

Form No: HCJD/C

## **JUDGMENT SHEET**

**IN THE ISLAMABAD HIGH COURT, ISLAMABAD**  
**JUDICIAL DEPARTMENT**

**Case No: Tax Reference No.66 of 2004**

**Commission of Income Tax/Wealth Tax Companies Zone**  
**Vs.**  
**Ms Fahmida Hamid**

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

**Respondents: Mr. Akhtar Hussain, Advocate**

**Date of hearing: 12.02.2015**

**Aamer Farooq, J.-** Through this consolidated judgment we intend to decide six Tax References namely No.66 (instant Tax Reference), 67, 68, 69, 86 & 87 of 2004, as the common question of law is involved.

2. The facts, in brief, leading to filing of the abovementioned Tax References are that the assessee, in all the cases, filed returns for the assessment years 1997-98 & 1998-99 and their assessments for the referred years were finalized under section 59A of Income Tax Ordinance, 1979. Subsequently, the assesseees were issued show cause notices to explain their position with respect to loan (s) obtained by them. Replies to show cause notices were filed which were found to be unsatisfactory and the assessment orders were modified and the loan amounts were added as deemed income under section 12 (18) of the Ordinance *ibid* and assessments were finalized accordingly. The assesseees who are the respondents in the present proceedings, feeling aggrieved filed appeals before the Income Tax Appellate Tribunal which were accepted vide order dated 13.11.2001 and it was held that the original assessment orders were not erroneous and the provisions of section 12(18) were not attracted and that the invocation of provisions of section 66A of Income Tax Ordinance, 1979 was improper and illegal. The department filed applications for framing questions of law arising out of abovementioned orders of the Income Tax Appellate Tribunal for referring the same to the High Court. The applications, filed by the Department, were dismissed by the Income Tax Appellate Tribunal vide order dated 19.11.2003. The applicant preferred applications under section 133 (4) of the Income Tax Ordinance, 2001 by way of References to decide the questions of law arising out of abovementioned orders of

Income Tax Appellate Tribunal. In this behalf, following questions of law have been framed for decision by this Court:

- i) *“Whether on the facts and in circumstances of the case the learned ITAT was justified to hold that provision of section 12(18) was not attracted on the point that the appellant’s claim of advance was not demolished by the IAC besides the established criteria that onus to prove the same lied on the assessee.*
- ii) *Whether on the facts and in the circumstances of the case the learned ITAT was justified to hold that it was an advance and not a loan whereas in fact the assessee had declared it as liability/loan in her wealth tax return and reconciliation statement.*
- iii) *Whether on the facts and in the circumstances of the case the learned ITAT was justified to hold that the amendment made in section 12(18) vide Finance Act, 1998 was not clarificatory rather it intended to bring about a change by including the advance in the ambit of taxing provisions.*

3. Learned counsel for the applicant *inter alia* submitted that the abovementioned questions of law arise out of the decision by the Income Tax Appellate Tribunal whereby the appeals filed by the assessees/respondents were allowed and it was held that section 12(18) was not applicable in the circumstances. The learned counsel further submitted that the question whether the amount received by the assessee was loan or otherwise is a question of law that needs to be addressed. He further submitted that there are a number of arguments pertaining to the facts of the case which have not been adverted to by the Income Tax Appellate Tribunal and that in itself is a question of law, on the basis of which the case needs to be remanded to the Tribunal for decision afresh.

4. Learned counsel for the respondents opposed the application and submitted that no question of law arises from the decision by the Income Tax Appellate Tribunal and all the issues raised before the Appellate Tribunal were dealt with by the referred forum in its decision. Learned counsel for the respondents placed reliance on the case titled *The Commissioner of Income-Tax, Lahore v. Messrs Immion International, Lahore* (2001 PTD 900).

5. The jurisdiction of this Court, as provided in section 133 of the Income Tax Ordinance, 2001, is to decide a question of law arising out of the decision of the Income Tax Appellate Tribunal. The scope and purpose for the exercise of this jurisdiction was lucidly discussed by the Hon’ble Lahore High Court in the case titled *The Commissioner of Income-Tax, Lahore v. Messrs Immion International, Lahore* (2001 PTD 900). The relevant paragraphs of the decision are as follows:

*“4. The scheme of the Income Tax Ordinance, 1979 (and the late Income Tax Act, 1992) contemplates a reference on a question*

*which is of general interest and importance. An isolated issue which is neither of general recurrence nor its determination would be applicable to other assesseees cannot be said to be a substantial question of law. The purpose of reference under the aforesaid provisions, it will be seen is not merely the resolution of a legal controversy between the revenue and an assessee, it is also for future guidance of the revenue to deal with the matter in a particular manner. An assessee will also be guided for its future assessments if a particular issue is decided for or against him to determine if it is to make of particular claim in a particular set of facts or is to refrain from making a particular expense in a particular manner. For the assessee also the purpose of reference is not only the resolution of an existing controversy but also its future guidance. Where, however, none of these purposes is to be served, a reference to this Court need not be made and the matter should conclude with the decision with the Tribunal. An answer by this court or the opinion expressed should not merely at some more pages to the file of an assessee. Such opinion, generally speaking, must be to the interest of all those involved in the assessment process, the assessing officer, the first Appellate Court and the Tribunal as an extra departmental or the judicial forum. The opinion so expressed should normally enable all of them to avoid unnecessary pleas in future and to restrict litigation.*

5. *The Supreme Court of Pakistan in re: The Lungla (Sylhet) Tea Co. Ltd. v. Commissioner of Income Tax, Dacca Circle, Dacca 1970 SCMR 872 held that every question of law need not to be referred to the High Court. Also that only a question having some substance needed to be so referred. These words of the apex Courts appear to have been adopted by the Indian Legislature while conferring Appellate jurisdiction on the High Courts by finance (No.2) Act, 1998. Subsection (1) of section 260A inserted in the (Indian) Income Tax Act, 1961 states: "An appeal shall lie to the High Court from the very every order passed in appeal by the Appellate Tribunal, if the High Court is satisfied that the case involves a substantial question of law". The word "Substantial" according to Black's Law Dictionary 6<sup>th</sup> Addition page 1428, inter alia means", of real worth" and "importance". A reference, as a matter of course, to the High Court has never been the intention of law either under the late Act, 1992 or section 136 of the Ordinance, 1979.*

6. *It has been our experience that the Revenue in case of an adverse decision invariably goes for an application for reference to this Court and is generally well obliged by the Tribunal. The Revenue, the assesseees as well as the Tribunal need to understand the precise nature of the jurisdiction of this Court as also the purpose for which it has been conferred. Without any iota of doubt is advisory in nature and is required to be invoked only when the issues raised before and decided by the Tribunal were of substantial nature and of general application to a sizeable class of assesseees. The nature of jurisdiction of this Court is clearly distinguishable from its Appellate or Revisional jurisdiction. The most important difference which needs to be noted is that during the pendency of a reference the appeal before the Tribunal is deemed pending and in the case view adopted by the Tribunal is valid it is again listed before them and then decided in the light of the opinion expressed by this Court. The purpose of reference is not to get a decisions for or against a party before the Tribunal. It is only the resolution of a problematic or debatable legal question.*

*In re: C.I.T. v. Basanta Kumar Agarwalla (1983) 140 ITR 418, their Lordships expressed the view that "A point of law" could not be equated with the expression "question of law" and that the question referred must be a disputed or disputable question of law. Further that the object of reference was to get the decision from the High Court on a problematic or debatable question and not an obvious or simple point of law. Accordingly, the reply to a question referred to this Court, affirmative or negative, should normally settle a patron of guidance both for the revenue as well as the assessee besides the Tribunal who had sought the advice in the first instance. Therefore, the practice on the part of the revenue or the assessee which at times is aided by the Tribunal to treat this Court as a Court of appeal needs to be disapproved. Factual controversies should not be allowed to be converted into legal issues only by dint of draftsmanship or employment of legal language in a style which is usual to the framing of such questions. In case of the Tribunal is not certain if the question framed raises of substantial legal issue, it must refuse to make a reference as in that case the assessee or the revenue will have to approach this Court under subsection (2) of section 136 and satisfies, before admission, that the question raised/framed is of substance. Therefore, unless a question framed by the Tribunal at the instance of an assessee or the revenue under section 136 (1) or brought directly before this Court under section 136 (2) of the Income Tax Ordinance, 1979 fulfills the aforesaid standard of general interest, application and relevancy to the overall assessment proceedings, it shall be deemed to be a question of fact. The principle that an advice should never be given unless asked for has also another angle. With regard to reference proceedings under the Ordinance it means that an advice should not be sought unless it is absolutely necessary for the guidance of the parties and for smooth and effective flowing of the assessment stream. In the present case the eligibility of individual assessee in the particular year to avail immunity from detailed scrutiny can hardly be said to be a question having substance. The reply to the aforesaid questions will not even be available to the assessee for his future assessments. Having a particular background of facts it will not be of any importance for the revenue or other assessee either. The principles settled in replying the questions will not be of general application even to answer the parameters of the Self Assessment Scheme for the year."*

6. The above decision clearly shows that the question of law that needs to be addressed by this Court not only should arise out of the decision by the Income Tax Appellate Tribunal but also should be of general public importance for future reference and should not be confined to controversy. In the instant case the questions framed by the applicant are not questions of law that are of general public importance, rather are questions of fact. The learned counsel for the applicant has not been able to point out any question/issue which was raised before the learned Income Tax Appellate Tribunal and has not been dealt with, in its decision.

7. In view of what has been discussed above, we are of the view that no question of law arises out of the decision of the learned Income Tax Appellate Tribunal and therefore, all the above referred applications are dismissed.

(ATHAR MINALLAH)  
JUDGE

(AAMER FAROOQ)  
JUDGE

\*M. Naveed\*

*Approved for reporting*