

HCJD/C-121
JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

I.T.R. No.263/2015

COMMISSIONER INLAND REVENUE (ZONE-III), L.T.U., ISLAMABAD
VERSUS
M/S OIL & GAS DEVELOPMENT CO. LTD.

Applicant by : **Hafiz Munawar Iqbal Advocate.**

Respondent by : **Mr. Nasim Sikandar, ASC.**

Date of Hearing : **11-01-2016.**

ATHAR MINALLAH, J.- Through the instant Reference Application, the applicant has proposed questions of law arising out of the order, dated 14-05-2015, passed by the learned Appellate Tribunal, Inland Revenue Division Bench (DB-I), Islamabad (*hereinafter referred to as the 'Tribunal'*) in I.T.A. No.05/IB/2013. The following questions of law have been formulated.-

- a. *"Whether on the facts and in the circumstances of the case, the Honourable ATIR was justified to accept the appeal of the taxpayer without considering the ratios settled in cases reported as (2005) 91 Tax 258 (H.C Lah) & (2009) 99 Tax 371 (H.C Kar) and also ignoring CIR (Appeals) judgment holding departmental action in line with law to compute limitation period for amending assessment for Tax Year 2006 within "5" years in terms of amendment brought in sub-section (2) of section 122 of the Income Tax Ordinance, 2001 through Finance Act, 2009?"*

- b. *"Whether on the facts and in the circumstances of the case, the amendment brought in sub-section (2) of the section 122 being procedural in nature, shall not operate retrospectively?"*
- c. *"Whether on the facts and in the circumstances of the case, the act of the Taxation Officer to amend the assessment for Tax Year 2006 on the basis of the amendment in sub section (2) of section 122 brought through the Finance Act, 2009, is within the vires of law, thereby allowing the Taxation Officer to finalize the amendment of assessment within 'five' years ending on 30.06.2010?"*
- d. *"Whether on the facts and in the circumstances of the case the learned ATIR, was justified in ignoring judgment of the honourable Sindh High Court in the case of Zeel Pak Industries (Pvt) Ltd Karachi V/s Regional Commissioner, Income Tax Karachi reported as 2009 PTD 712 wherein it has been categorically decided that procedural amendments relating to time limitation apply to all pending proceedings and to all cases which have not become past and closed transactions?"*

2. The facts, in brief, are that the respondent is a company incorporated under the Companies Ordinance, 1984 and is, *inter alia*, engaged in the business of Oil and Gas production and its sale thereof. The Officer of Inland Revenue (Audit-III), Large Taxpayers' Unit (*hereinafter referred to as the 'Officer of Inland Revenue'*) issued a show cause notice, dated 31-05-2012, informing the respondent of his intention to amend the assessment order for the tax year 2006. The respondent filed a written reply dated 26-06-2012 wherein, *inter alia*, the question of the show cause notice being barred by the limitation provided under sub-section (2) of section 122 of the Income Tax Ordinance, 2001 (*hereinafter referred to as the 'Ordinance'*) was also raised. The Officer of Inland

Revenue, vide order dated 27-06-2012, amended the assessment order for the tax year 2006 under section 122 (2) read with section 122(5) of the Ordinance. The said order was assailed by the respondent before the Commissioner Inland Revenue (Appeals-II) Islamabad and the same was disposed of vide order dated 16-10-2012. The respondent filed an appeal before the learned Tribunal and the latter, vide order dated 14-05-2015, accepted the appeal and resultantly the orders passed by the Officer Inland Revenue and the Commissioner (Appeals) were vacated. The learned Tribunal had accepted the appeal on the sole ground that since the return was filed by the respondent on 30-12-2006 and had been treated as an assessment order, therefore, the amendment made vide order dated 27-06-2012 was barred by limitation. Moreover, the argument advanced by the representative of the Department that the amendment made in sub-section (2) of section 122 of the Ordinance was procedural in nature and, therefore, would have retrospective application was not accepted.

3. The above reproduced questions of law proposed in the instant reference application essentially relate to the interpretation of sub-section (2) of section 122 of the Ordinance i.e. whether it is procedural in nature and, if so, will it have retrospective effect in relation to an assessment order passed by the Commissioner or be treated as having been passed under section 120, before the amendment in section 122(2) through the Finance Act 2009.

4. Hafiz Munawar Iqbal, the learned counsel for the Department has contended that; the Return was filed on 30-12-2006 and

the same was treated as an assessment order; the period of five years prior to the amendment made in sub-section (2) of section 122 through the Finance Act 2009 was to be completed on 30-12-2011; the amendment in section 122(2) was made before the expiry of the limitation period, as was prescribed under the provision which had been substituted and, therefore, the assessment order was not a past and closed transaction; the Officer Inland Revenue was competent to amend the assessment order deemed to have been passed on 30-12-2006; the amendment made through the Finance Act 2009 was procedural in nature and it , therefore, will have retrospective effect.

5. Mr. Nasim Sikandar, ASC, on the other hand, has argued on behalf of the respondent that; the provision prior to the amendment through the Finance Act 2009 was attracted in the case of the respondent and, therefore, the assessment made on 27-06-2012 was barred by limitation; the assessment order for the tax year 2006 could only have been amended on or before 30-12-2011, as the Return had been filed by the respondent on 30-12-2006; reliance has been placed on the cases of '*Commissioner Inland Revenue v. Maj. Gen. (R) Dr. C. M. Anwar and 2 others*' [2015 PTD 424], '*Nagina Silk Mill, Lyallpur v. The Income-Tax Officer, A-Ward Lyallpur, etc.*' [PLD 1963 SC 322], '*M/s Shoaib Bilal Corporation, U.B.L. Super Market Circular Road, Faisalabad through Ejaz Hashmat Khan Member v. The Commissioner of Income Tax, Faisalabad Zone, Faisalabad and another*' [1993 PTD 332], '*Commissioner of Income Tax v. Messrs Eli Lilly Pakistan (Pvt.) Ltd.*' [2009 PTD 1392] and unreported judgement dated 03-09-2014 passed by the august Supreme Court in Civil Petition No.1306 of 2014.

6. The learned counsels have been heard and the record perused with their able assistance.

7. Sub-section (2) of section 122 of the Ordinance was amended vide the Finance Act 2009. Before the amendment was made, the said provision (hereinafter referred to as the 'substituted provision') was as follows.-

"122(2) An assessment order shall only be amended under subsection (1) within five years after the Commissioner has issued or is treated as having issued the assessment order on the taxpayer.

The amended provision is reproduced below.-

"122(2) No order under sub-section (1) shall be amended by the Commissioner after the expiry of five years from the end of the financial year in which the Commissioner has issued or treated to have issued the assessment order to the taxpayer."

8. A plain reading of the above provisions shows that before the amendment the period of limitation was to begin from the date of an order passed by the Commissioner, or treated to have been issued under sub section (1) of section 120, while the limitation period provided under the amended provision starts immediately after the expiry of 'five years from the end of the financial year' in which the Commissioner has issued or treated to have issued the assessment order. The amended provision, therefore, provides for a larger period of limitation in relation to the substituted sub section (2). Admittedly, the limitation had expired in the

instant case under the substituted provision when the order dated 27-06-2012 was passed. The precise question for our consideration is whether the amendment made through the Finance Act 2009 in sub-section (2) of section 122 of the Ordinance will be attracted in the instant case, or the provision as it stood before the amendment i.e. the substituted provision.

9. In order to answer the above question, it would be pertinent to examine the precedent law. A Division Bench of the Lahore High Court, in the case of *Commissioner Inland Revenue v. Maj. Gen. (R) Dr. C. M. Anwar and 2 others* [2015 PTD 424], examined the effect of the amended section 122(2) and has held that even procedural law cannot take away vested or existing rights by applying the limitation period retrospectively, unless such an intention of the legislature had been expressed in unequivocal terms. It was, therefore, held in the context of sub-section (2) of section 122 of the Ordinance, as amended vide the Finance Act 2009, that it will not be attracted in the case of an assessment order treated to have been passed under section 120 of the Ordinance, and which had attained finality under the substituted provision. The limitation period, as it stood at the time of the filing of the Return was, therefore, applicable. The said judgment was upheld by the august Supreme Court, vide its order dated 03-09-2014, in Civil Petition No.1306 of 2014 titled '*Commissioner of Income Tax, Rawalpindi Zone, RTO Rawalpindi v. Major General (R) Dr. C. M. Anwar etc.*'. The relevant portion is reproduced as follows.-

"Thus it was categorically held that a vested right has been created in favour of the respondent assessee, which cannot be retrospectively taken away without there being an express

intention of the legislature to do so. But the amended Section 122(2) is neither manifest nor unequivocal for such express/clear intention. Learned counsel for the petitioner has not been able to dislodge the reasoning assigned by the learned High Court in the impugned judgment and we are not persuaded to interfere therewith on the basis of the facts before us. The conclusion drawn by the learned High Court that Section 122(2) as amended by the Finance Act, 2009 shall have no retrospective effect and would not annul the past and closed transaction, when the assessment in favour of the respondent as per the deeming clause under Section 120 had become conclusive and the period for the purpose of invoking earlier Section 122(2) had expired on 28.9.2009, does not call for interference."

10. The principles and law in the context of an amendment made by altering the prescribed period of limitation were enunciated by the august Supreme Court in the case titled '*Commissioner of Income Tax v. Messrs Eli Lilly Pakistan (Pvt.) Ltd.*' [2009 PTD 1392]. The august Supreme Court, after quoting with approval paragraph 15 from the earlier judgment rendered in the case of '*Commissioner of Income Tax v. Eastern Federal Insurance Company*' [PLD 1982 SC 247], held as follows.-

"The introduction of time-limit within which an assessment can be amended in both the Ordinance (section 65 of the repealed Ordinance and section 122 of the Ordinance) is a statutory recognition of the protection against arbitrary power of reopening or amending an assessment after the expiry of the prescribed period. Therefore, it could not be said that in reopening the assessments already completed no right of the assessee/taxpayer was involved."

The august Supreme Court also dilated upon the distinction between a charging section and a machinery or procedural provision in the context of section 122, particularly in respect to the limitation having

retrospective effect. The Apex Court, after considering the same, held as follows.-

"Having anxiously considered the matter, the view we are inclined to take is that the provision is impregnated with the potential of adding to the liability of the taxpayer, therefore, the same is not mere matter of procedure. It has already been held that the taxpayer/assessee have a right that their assessments will not be reopened after the expiry of the statutory period of five years."

11. A Division Bench of the Lahore High Court, in another case titled '*Commissioner Inland Revenue v. Messrs Ghausia Builders (Pvt) Ltd.*' [2015 PTD 772], has followed the law laid down by the apex Court in the judgment of *Messrs Eli Lilly Pakistan (Pvt.) Ltd.* supra in the context of the questions formulated for our consideration. It has been held that where an assessment order has been passed or treated to have been passed under section 120, before the amended sub-section (2) of section 122 was inserted, then the limitation prescribed under the substituted provision i.e which stood at that time, will be attracted.

12. It is obvious from the above that the law by now is well settled, and in a case where the assessment order has been passed by the Commissioner, or treated to have been passed by the Commissioner, under section 120 before the amendment was made through the Finance Act, 2009 then the limitation prescribed under the substituted provision will be attracted. As a corollary, the limitation will start running from the date when the order was passed or treated to have been passed, and not from the end of the financial year when such an order had been issued or

treated to have been issued. The limitation period as contemplated in section 122(2) as amended vide Finance Act 2009 is 'impregnated with the potential of adding liability of the taxpayer is not mere matter of procedure'. The vested right of a taxpayer, therefore, cannot be taken away retrospectively as the legislature has not expressly intended to do so, as is manifested in the language used in the provision. It is, therefore, obvious and settled that the amended sub-section (2) of section 122 of the Ordinance shall not operate retrospectively. At the time when the show cause notice was issued in the instant case, the assessment order treated to have been passed by the Commissioner under section 120 of the Ordinance, dated 30-12-2006, had attained finality i.e. had become a past and closed transaction and, therefore, it could not have been reopened by applying the limitation period provided under the amended sub section (2) of section 122 thus giving it retrospective effect. A vested right was created in favour of the respondent Company when the limitation had expired under the substituted provision, and the same could not have been taken away by giving the amended provision retrospective effect. There is no force in the argument of the learned counsel for the Department that since the limitation period had not expired under the substituted provision at the time when section 122(2) was amended therefore the latter provision should apply. After the period prescribed under the substituted provision had expired, the assessment order dated 30-12-2006 had become a past and closed transaction, and the same could not have been amended or opened by giving the amendment made through the Finance Act 2009 retrospective effect, regardless of when the said amendment had taken effect. The show cause notice dated 31-05-2012 and order dated 27-06-2012 were barred by limitation. It is settled

law that what cannot be done directly can also not be done indirectly. The learned Tribunal has correctly appreciated the law by following the judgment of the Division Bench of the Lahore High Court in the case of Maj Gen (Rtd) Dr C.M. Anwar and two others supra, which was upheld by the august Supreme Court vide order dated 03-09-2014 in Civil Petition No.1306 of 2014. The case law relied upon by the learned counsel for the Department is distinguishable in the facts and circumstances of the instant Reference application. Consequently, we answer the questions 4(a) & 4(d) in the affirmative, and 4(b) & 4(c) in the negative.

13. The Reference application is, therefore, decided against the applicant Department. The office is directed to send a copy of this judgment under the seal of the Court to the learned Tribunal Inland Revenue as required under section 133(5) of the Ordinance.

(NOOR-UL-HAQ N. QURRESHI)
JUDGE

(ATHAR MINALLAH)
JUDGE

Announced in the open Court on 29-03-2016.

JUDGE

JUDGE

Approved for reporting.