Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

INCOME TAX REFERENCE NO. 45 OF 2014

M/s Pakistan Tobacco Company Limited

Vs

Deputy Commissioner Inland Revenue, etc.

APPLICANT BY: Sardar Ahmed Jamal Sukhera, Advocate.

RESPONDENTS BY: Mr. Saeed Ahmed Zaidi, Advocate.

DATE OF Decision: 26.05.2022.

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BABAR SATTAR, J.- This is a reference filed under section 133 of the Income Tax Ordinance 2001 **("Ordinance")** and the questions of law stated to have arisen out of order, dated 08.07.2014 passed by the learned Appellate Tribunal Inland Revenue **("Tribunal")** are as follows:

i) *Whether the Appellate Tribunal Inland Revenue erred in law in failing to appreciate that the benefit of Section 113(2)(c) which was incorporated in the statute on 01.07.2004 could be availed by the applicant company for the tax year 2005 to adjust the minimum tax paid for the tax year 2003 and 2004 against the tax liability for tax year 2005?*

ii) *Whether in the circumstances, the learned Tribunal erred in law in failing to appreciate that power under Section 221 of the Income Tax Ordinance, 2001 cannot be exercised to adjudicate contentious issues given that the question, whether excess minimum tax paid in tax years 2003 and 2004 can be adjusted against the tax liability for tax year 2005 in*

terms of Clause (c) (incorporated in the Ordinance on 01.07.2004) of Section 113(2) is retrospective or prospective application of Clause (c), is an intricate contentious issue?

iii) *Whether the learned Tribunal's order dated 08.07.2014 is a speaking order?*

2. The questions emanate from tax assessment of the applicant **("Taxpayer")** for the tax year 2003 and 2004. The admitted facts are that the Taxpayer was liable to pay minimum tax on income as applicable to it under Section 113(1) of the Income Tax Ordinance, 2001. Section 113 was amended through Finance Act, 2004, with effect from 01.07.2004 and clause (c) was added to Section 113(2) of the Ordinance. The basic controversy between the Taxpayer and the Tax Department is whether the benefit of Section 113(2)(c) of the Ordinance would be available to the Taxpayer for tax years 2003 and 2004.

3. The learned counsel for the Taxpayer proffered four arguments:

(i) Section 113(2)(c) of the Ordinance was a remedial and curative provision of law which would apply retrospectively to the tax years 2003 and 2004. He relied on ***Messrs Travel Waljis (Pvt.) Ltd vs. Commissioner Appeals, Income Tax, Islamabad*** **(2015 PTD 550),** ***Commissioner Inland Revenue Zone-II, regional Tax Office, Multan vs. Mrs. Ambreen Fawad Co. Pak Arab Fertilizers Limited, Multan*** **(2014 PTD 320) and** ***Commissioner of***

Income Tax vs. Shahnawaz Ltd and others **(1993 SCMR 73)** amongst other precedents.

(ii) Section 113(2)(c) of the Ordinance permitted carry forward of excess amount of tax paid for a period of five years in view of the proviso of the said clause. And even in the event that Section 113(2)(c) of the Ordinance was found not to be applicable retrospectively to tax years 2003 and 2004 the carry forward permitted by the proviso of clause 113(2)(c) of the Ordinance allowed carry forward for tax years 2003 and 2004 which fell within the five year window contemplated by the said proviso even if the said clause was given effect from 01.07.2004 when it was promulgated. That in case of a beneficial legislation where two different interpretations of the language were possible, the interpretation more beneficial to the Taxpayer was to be adopted. He relied on ***Sindh Employees Social Security Institution vs. Messrs Spencer & Company (Pak) Limited*** **(1998 SCMR 440)** and ***Shaheen Airport Services vs. Sindh Employees Social Security Institution*** **(1994 SCMR 881)** amongst other precedents.

(iii) The Order-in-Original impugned before the Commissioner Income Tax (Appeals) and the learned Tribunal was passed under Section 221 of the Income Ordinance, which was without jurisdiction as the determination of applicability of Section 113(2)(c) of the Ordinance to the Taxpayer for tax years 2003 and 2004

required application of mind and interpretation and application of law (as also admitted by the learned Commissioner Income Tax (Appeals) in order dated 03.03.2014) and fell beyond the scope of rectification of an error floating on the surface for purposes of which powers under Section 221 of the Ordinance could be employed. He relied on ***Commissioner of Income Tax vs. National Food Laboratories*** **((1992) 65 Tax 257**) and ***Commissioner of Income Tax vs. National Food Laboratories*** **((2007) 95 tax 353**) amongst other precedents.

(iv) The initial order through which the tax assessment for Taxpayer for years 2003 to 2006 was finalized pursuant to an agreement between the Taxpayer and the Tax Department after which an order under Section 221 of the Ordinance was passed on 15.06.2012. That in view of such agreement and subsequent order under Section 221 of the Ordinance both the Taxpayer and the Tax Department withdrew the litigation initiated by them in relation to tax liability for tax years 2003 through to 2006. By passing the impugned order under Section 221 of the Ordinance dated 15.06.2012, under the garb of rectification of a mistake, the Tax Department had breached the settlement between the parties and such order was therefore hit by the doctrine of judicial estoppel.

4. The learned counsel for the department submitted that question of estoppel would not arise as there was no estoppel against law. That the initial order passed under Section 221 of the Ordinance dated 15.06.2012 was inspired by an agreement. But such agreement did not relate to adjustment of minimum tax for the years of 2003 and 2004. And the adjustment granted to the Taxpayer for the said years was a mistake made by the Deputy Commissioner Inland Revenue, as the Taxpayer had been granted the benefit of Section 113(2)(c) of the Ordinance which was not available to the Taxpayer for tax years 2003 and 2004 given that such provision was enacted with effect from 1st July 2004. Consequently, the amended rectification order under Section 221 of the Ordinance dated 03.07.2012 was in accordance with law. He submitted that Section 113(2)(c) of the Ordinance applicable with effect from July 1st 2004 was a beneficial provision but was not a remedial provision and consequently it would apply prospectively and not retrospectively. And the Taxpayer could therefore not avail the benefit of such provision for tax years 2003 and 2004.

5. Let us first consider whether Section 113(2)(c) of the Ordinance enacted through Finance Act, 2004, with effect from 1st July 2004, was a remedial or curative provision. Section 113(2)(c) of the Ordinance as it existed at the relevant time, stated the following:

> *(c) where tax paid under sub-section (1) exceeds the actual tax payable under Part I, Division II of the First Schedule, the excess amount of tax paid shall be*

carried forward for adjustment against tax liability under the aforesaid Part of the subsequent tax year:

Provided that if tax is paid under sub-section (1) due to the fact that no tax is payable or paid for the year, the entire amount of tax paid under sub-section (1) shall be carried forward for adjustment in the manner stated aforesaid:

Provided further that the amount under this clause shall be carried forward and adjusted against tax liability for five tax years immediately succeeding the tax year for which the amount was paid.

6. Through Circular No.17 of 2004 dated 17.07.2004 the Federal Board of Revenue **("FBR")** explained the amendments introduced through the Finance Act, 2004, and paragraph 18 addressed the allowance made for adjustment of minimum tax on turnover for five tax years in the following words:

ALLOWING ADJUSTMENT OF MINIMUM TAX ON TURNOVER FOR PRECEDING FIVE TAX YEARS

Every company is required to pay minimum tax on turnover @ 0.5% of declared turnover. However, profit-yielding companies paying tax more than turnover tax do not get credit for their contribution towards national exchequer during the face liquidity problem. Section 113 has, therefore, been amended to allow the facility of carry forward of minimum tax on turnover for next five years. Any amount not adjusted against normal tax liability in the aforesaid period would, however, automatically lapse.

7. The explanation reflects the intent behind the enactment of Section 113(2)(c) of the Ordinance. The amendment was clearly driven by a sense that profit-yielding companies paying more tax on turnover while not getting any benefit during the years when they suffered losses or when their income was in

decline was not right as new companies with no turnover and no margin of profit were consequently facing liquidity problems. And the amendment was promulgated to fix such manifest unfairness and afford new companies as well as profit-yielding companies, who suffered a decline in their income, break by allowing them a rollover of additional tax paid.

8. The explanation reflects that the legislature, in order to treat companies liable to minimum tax under Section 113 fairly and to right a wrong inflicted on them during years when their incomes declined, introducing Section 113(2)(c) of the Ordinance to allow them the benefit of carrying forward adjustment against tax liability for a five-year period immediately succeeding the tax year during which excessive tax was paid. The legislative intent as manifest in Circular No.17 of 2004 issued by FBR reflects that Section 113(c) of the Ordinance was a remedial provision aimed at curing a hardship inflicted on companies liable to pay minimum tax under Section 113, which were otherwise profit-making and were considered to be useful contribution to the national economy and exchequer by virtue of their tax payments.

9. Once it is determined that the provision is remedial and curative in nature the law applicable to remedial legislation is not disputed. Such legislation applies retrospectively as held by this Court in ***Messrs Travel Waljis Pvt. Ltd*** while relying on the law laid down by the august Supreme Court in ***Shahnawaz***.

10. We are also an agreement with the learned counsel for the Taxpayer that even if Section 113(2)(c) was to apply with effect from July 1st 2004 the carrying forward of excess tax paid for adjustment against the tax liability of subsequent years would be available to the Taxpayer for tax years 2003 and 2004 in view of the proviso to Section 113(2)(c) of the Ordinance. The proviso to Section 113 (2) is an exception to the provision of Section 113(2) and clearly states that the entitlement to carry forward minimum tax paid in excess of actual tax payable would be valid for five tax years immediately succeeding the tax year for which the amount was paid. Consequently, even if the said provision was to be given effect from 1st July 2004, tax years 2003 and 2004 would still fall within the five-year period for which carry forward entitlement was introduced through Section 113(2)(c). The proviso to Section 113(2) could be given two possible interpretations: one, that the five year period was to be calculated from 1st July 2004 going forward; and two that once Section 113(2)(c) stood enacted the entitlement to carry forward to excessive tax paid would be available for any five year period that culminated on a date after Section 113(2)(c) of the Ordinance stood enacted. It is also a settled canon of interpretation where two possible interpretations of a provision are possible, the more beneficial interpretation is to be given effect. On this basis too the Taxpayer would be deemed eligible to carry forward, for purposes of adjustment, excessive income paid for tax years 2003 and 2004, as such

period fell within the five-year period contemplated by a proviso to Section 113(2) of the Ordinance.

11. We are also in an agreement with the learned counsel for the Taxpayer that the exercise of authority under Section 221 of the Ordinance through which the carry forward of excessive tax paid for tax years 2003 and 2004 has been refused falls beyond the scope of Section 221 of the Ordinance. The question of application of Section 113(2)(c) was agitated by the Taxpayer before the learned Commissioner (Appeals) who observed in Para 5 of his order dated 03.03.2014 that "the issue of adjustability of excess paid minimum tax requires consideration as to whether the interpretation of assessing officer is in line with the motive of the law". The learned Commissioner (Appeals) therefore conceded the contention of the Taxpayer that the question of applicability of Section 113(2)(c) was a matter of interpretation and application of law and could not be treated as an error floating on the surface of an order. The question of applicability of Section 113(2)(c) was therefore a substantive question of law that required application of mind and could not be treated as an error to be fixed in a mechanical fashion. And such substantive questions cannot be resolved through exercise of jurisdiction under Section 221 of the Ordinance. The impugned rectification order of the learned Deputy Commissioner dated 03.07.2012 and the orders of the learned Commissioner (Appeals) and the learned Tribunal therefore suffer from infirmity. The determination of whether or not Section 113(2)(c) of the Ordinance was applicable to the

Taxpayer for tax year 2003 and 2004 could not have been adjudicated in exercise of authority under Section 221 of the Ordinance.

12. We have already held that Section 113(2)(c) of the Ordinance was a remedial legislation applicable retrospectively. And that tax years 2003 and 2004 in any event fell within the five-year tax window contemplated under Section 113(2) of the Ordinance, even if such provision was applicable with effect from 1st July 2004. And further that the exercise of authority under Section 221 of the Ordinance to determine applicability of Section 113(2)(c) of the Ordinance to the Taxpayer was without jurisdiction. We therefore need not dwell on the question of judicial estoppel and whether or not Tax Department was entitled to repudiate an agreement pursuant to which the rectification order under Section 221 was initially passed on 15.06.2012, through which the tax liability of the Taxpayer for years 2003 through 2006 was finalized. Such question can be addressed in an appropriate case. We do, however, note that the said question was raised before the learned Appellate Tribunal and the learned Tribunal simply did not engage with the question or address it in a reasoned manner. The learned Tribunal also did not engage with the legal contentions raised before it with regard to the applicability of Section 113(2)(c) of the Ordinance to tax years 2003 and 2004. And on this ground too we find that the order of the learned Tribunal was not a reasoned order and did not comply with requirements prescribed by Section 24-A of the General Clauses Act, 1897.

13. The questions listed above in Para No.1 are answered accordingly.

14. A copy of this order is directed to be sent to the Registrar of the learned Tribunal under the seal of this Court.

(SARDAR EJAZ ISHAQ KHAN)
JUDGE

(BABAR SATTAR)
JUDGE

Shakeel Afzal/-