IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE MUNIB AKHTAR
MR. JUSTICE AMIN-UD-DIN KHAN

CIVIL PETITION NO.2256-L OF 2015
AND
CIVIL PETITION NO.2257-L OF 2015
AND
CIVIL PETITION NO.2283-L OF 2015
(On appeal from judgment dated 09.06.2015 passed by the Lahore High Court, Lahore in ITA No.382-1999 and 383-1999 and PTR No.675-2007.)

M/s Nishat Mills Limited : (in CPs 2256-L & 2257-L/2015)

M/s Muslim Insurance Company Limited (Now Atlas Insurance Limited) : (in CP 2283-L/2015)

... Petitioners

vs

The Commissioner of Income / Wealth Tax, Companies Zone, Faisalabad (Now CIR, LTU, Lahore) ... Respondent (in all cases)

For the Petitioners : Mr. Muhammad Ajmal Khan, ASC (Video-Link, Lahore) (in all cases)

For the Respondent : Mr. Muhammad Shakeel, ASC (Video-Link, Lahore) (in CPs 2256-L & 2257-L/2015)

Mian Yousaf Umer, ASC (Video-Link, Lahore) (in CP 2283-L/2015)

Date of Hearing : 30.06.2021

ORDER

Munib Akhtar, J.: These matters arise out of the Income Tax Ordinance, 1979 ("1979 Ordinance"). There are three leave petitions, filed by two assessees, against a common judgment of the High Court dated 09.06.2015. Two of the petitions are filed by Nishat Mills Ltd ("Nishat Mills") while the third is by Muslim Insurance Co. Ltd. ("Muslim Insurance", which is time barred by 44 days). The learned High Court allowed tax references that had

been filed by the department, and the assessees seek leave to appeal against the same. The impugned judgment is reported as *Commissioner of Income Tax v Muslim Insurance Co. Ltd.* 2015 PTD 2624, (2016) 113 Tax 216. At the conclusion of the hearing the following short order was made: “For the reasons to be recorded later, these petitions are dismissed”. Those reasons are given below.

2. The relevant facts can be stated briefly. The assessees filed returns for the assessment years involved, being 1993-94 and 1994-95 for Nishat Mills and 1999-2000 for Muslim Insurance. Assessments were framed by the concerned Deputy Commissioner of Income Tax (for convenience referred to as the “ITO”) under s. 62. Thereafter, in each case the concerned Inspecting Additional Commissioner (“IAC”) sought to revise the assessments under s. 66-A on the ground that the same were erroneous and prejudicial to the interests of the revenue. The orders so made were challenged before the Appellate Tribunal where the assessees met with success. The department thereafter filed tax references, which were taken up together and decided by means of the impugned judgment. The only point of challenge relevant for present purposes was that according to the petitioners the ITOs while framing the assessments made those orders with the approval and in consultation with the concerned IACs. It was contended that the IACs could not, having participated in the making of the orders, thereafter turn around and seek to revise those very same orders under s. 66-A. This contention was accepted by the learned Tribunal, and it set aside the orders of the IACs. The question of law considered by the learned High Court was cast by it in the following terms:

> "Whether under the facts and circumstances of the case, the learned Tribunal was justified to vacate the orders under Section 66A holding that the original orders was [*sic*] finalized with the approval of IAC whereas no such approval is apparent from the assessment order?"

The High Court of course answered this question in favor of the department.

3. Before us, learned counsel for the petitioners submitted that the record as produced before the learned Tribunal clearly established that the assessment orders were made with the approval of the IACs. Those approvals, noted by the ITOs, were stated to be in the following terms:

> "Entire proceedings and assessments completed in consultation and with approval of the W/IAC/CIT." [Nishat Mills]
>
> "Assessment order approved by the IAC Range-I Comp. Zone III, Lahore letter No.IAC/R-I/708 dated 14.12.1999." [Muslim Insurance]

Learned counsel also referred to the orders of the learned Tribunal where, according to them, findings of fact were recorded that the assessment orders had been so made. Reliance was placed on ss. 7 and 62(2), and a judgment of this Court reported as *H.M. Abdullah v Income Tax Officer and others* 1993 SCMR 1195 (esp. para 6, at pg. 1200; herein after "*HM Abdullah*") to submit that if there was any involvement at all by the IAC in the making of the assessment order that precluded him from revising the same under s. 66-A. It was submitted that the learned High Court erred materially in coming to the contrary conclusion, and leave to appeal ought to be granted. Learned counsel for the department on the other hand supported the impugned judgment which, it was submitted, was correct in law and on the facts. It was submitted that in at least one case (of Muslim Insurance) the IAC who was purportedly consulted by the ITO (Range I, Companies Zone III)

was different from the IAC who invoked s. 66-A (Range II, Companies Zone I). It was submitted that the ITOs could always consult with the IACs (or other officers superior to them in the hierarchy) under s. 7 and if it were held to the contrary the result would be administratively chaotic. Learned counsel emphasized that any such consultation or approval was an administrative act and not quasi-judicial in nature. It was prayed that the leave petitions be dismissed.

4. After having heard learned counsel as above and considered the record and the decision cited, we concluded that leave ought to be refused. Section 7 of the 1979 Ordinance had its counterpart in both predecessor (the Income Tax Act, 1922, herein after the "1922 Act") and successor (the Income Tax Ordinance, 2001, herein after the "2001 Ordinance") legislation. It will be convenient to set out these provisions in tabular form:

1922 Act	1979 Ordinance	2001 Ordinance
5. Income-Tax Authorities.- ... (7B) The Inspecting Assistant Commissioner may issue, in the matter of any proceeding under this Act, such instructions as he thinks fit for the guidance of any Income-tax Officer or Tax Recovery Officer subordinate to him.	**7. Guidance to Deputy Commissioner.-** In the course of any proceedings under this Ordinance, the Deputy Commissioner may be assisted, guided or instructed by any other income tax authority to whom he is subordinate or any other person authorised in this behalf by the Central Board of Revenue.	**213. Guidance to income tax authorities**.—In the course of any proceedings under this Ordinance, the Commissioner or any taxation officer may be assisted, guided or instructed by any income tax authority to whom he is subordinate or any other person authorised in this behalf by the Board.

Now, under the 2001 Ordinance the return filed by the taxpayer is deemed to be the assessment order (subject, in appropriate cases, to exceptions, qualifications or conditions not presently relevant). It will be recalled that the position under the 1922 Act and the 1979 Ordinance was materially different. There (except in the case of a self-assessment scheme) the return filed by

the assessee was just that, a return. Of course the return had to be filed truthfully, diligently and without concealment. The return (along with any other record or information as was summoned) was considered by the ITO in accordance with the relevant statutory provisions and he then, applying his mind to the same, framed the assessment. The order so made was the assessment order. The basic provision in this regard was s. 23 of the 1922 Act and s. 62 of the 1979 Ordinance. We are concerned with the seventh and second subsections, respectively, of these provisions, which were as follows:

1922 Act, s. 23	1979 Ordinance, s. 62
(7) In the course of any proceedings under section 2 or section 23, an Income-tax Officer, for the purpose of assessment of the income of an assessee or determination of the sum payable by him, may be assisted, guided or instructed by an authority mentioned in section 5 or by one or more nominees of the Central Board of Revenue.	(2) Where a person is authorised by the Central Board of Revenue under section 7 to assist the Deputy Commissioner in making an assessment and the Deputy Commissioner disagrees with the opinion of such person on any point concerning assessment, the Deputy Commissioner shall record, in the order under subsection (1), the opinion of such person and the reason for his disagreement with such opinion.

5. The learned High Court concluded that the approval relied upon by the petitioners (who were, of course, respondents before it) was merely a consultation. It was held that to regard it as binding on the IAC, in that he could not thereafter take recourse to his powers under s. 66-A, would render the latter redundant. The section was an independent provision, which operated on its own terms. With reference to s. 7 it was held as follows (PTD at pg. 2628):

> "The consultation by the Assessing Officer with the IAC in the advisory capacity and for policy guidelines were in the nature of administrative instruction meant for internal consumption of the department. Such consultations are not by exercise of judicious mind, therefore did not make him [i.e., the IAC] functus officio."

Accordingly, the references were answered in favor of the department. In our view this analysis is correct only to a certain extent. As we indicate below the learned High Court, with respect, did not fully understand and apply the statutory provisions in their correct perspective. In particular, the learned Division Bench failed to appreciate that the aforesaid provisions could, depending on the facts and circumstances of the case, result in two distinct types of outcome, one being a matter of law and the other being one of fact, which must now be considered.

6. We begin with what can be regarded as the general provision, s. 7 and its counterparts. It is to be noted that s. 7 and s. 213 of the 2001 Ordinance are cast in virtually identical terms. Now, in any organization (including a Government department) it is only to be expected that there will be, in the ordinary course and as part of the normal routine, an ongoing consultation and interaction among persons holding different posts in the hierarchy. Juniors would wish (and indeed, in most cases, be expected) to seek informal guidance from their seniors, or to be assisted and even instructed by them, and thereby benefit from their experience and the collective institutional wisdom. For example, as is well known, fresh recruits and probationers are attached for some time to senior officers for this very purpose. But the process is not so narrow or limited. It continues throughout an officer's career, certainly at the junior or middle levels. Even seniors can benefit from what other seniors (or even junior officers) may have to offer. Such consultations, communications and interactions (or, to use the words of ss. 7 and 213, assistance, guidance or instruction) are part of the woof and warp of any organization, and that certainly includes the bureaucracies of the State. There is nothing strange or exceptional about this. Indeed, it is the absence of such activity

that would call for comment and be a matter of concern. It is also to be kept in mind that the informality of the process means that the assistance, guidance or instruction is not generally regarded as binding in a formal sense. They are, rather, a resource that is available, and one which inures especially to the benefit of those lower down the hierarchy. It is something that can be usefully and productively drawn upon, as and when needed.

7. What s. 7 and s. 213 did was simply to give statutory recognition to the processes and procedures described above. These provisions formalized what would have happened informally in any case, and gave it statutory expression. The learned High Court has correctly characterized the scope and intent of these provisions as being concerned with “administrative instruction[s] meant for [the] internal consumption of the department”. (The sentence immediately following this conclusion is not however entirely correct.) It is to be emphasized that these sections do not make permissible what would otherwise be impermissible. Rather, they (as it were) lay bare the internal functioning and “piping” of the (here) revenue bureaucracy, for the removal of any confusion. The sections are, in our view, neither enabling or permissive in the technical sense but rather more akin to an explanation (i.e., meant for the avoidance or resolution of any doubt). The contrast between them and s. 5(7B) of the 1922 Act may be noted. There, the key words (“assisted, guided or instructed”) were not used as part of one self contained phrase, and there was no reference to the departmental hierarchy in general terms. Only one officer was mentioned, the Inspecting Assistant Commissioner. He was empowered to “issue” such “instructions” as he deemed fit for the “guidance” of the ITOs. As compared with the other two this section had a much more formal and legalistic ring to it and in our

view was more in the nature of a statutory power, properly so called.

8. We now come to the provisions specifically relating to assessments, s. 23(7) of the 1922 Act and s. 62(2) of the 1979 Ordinance. Although the two may superficially appear to have served the same purpose, a closer look reveals important differences, which are a key to resolving the issue before us. Firstly, s. 23(7) used the very phrase that was missing in s. 5(7B): “assisted, guided or instructed”. Secondly, these words were used in relation to the generality of the departmental hierarchy: “an authority mentioned in section 5 or by one or more nominees of the Central Board of Revenue”. Thus, structurally, the language of s. 23(7) was quite similar to what was set out in s. 7 and s. 213. In our view, s. 23(7) gave recognition, in the specific context of the making of an assessment, to those general processes of consultation, communication and interaction that were given much broader expression in the successor legislation.

9. In contrast, the position under s. 62(2) was different. It was cast in entirely different terms. Firstly, it required that the officer or other nominated person, as mentioned in s. 7, had to be authorized by the Central Board of Revenue (“Board”) to assist the ITO in making an assessment. It then provided that if the ITO disagreed with the officer so assisting on any point he had to expressly set out the opinion of the latter in the assessment order and his reasons for disagreeing with the same. Now, both s. 23 and s. 62 cast a statutory duty on the ITO to frame the assessment and make the necessary order. In our view the officer, if any, authorized by the Board under s. 62(2) was also under a statutory duty, albeit of a more limited nature, namely, to assist the ITO in the making of that assessment. This conclusion follows necessarily

from the duty cast on the ITO in case of any disagreement. Such provision would make sense only if, as a matter of law, the duty of assistance was of the same nature as the duty of making the assessment order itself. If the assistance had been intended to be only of an informal or general nature which could simply be ignored by the ITO the language of subsection (2) would have been materially different. Of course even on the language as used the ITO's view ultimately prevailed. But the manner in which the subsection was structured shows that the assisting officer was also under a statutory duty. Both had to separately apply their minds to the case. If the outcome was concurrence the assessment order followed accordingly. If there was discordance then the view of the officer under the primary duty (i.e., the ITO) prevailed, but he had to set out the point(s) of disagreement, and give reasons for coming to a conclusion contrary to that of the officer under the collateral duty.

10. For present purposes the crucial point is that on its true construction subsection (2) required the assisting officer, as a matter of law, to apply his mind to the case. This brings us to the nub of the matter. It followed from the duty so cast that if the assisting officer was the IAC concerned then he would stand precluded from taking recourse to s. 66-A. If the earlier application of mind resulted in an assessment order on which there was complete agreement then the IAC could not turn around and claim under s. 66-A that there had been an error prejudicial to the interests of the revenue. And if there had been any point(s) of disagreement, which ended in the view of the ITO prevailing, it would still have been impermissible for the IAC to continue to press his view under the guise of invoking s. 66-A. He could not, as it were, have two bites at the cherry. There is another important

aspect to keep in mind. In our view, it also followed that if s. 62(2) applied in the facts and circumstances of the case an irrebuttable presumption of law was raised. Since the subsection required the assisting officer, as a statutory duty, to apply his mind to the case it did not matter whether (and, more importantly, did not have to be shown that) he had in fact done so and if so to what degree. If therefore the assisting officer was the IAC concerned it would be sufficient, to preclude any exercise of powers under s. 66-A, to show simply that he had been authorized by the Board under the subsection in respect of the case. Whether he had in fact provided any assistance, and if so to what degree of intensity or involvement, would be irrelevant as a matter of law. This is the first of the two possible outcomes mentioned in para 5 above.

11. We turn to the other possible outcome, which would have been a matter of fact. Even if s. 62(2) did not apply in the facts and circumstances of the case it could still have been that the ITO took assistance, guidance or instruction from a superior officer in terms of s. 7. However, now it would be a question of fact whether any officer (and in particular the concerned IAC) had been so involved. And that is not all. An affirmative finding would not in itself have been sufficient to preclude the IAC from invoking s. 66-A in relation to that particular case. It would also further have to be shown, as a matter of fact, that the degree of involvement was of such intensity that it would make subsequent recourse to s. 66-A impermissible. For, it must be remembered, the nature of the assistance, guidance or instruction under s. 7 was essentially general, informal and non-binding. Notwithstanding this, in a particular case the involvement could have been to such a degree, and of such intensity, that it would amount to the superior officer (here the IAC) having been materially involved in the very making

of the assessment order. But all of this would raise questions of fact. Those questions would have to be answered in the usual manner, as appropriate for tax proceedings under the statute. Certainly, there would be no presumption of law. This is the second of the two possible outcomes mentioned in para 5 above.

12. We pause to comment upon the last sentence in the passage extracted above from the impugned judgment, which for convenience is again set out (it will be recalled that the context was a consideration of s. 7):

> "Such consultations are not by exercise of judicious mind, therefore did not make him [i.e., the IAC] functus officio."

With respect, these observations are not correct in so general a form. As has just been seen, a "consultation" under s. 7 could have been of a degree and intensity that, for all practical purposes, it would have amounted to the concerned office having "judiciously" applied his mind to the case. If such officer were the IAC he would then have been precluded from acting under s. 66-A. But all of this would have been a matter of fact, not of law. Secondly, the preclusion of the IAC in relation to a particular case would not have made him "functus officio". This is a distinct and separate legal concept and one which, with respect, had no relevance for the question before the learned High Court.

13. We now turn to apply the foregoing analysis and discussion to the facts and circumstances before us. On a specific query from the Court none of the learned counsel could confirm whether any officer, and especially the IACs concerned, had been specifically authorized by the Board in terms of s. 62(2). Thus, the first requirement for that subsection, and the legal consequences emanating from it, to apply did not exist. The first possible outcome, which would have been a matter of law and raised an

irrebuttable legal presumption, did not therefore exist. That leaves only the second possible outcome. This was a matter of fact. Now, the learned Tribunal did find that there had been consultation with, and the approval of, not only the IAC but also the Commissioner of Income Tax (CIT). However, even if we put aside the (important and material) submission by learned counsel for the department that in the case of Muslim Insurance the IAC consulted and the one who acted under s. 66-A were different, any conclusions based on the finding of fact recorded by the Tribunal was deficient and erroneous. This is so because, as observed above, the mere fact of consultation or even approval was not enough. The degree and intensity of the consultation (itself a question of fact) had also to be established and shown to have been of such level that it would preclude the subsequent exercise of powers under s. 66-A. In our view, the learned Tribunal misdirected itself in law by considering that it sufficed simply, and only, to show that the IAC had been consulted. This misunderstanding and misapplication of the statutory provisions led it into legal error. The conclusion arrived at was not sustainable.

14. It remains only to consider the *HM Abdullah* case. The matter arose under the 1979 Ordinance. Three assessment years were involved, in each of which the appellant filed returns under the self assessment scheme. The ITO sought to reopen those (deemed) assessments (see s. 59) under s. 65. It is to be noted that the initiation of proceedings under the latter required, inter alia, the approval of the IAC (see s. 65(2)). Such approval was apparently given. Subsequently, the successor ITO wanted to close or drop those proceedings and sought the IAC's permission to do so. However, that was refused. That led to the assessee filing a

constitutional petition challenging the s. 65 notices and proceedings thereunder. While all this was going on the ITO proceeded to make orders under s. 65. The writ petition was ultimately disposed of by the learned High Court (whose judgment is also reported: *H.M. Abdullah v Income Tax Officer* 1991 PTD 217) with the direction that the s. 65 notices were to be regarded as pending but were to be decided by some other ITO. That led to the appeal to this Court, which was dismissed in the following terms (pg. 1199):

> "5. It has been noticed that during the pendency of the writ petition, the notices under section 65 were acted upon and the Income Tax Officer passed the assessment orders. We may observe that these orders could have been challenged through appeal before the Appellate Assistant Commissioner and then in second appeal before the Income Tax Appellate Tribunal. Further on a question of law, a reference also lay before the High Court. As a matter of fact all the points urged before the High Court in its Constitutional jurisdiction could be raised in the reference application under section 136 of the Income Tax Ordinance, 1979. It is clear to us that for all intents and purposes on the passing of the assessment orders by the Income Tax Officer, the writ petition became infructuous, as an alternate remedy in terms of Article 199 of the Constitution was available to the appellant. Unfortunately, the High Court's attention was not drawn to this aspect of the matter.... In the circumstances of the case, the appellant was not entitled to invoke the Constitutional jurisdiction of the High Court and bypass the remedy available under the Income Tax Ordinance....
>
> 6. For the foregoing reasons alone, without going into the merits of the case, this appeal is liable to be dismissed. However, before parting with the case we feel it appropriate to comment upon the interpretation put by the High Court on section 7 of the Ordinance...."

It will be seen that the facts of the cited decision diverged from those at hand and the appeal was decided on a basis altogether different from the question raised here. The discussion regarding s. 7, relied upon by learned counsel for the petitioners, was only to correct an error perceived in the judgment of the High Court. It is also to be noted, as is obvious from the opening portion of para 6 extracted above, that the discussion formed only the end piece of an appeal that already stood decided. With respect, the

discussion is of no utility for present purposes. It was largely concerned with clarifying the distinction between those income tax authorities as exercised quasi-judicial powers and those who were concerned with administrative and executive matters. The end portion of para 6 was particularly emphasized (sidebar D at pg. 1200). It is self-explanatory and requires no elaboration. It does not advance the petitioners' case. The cited decision is not, with respect, relevant for present purposes.

15. For the foregoing reasons (which are rather different from those that found favor with the learned High Court) leave was refused and the petitions stood dismissed.

Judge

Judge

Judge

Islamabad, the
30th June, 2021
Naveed Ahmad/*
Approved for reporting