

HCJD/C-121
JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

ITR No.144/2010

Commissioner Inland Revenue (Legal), L.T.U., Islamabad
VERSUS
M/s Bahawalpur Engineering (Pvt) Ltd., Islamabad

Applicant by : Mr. Abdul Shakoor Parach and Ms. Wajeeha Pervaiz, Advocates.

Respondent by : Mian Tauqeer Aslam, Advocate.

Date of Hearing : 22-03-2016.

ATHAR MINALLAH, J.- Through this consolidated order we shall decide the instant Income Tax Reference filed under section 133 of the Income Tax Ordinance, 2001 (*hereinafter referred to as the 'Ordinance of 2001'*) along with the following References:-

- i) I.T.R. No.140/2010 Commissioner Inland Revenue (Legal), L.T.U., Islamabad v. M/s Bahawalpur Engineering (Pvt.), Ltd., Islamabad'.
- ii) I.T.R. No.141/2010 'Commissioner Inland Revenue (Legal), L.T.U., Islamabad v. M/s Bahawalpur Engineering (Pvt.), Ltd., Islamabad'.
- iii) I.T.R. No.142/2010 'Commissioner Inland Revenue (Legal), L.T.U., Islamabad v. M/s Bahawalpur Engineering (Pvt.), Ltd., Islamabad'.
- iv) I.T.R. No.143/2010 'Commissioner Inland Revenue (Legal), L.T.U., Islamabad v. M/s Bahawalpur Engineering (Pvt.), Ltd., Islamabad'.

The question of law proposed for our consideration in the instant References is as follows.-

"Whether on the facts and circumstances of the case, the learned ITAT was justified to hold that rectification application can be entertained beyond the prescribed time limit notwithstanding the fact that rectification application was filed after mandatory limitation of five years as envisaged under section 221(4) of the Income Tax Ordinance, 2001."

2. The facts, in brief, are that the respondent is a private limited company and derives its income from auto wires harness. The respective assessment orders for the years 1992-1993 to 1996-1997 were passed by the relevant Assessing Officers. The last assessment order was passed on 31-05-1997. The Assessing Officer, through the assessment orders, had charged minimum tax under section 80-D of the Income Tax Ordinance, 1979 (*hereinafter referred to as the 'Repealed Ordinance'*). The respondent did not prefer an appeal against the assessment orders. However, an application dated 13-11-2006 was filed under section 221 of the Ordinance of 2001. It was the case of the respondent No.1 that it was exempt from the income tax under clause 118C of the Second Schedule to the Repealed Ordinance and, therefore, the minimum tax under section 80-D was not attracted. The respondent no.1, therefore, sought rectification of the assessment orders and the refund of the amount which had been paid at that time. The application submitted under section 221 of the Ordinance of 2001 in respect of the five assessment years was dismissed vide order dated 15-11-2006 on the ground that it was barred by limitation provided under sub-section (4) *ibid*. The respondent No.1

preferred five appeals and the same were allowed by the Commissioner of Income Tax/Wealth Tax (Appeals), Islamabad (*hereinafter referred to as the 'CIR(A)'*) vide order dated 17-01-2007. The appeals were allowed on the ground that a refund cannot be declined for the reason that it was hit by limitation, and in this regard reliance was placed on the law settled by the Hon'ble Supreme Court of Pakistan. The Department filed appeals before the Income Tax Appellant Tribunal Islamabad Bench, Islamabad (*hereinafter referred to as the 'Tribunal'*) and the same were dismissed vide order dated 12-09-2009.

3. The learned counsel for the applicant has contended that; section 221 of the Ordinance of 2001 provides the limitation period in sub-section (4) *ibid*; section 122(4) unambiguously envisages that no order under sub-section (1) can be passed after five years from the date of the order sought to be rectified; the application filed by the respondent, seeking rectification of the respective assessment orders, was hopelessly time barred; neither the learned CIR(A) nor the learned Tribunal were competent or vested with the power to condone the period of limitation or to ignore the same.

4. The learned counsel appearing on behalf of the respondent has argued that; the exemption was available to the latter under clause 118C of the Second Schedule of the Repealed Ordinance; the minimum tax charged under section 80-D through the respective assessment orders was illegal and liable to be refunded; the august Supreme Court in the case reported as '*Messrs Pfizers Laboratories Limited v. Federation of Pakistan and others*' [PLD 1998 SC 64] has held that a right to refund

cannot be denied on the ground of limitation; the limitation would not be attracted as it was a case of refund.

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

6. It is not denied that the respective assessment orders for the years 1992-1993, 1993-1994, 1994-1995, 1995-1996 and 1996-1997 were passed and the minimum tax under section 80D was charged. The respondent had paid the assessed income tax pursuant to the assessment orders. It is also not denied that the respondent had not preferred an appeal or availed any other remedy against the assessment orders. Admittedly, an application dated 13-11-2006 was belatedly filed under section 221 of the Ordinance of 2001 seeking rectification of the five assessment orders. The Taxation Officer dismissed the application on the ground that it was hit by the limitation prescribed under section 221 of the Ordinance of 2001. The question involved in the instant References essentially relates to the applicability of the limitation period prescribed under section 221 of the Ordinance of 2001. Sub-section (4) of section 221, as it stood at the relevant time, provided that no order under sub-section (1) can be issued after five years from the date of the order sought to be rectified. Sub-section (1) of section 221 provides that the Commissioner, the Commissioner (Appeals) or the Appellate Tribunal may, by an order in writing, amend any order passed by him/her to rectify any mistake apparent from the record on his or its own motion or any mistake brought to his or its notice by the taxpayer. Sub-section (1), therefore, contemplates that in order to pass an order there under, the officer will

apply his/her mind. The application filed by the respondent was not a straight forward case of a refund. The competent authority was required to apply his or her mind in order to decide whether there had been any mistake apparent from the record, and then to have passed an order to rectify such a mistake. The question of a refund would have become relevant only after an order under sub-section (1) of section 221 had been passed by the competent officer/authority. An order under sub-section (1) of section 221, therefore, precedes initiating proceedings for a refund. By no stretch of the imagination can Section 221 be invoked for claiming a refund of an amount already deposited. The legislature, in its wisdom, has prescribed the limitation period under sub-section (4) *ibid*, which at the relevant time i.e. when the assessment orders were passed, was within five years from the date of passing the order sought to be rectified.

7. The learned counsel for the respondent has relied on the law laid down by the august Supreme Court in the case of *'Messrs Pfizers Laboratories Limited v. Federation of Pakistan and others'* [PLD 1998 SC 64]. The said judgment was rendered in the context of a claim for a refund made under the Customs Act 1969. The facts and circumstances of the aforementioned judgment did not relate to the rectification of an order under section 221 of the Ordinance of 2001. Moreover, the august Supreme Court in the case of *'Shahtaj Sugar Mills Ltd through Chief Executive v. Addl. Secretary Government of Pakistan, Ministry of Finance, Karachi and others'* [2009 SCMR 1421] re examined the principles elucidated in the case of *Messrs Pfizers Laboratories Limited* *supra* and with reference thereto observed as follows:-

"It is pertinent to note that in that case the petitioner from the very first day objected the payment of the duty and resorted to remedies available under the law upto this Court but the facts in the case in hand are distinguishable."

It was further observed and held as follows.-

"By depositing the Regulatory duty and not claiming the refund within one year, the petitioner was estopped to agitate the claim after six year, and the principle of laches and waiver would also come into play against the petitioner".

8. When the above two judgments are read together it makes it obvious that if a person has wrongly or mistakenly deposited a tax or duty and did not raise any protest then he can only claim the refund within the time prescribed under the relevant provision, otherwise he would be stopped, and the principles of laches and waiver would also be attracted. Both the judgments have been rendered by Benches consisting of an equal number of Hon'ble Judges and, therefore, the principles and law enunciated in the case of *Shahtaj Sugar Mills Ltd supra* is binding as it has been rendered later in time. In the instant case the respondent, for the first time, had agitated the matter by approaching the Taxation Officer on 13-11-2006 by filing an application under section 221. As already noted above, the last assessment order was passed on 31-05-1997 and the respondent had kept silent till an application was filed after almost nine years. The learned CIR(A), as well as the learned Tribunal, have not taken into consideration the principles and law elucidated in the judgment of the august Supreme Court in the case of *Shahtaj Sugar Mills supra*. In the facts and circumstances of the instant Income Tax References, the

judgment of the august Supreme Court rendered in the case of *Shahtaj Sugar Mills Limited* supra is relevant and binding.

9. It is settled law that delay defeats equity. Equity leans in favour of a vigilant litigant. The law of limitation is not considered a mere formality and is required to be observed as being of mandatory nature. These principles rest on the foundation that lapse of time creates rights in favour of the other party and, therefore, burdening the party which fails to act within the stipulated time, to demonstrate sufficient and satisfactory cause/reason for delay regarding each day. A person may have an enforceable right, but if he/she fails to enforce the said right within the time stipulated by law, then the right becomes unenforceable. Reliance for these principles is placed on '*State Bank of Pakistan through Governor Versus Imtiaz Ali Kharl*' [2012 SCMR 280], '*Ghulam Sarwar Versus Amir Hussain*' [2004 SCMR 944], '*Lahore Development Authority Versus Mst. Sharifan Bibi*' [PLD 2010 S.C. 705] and '*Shahid Pervaiz alias Shahid Hameed Versus Muhammad Ahmad Ameen*' [2006 SCMR 631].

10. In the light of the above discussion, we answer the proposed question in the negative. Neither the learned CIR(A) nor the learned Tribunal was justified in allowing the rectification application beyond the limitation period prescribed under section 221(4) of the Ordinance of 2001. The Taxation Officer, vide order dated 15-11-2006, had rightly dismissed the application filed under section 221 seeking rectification of the respective assessment orders for the relevant assessment years.

11. A copy of this order shall be sent to the learned tribunal under the seal of this court as required under sub section 5 of section 133 of the ordinance of 2001.

(NOOR-UL-HAQ N. QURESHI)
JUDGE

(ATHAR MINALLAH)
JUDGE

Approved for reporting.