on 03.04.2009; the Department filed appeals before Appellate Tribunal Inland Revenue (ATIR), which were dismissed vide order dated 15.10.2009.

3. Learned counsel for the applicant *inter alia* contended that under section 128 (5) of the Income Tax Ordinance, 2001, any additional document in appeal, can only be looked into or admissible, if appellate forum is satisfied that the assessee or the party, was unable to have access to the same. It was contended that neither in the appeal, any such ground was taken nor in the order, the appellate authority has passed any order to the effect. In support of contention, learned counsel placed reliance on case reported as 'Commissioner of Inland Revenue (Legal),

Peshawar Vs. Khalid Umar Khan' (2016 PTD 832).

4. Learned counsel for the respondents *inter alia* contended that there is no law debarring the appellate authority from taking in to account any document, which was not produced before the assessing officer. It was contended that the appellate authority, after application of mind, has placed reliance on the document in question which is within the four corners of law. Reliance is placed on case reported as 'CIR Vs. Dr. Ghulam Rasool' (2018 PTD 612); he has also placed reliance on the Notification dated 12.04.2001 issued by the Government of Pakistan mentioning that any Foreign Exchange Bearer Certificate or money exchanged through authorized Money Exchanger, is an admissible proof of any source of income. It was also contended that in the facts and circumstances, no question of law, as such, has been raised.

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

6. The factual aspect of the controversy, giving rise to the instant Tax References, has been mentioned hereinabove.

7. In the referred facts and circumstances, the question of law, proposed by the applicant, is as follows:-

> ***Whether on the facts and in the circumstances of the case the learned ITAT was justified to uphold the decision of learned CIT (A) regarding acceptance of fresh evidence at the appellate stage without establishing that the taxpayer was prevented by sufficient cause from producing such***

material or evidence before the Taxation Officer?

8. The bare perusal of above question shows that the same is to the effect; whether any document is admissible before the appellate forum as of right, or leave is to be sought from the said forum and the appellate authority has to give reasons for the same. Learned counsel for the applicant, to substantiate his argument while interpreting section 128(5) of the Income Tax Ordinance, 2001, has placed reliance on case reported as 'Commissioner of Inland Revenue (Legal), Peshawar Vs. Khalid Umar Khan' (2016 PTD 832); the relevant paragraphs of the said judgment are as follows:-

> *"4. The necessary discussion that will have to follow may be initiated by extracting the relevant applicable section of law i.e. section 128 of Income Tax Ordinance, 2001 which provide procedure for entertaining appeal by "CIR (A)". The text of section 128 of the Ordinance reads as under:--*
>
> > *"128. Procedure in appeal.-(1) The Commissioner (Appeals) shall give notice of the day fixed for the hearing of the appeal to the appellant and to the Commissioner against whose order the appeal has been made.*
> >
> > *(1A) Where in a particular case, the Commissioner (Appeals) is of the opinion that the recovery of tax levied under this Ordinance, shall cause undue hardship to the taxpayer, he, after affording opportunity of being heard to the Commissioner against whose order appeal has been made may stay the recovery of such tax for a period not exceeding thirty days in aggregate.*
> >
> > *(2) The Commissioner (Appeal) may adjourn the hearing of the appeal from time to time.*
> >
> > *(3) The Commissioner (Appeal) may, before the hearing of an appeal, allow an appellant to file any new ground of appeal not specified in the grounds of appeal already filed by the appellant where the Commissioner (Appeals) is satisfied that the omission of the ground from the form of the appeal was not willful or unreasonable.*
> >
> > *(4) The Commissioner (Appeals) may, before disposing of an appeal, call for such particulars as the Commissioner (Appeals) may require*

respecting the matters arising in the appeal or cause further enquiry to be made by the Commissioner.

(5) The Commissioner (Appeals) shall not admit any documentary material or evidence which was not produced before the Commissioner unless the Commissioner (Appeals) is satisfied that the appellant was prevented by sufficient cause from producing such material or evidence before the Commissioner."

5. Bare reading of the above quoted section of law would reveal that during pendency of the appeal, the "CIR (A)" may allow the appellant to add new ground in memo of pending appeal, subject to his satisfaction to the effect that the omission of the ground from the form of appeal was not deliberate and unreasonable. Subsection (4) of section ibid invest the Commissioner (Appeals) with the power to call for the required particulars being necessary for arriving at just and proper conclusion in the appeal and can also make further inquiry in the matter involved in the appeal. Here the word "particulars" used having extreme significance which usually means "specific points, details or circumstances". The legislature very wisely applied the word "particular" instead of "record" because the record generally refers to the documents/evidence and proceedings on the basis of which an assessment order is passed. The word "record" would have limited and curtailed the powers of "CIR(A)", who would have not been able to go beyond the documents submitted in the proceedings before Commissioner. However the word "particular" has removed the said clog from the "CIR (A)" and now he may call such particulars as required in respect of the matter arising in the appeal. Hence the section ibid empowered the "CIR (A)" to call for "particulars" which of course include "record" but not limited thereto. The last sentence of sub-section (4) of section 128 further empowered the Commissioner (Appeals) to make resort to further inquiry in respect of the matter relating to the appeal. The inquisitorial powers are a characteristic feature of quasi-judicial proceeding. In a strict judicial proceedings further enquiry or calling for other than record material may plunge the appellate Court in the territory of undue diligence which is against the two pillars of our adversarial judicial system that adjudicator must be disinterested person in the end of lis and the Court has to rely upon the evidence produced by the parties to the lis. Reading subsection (4) of sections 128 and 129(1)(a) lead to the conclusion that Commissioner (Appeals) may call for certain information and particulars which were not previously relied upon neither by the revenue nor by the assesee but also has the authority to make further enquiry and whatever documents/evidence collected during the course of enquiry may "examine as required by him or he deems fit.".

6. Now adverting to the moot question as to whether the "CIR (A)" may admit any documentary material in appeal, on cost of repetition we would like to refer to subsection (5) of the Section ibid which is coached in negative language prohibiting the appellant to produce oral

or documentary evidence, as well as abstaining the Commissioner (Appeals) not to admit any documentary material or evidence which was not produced before the Commissioner. However, the Commissioner (Appeals) may do so in the circumstances when he is satisfied that the appellant was prevented by "sufficient cause" from producing material or evidence before the commissioner. Section 128(5) has limited scope and permit the Commissioner to seek production of material or evidence to enable him to pass an order in the better interest of substantial justice. Thus the taxpayer/assessee/appellant had no right to produce any additional document or evidence and so far the Commissioner is concerned he has no suo motu authority to ask for production of such documents. The essence of section 128(5), in general forbids the "CIR(A)" to admit additional material or evidence either oral or documentary unless satisfied through sufficient reason that the appellant was precluded to produce it before the Commissioner. For admitting such material the "CIR (A)" shall pass a speaking order by stating and recording plausible reasons.

7. The satisfaction of judicial conscience of the Commissioner (Appeal) to the effect that there was "sufficient cause" which prevented the appellant from producing such material or evidence at the time of proceedings before the Assessing Officer is sine qua non for the simple reason firstly, the section ibid is coached in negative language secondly the word "shall not" strictly prohibit the "CIR (A)" to admit any additional material or evidence and thirdly, the compliance of second part i.e. "satisfaction" of "CIR (A)" by showing "sufficient reason of prevention" is essential. The word "unless" used in section 128(5) bifurcate and divide the section into two parts. The first part of section ibid place absolute bar on the Commissioner not to admit any documentary material or evidence which was not produced at the time of initial proceedings while the second part empower the Commissioner to exercise discretion for admitting additional documentary material or evidence provided the appellant satisfied him that he was prevented by sufficient cause from producing such material or evidence before the Commissioner. The word "sufficient cause" used in section 128(5) is an expression which is found in various statute. In general parlance it means "adequate justification for something existing or happening". According to the law dictionary "sufficient cause" means "having adequate or substantial grounds upon which to do something (e.g. make a ruling) or not to do something). Though the expression sufficient cause has not been defined by legislature in the Ordinance, however it being a diluted word of "reasonable cause" and "good cause" which mean an adequate, enough and good reason to satisfy the intellectual process and mental status of person to do or not to do something. The above phrase provides a guideline for the Commissioner Appeals that while granting permission of additional evidence care is always to be taken to guard against admission of false and fabricated documents. It is not the right of the appellant to be permitted to produce evidence, rather it would only be on the satisfaction of the Commissioner, who shall determine that the additional evidence to be produced are genuine and bringing on record

such evidence, before the Commissioner was beyond the control of appellant. The expression "sufficient cause" is sine qua non for satisfaction of the "CIR (A)", however, neither it can be defined precisely nor a specific yardstick can be fixed for its determination. It varies from case to case. The word "sufficient cause" has received attention of Courts invariably, however, consensus is that a genuine or good cause is "sufficient cause", particularly, a cause beyond the control of party would be deemed "sufficient cause".

8. On the test and touchstone of the above definition, the appellate Court is required to satisfy its judicial conscience for admission of additional material or evidence. Simultaneously, the "CIR(A)" is under legal obligation to state the reasons for its satisfaction while admitting the additional material or evidence. The "CIR(A)" by giving reason for determination shall at least make substantial compliance with requirement of section 128(5), which is mandatory being word "shall" has been used. It should be evident from the order in appeal that the appellate Court had applied its independent mind consciously to matter involved in admission of additional material. The most important ingredient of section 128(5) is that the appellant shall satisfy the judicial mind of appellate Court regarding his prevention from producing such documents through sufficient cause before the Commissioner whereas the "CIR(A)" shall state reason for admission of documents through a speaking order, because the validity of order of admission by the appellate Court is to be seen from the reasoning and the same is to be challenged by the department again with reference to the reasoning. No doubt, the "CIR(A)" deals with the question of the right of taxpayer and revenue, thus in doing so, it is required to adopt the judicial approach and it must act according to the mandatory provision enumerated in section 128 of the Ordinance. The determination whether a provision of law is directly or mandatory may be ascertained from the words used in the statute. The word shall lays down conclusive duty on the authority that the irremissibly be done in the manner provided by the statute. Section 128 provides that the Commissioner (Appeals) "shall not" admit any documentary material or evidence which was not produce before the Commissioner unless satisfied that the appellant was prevented by sufficient cause from producing such material or evidence before the Assessing Officer. The above quoted provision of law is not ordinary procedure and it must be construed as mandatory. If it is held that the compliance of the aforesaid provision is optional and not obligatory, then the introduction of the provision by the parliament shall be a futile exercise and subsection (5) of section ibid will be surplusage and superfluous for all practical purpose. The provision of section 128(5) attract the principle that if a statute require a thing to be done in a particular manner it should be done in that manner or not at all. This principle was approved and accepted in well known judgments rendered by the august Supreme Court of Pakistan in cases of "Zia-ur-Rahman v. Syed Ahmad Hussain (2014 SCMR 1015) and "Tehsil Nazim TMA, Okara v. Abbas Ali (2010 SCMR 1437).

9. The tribunal and quasi judicial authorities are

under legal obligation to give plausible reason, absence whereof could render the order liable to judicial chastisement. In our view, it will not be far from the absolute principle of law that the courts and quasi judicial authorities should record reason for their conclusion to enable the aggrieved party/appellant or higher Courts to exercise their jurisdiction properly and in accordance with law because it is the reasoning alone which can enable a higher or an appellate Court to appreciate the controversy in issue in its correct and true perspective and to hold whether the conclusion recorded by the Court, whose order is impugned is sustainable in law and whether subordinate Court has adopted the correct legal approach. To sub serve the purpose of justice delivery system, it is essential that the Court should record detailed reasons for their conclusion and decide the matter through a speaking order. The stating of reason by the administrative and quasi judicial authorities is a well accepted norm and its compliance is stated to be mandatory. It is settled law that if the administrative officer having the duty to act judicially or required to set forth in writing the mental process of reasoning which have led them to the decision it would to large extent help to ensure purpose of the duty to act judicially and exclude arbitrariness and caprice in the discharge of their functions".

9. The case law, relied upon by learned counsel for the respondents and as mentioned above, is not, by any means, exhaustive or dilates upon the issue in question, whereas case reported as **2016 PTD 832** supra, squarely decides the issue in hand. Section 128(5) of the Income Tax Ordinance, 2001 puts a bar on the Commissioner (Appeals) to admit any documentary material or evidence in appeal, which was not before the Commissioner unless he is satisfied that the appellant was prevented by sufficient cause from producing such material or evidence before the Commissioner. The referred bar clearly stipulates that production of documentary material or evidence is not as of right but rather with the leave of the Commissioner (Appeals), who has to satisfy himself that the assessee was prevented by sufficient cause from producing such material or evidence. The referred aspect does not divulge that any ground for production of documentary

material or evidence was made by the Commissioner (Appeals) in his order providing reasons for looking into such document.

10. In light of above discussion of law and facts, the answer to the question proposed in the instant Tax References, is in **'negative'**.

11. Since the question has been answered, the matter stands decided and is disposed of accordingly.

12. Office is directed to send copy of instant order to the Appellate Tribunal Inland Revenue under the seal of the court for reference as prescribed under the law.

(TARIQ MEHMOOD JAHANGIRI)
JUDGE

(AAMER FAROOQ)
JUDGE

Zawar