[Inland Revenue Appellate Tribunal]

Before Jawaid Masood Tahir Bhatti, Chairman and
Farzana Jabeen, Accountant Member

I.T.As. Nos. 725 and 726/KB of 2012, decided on 8th February, 2013.

Muhammad Aleem for Appellant.

Mumtaz Ali Bhaio, D.R. for Respondent.

Date of hearing: 8th February, 2013.

ORDER

JAWAID MASOOD TAHIR BHATTI, CHAIRMAN.---The above titled appeals have been filed at the instance of the Revenue against the two separate orders passed by the learned CIR(A) dated 14-6-2012 for the tax years 2010 and 2011 challenging the relief allowed filing the following common grounds:--

"(1) That the order of the learned Commissioner Inland Revenue (Appeals-II) Karachi is bad in law and contrary to the facts of the case.

(2) That the order of the learned Commissioner Inland Revenue (Appeals-II) Karachi was not justified to annul the order for levy of Workers' Welfare Fund under section 122(5A) of the Income Tax Ordinance, 2001 which was passed in the legal status having judicial and charging powers under the Income Tax Ordinance, 2001 as well facts of the case.

(3) That the learned Commissioner Inland Revenue (Appeals-II), Karachi was not justified to annul the order which was correctly passed for levy of Workers' Welfare Fund under section 4 of WWF Ordinance, 1971 on default of taxpayer which was not paid along with return of income as it was liable to be paid at the time of return of income.

(4) That the order passed by learned CIR (Appeals-II) Karachi may be vacated and the order passed by the Assessing Officer may be restored."

For the Tax Year 2011 in addition to the above common grounds following ground of appeal has also been framed:--

"That the learned Commissioner Inland Revenue (Appeals-II) Karachi was not justified to allow the exemption of clause (57), Part-IV of the Second Schedule to the Income Tax Ordinance, 2001 as the taxpayer had not fulfilled all conditions as laid down in the said clause and the learned Commissioner Inland Revenue (Appeals-II), Karachi has erred in holding that the taxpayer is

entitled for exemption from charge of minimum tax under section 113 of the Income Tax Ordinance, 2001 which is contrary to law and is against the intention of legislature."

2. Brief facts of the case are that Messrs Awan Trading Co. (Pvt.) Limited, the "Respondent", was incorporated as a private limited company in the year 1992 with major activities of import of coal. The assessment orders for tax years 2010 and 2011 deemed to have been made under section 120 of the Income Tax Ordinance, 2001 were amended under section 122(5A)/122(9) of the Income Tax Ordinance, 2001 and WWF was levied for tax years 2010 and 2011, whereas, being a Large Trading House the exemption from payment of minimum tax under section 113 claimed under clause (57) of Part IV of Second Schedule to the Income Tax Ordinance, 2001 was rejected and minimum tax levied in the amended order for tax year 2011. The learned CIR(A) deleted the WWF for both the tax years 2010 and 2011 and the levy of minimum tax for tax year 2011 was also deleted. Being aggrieved, Revenue filed these appeals before this learned Tribunal taking the grounds for both the tax years mentioned supra.

3. The learned DR Mr. Mumtaz Bohio, representing the Revenue argued the case and stated that the learned CIR(A) was not justified to delete the levy of WWF for tax years under review as the levy as per orders made under section 122(5A) of the Income Tax Ordinance, 2001 was made as per applicable law. Regarding the deletion of minimum tax pertaining to tax year 2011, the learned DR opposed the findings recorded by the learned Commissioner (Appeals) and stated that this exemption was available to a new entity fulfilling the requirements of the law and the existing taxpayers fulfilling the said requirements cannot avail the exemption under the said clause. He stated that this company was incorporated in 1992 and has lost the period of ten years when the business operations were commenced. While concluding his arguments, the DR emphasized that the said Large Trading House (Respondent) irrespective of the fact that it has fulfilled all the requirements as required under said clause, but the exemption from payment of minimum tax cannot be allowed. The learned DR has requested for annulling the appellate orders for both the tax years under review.

4. On the other side the learned AR Mr. Muhammad Aleem, Advocate represented the respondent and argued the case. On the issue of the WWF, he contended that the relief allowed by the learned CIR(A) is supported with proper case-laws as followed by this Tribunal, therefore, the relief allowed by the learned CIR(A) for both the tax years is requested to be confirmed and the departmental appeals on this score be dismissed in the light of findings given by the learned CIR(A) on the issue of WWF.

5. We have heard the learned representatives and have perused the impugned order of the learned CIR(A), the order under section 122(5A) and other available record of the case. As regards the issue of WWF is concerned, since the learned CIR(A) has allowed the precedent set forth by the Honorable High Court of Lahore and followed by this Tribunal, therefore, no exception can be made on this score and relief allowed by the learned CIR(A) for tax years 2010 and 2011 deleting the levy of WW'F is accordingly confirmed. Both the appeals on this score are dismissed.

6. In the tax year 2011 the Taxpayer has claimed exemption from payment of minimum tax under section 113 under clause (57) of Part IV of Second Schedule to the Income Tax Ordinance 2001. The learned CIRCA) in the impugned order has allowed the relief with the observation below:--

> "The undersigned is persuaded to agree with the submissions of the appellant's AR that since the appellant had commenced its business in the Year 1992 i.e. the period related to the assessment year 1992-93, whereas condition/restriction for availability of exemption for ten years from levy of minimum tax under section 113 of the Income Tax Ordinance, 2001, has been imposed by the legislature through Finance Act, 2006, specifically mentioning "**Tax Year**" and not "**Assessment Year**". Moreover, the exemption is available provided that the conditions laid down are fulfilled and once the conditions are fulfilled, avail exemption. In order to be more specific, it would be appropriate to go through clause (57), Part-IV of the Second Schedule to the Income Tax Ordinance, 2001, which reads as under:-
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> (57)The provision of sections 113, 148 and 153 shall not apply to companies operating Trading House which---
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> (i) have paid up capital exceeding Rs.250 million;
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> (ii) own fixed assets exceeding Rs.300 million at the close of the Tax year;
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> (iii) maintain computerized records of imports and sales of goods;
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> (iv) maintain a system for issuance of 100% cash receipts on sales;
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> (iv) present accounts for audit every year, and is registered with Sales Tax Department;
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> provided that the exemption under this clause shall not be

available if any of the aforementioned conditions are not fulfilled for a tax year;

Provided further that exemption from application of section 113 shall he available for the first ten years starting from the tax year in which the business operations commenced."

The learned CIR(A) has concluded the matter as under:--

"In view of the above, I feel no hesitation to hold that the appellant is entitled for exemption from charge of minimum tax under section 113 of the Income Tax Ordinance, 2001 for the simple reason that the subsequent legislation i.e. the second proviso to clause (57), Part-IV of the Second Schedule to the Income Tax Ordinance, 2001 was introduced through Finance Act, 2009, wherein the conditions/restriction have been imposed from the tax year and not from the assessment year. It is correct that if the intention of the legislature was to apply this condition on the appellant who had commenced its business prior to the tax years the word "**assessment year**" or "**from the date of commencement of business**" would have been added. "Therefore, the Officer Inland Revenue is directed to allow exemption from levy of minimum tax under section 113 of the Income Tax Ordinance, 2001, in terms of clause (57) Part-IV of the Second Schedule to the Income Tax Ordinance, 2001, as the appellant has duly fulfilled the condition laid down to qualify as "**Trading House**" in the tax year under appeal."

7. The learned DR has contended that under the 2nd Proviso to Clause (57) of Part IV of Second Schedule to the Ordinance, 2001 the exemption from the chargeability and payability of minimum tax is subjected to certain conditions. He has contended that as per the audited accounts business operation was commenced in 1992 and ten years concession has already expired in 2002 therefore, the Taxpayer is liable for minimum tax along with penalty and default surcharge at total tax payable. According to learned DR the learned CIR(A) without any justification has directed to allow exemption. He has requested to vacate the impugned order of the learned CIR(A).

8. On the other hand, in support of his arguments the learned AR has referred to section 74 of the Income Tax Ordinance, 2001 which starts with words "for the purpose of this Ordinance and subject to this section, the tax year shall be a period of twelve months...." and no mention of assessment year has been made while defining the words "tax year". According to the learned AR the definition also supports the action of the learned CIR(A). He has contended that the second proviso added to the said clause vide Finance Act, 2006 is discriminatory as it

negates of the doctrine of equality as enshrined in the Constitution of Islamic Republic of Pakistan. In this regard he relied upon the case-law reported as 2010 PTD 1924 which deals with the identical situation. Brief facts of the case states that the second proviso was added to section 12(2)(a) of the Income Tax Ordinance, 2001, which reads as under:--

> "Provided that any bonus paid or payable to corporate employees receiving salary income of one million rupees or more (excluding bonus) in the year shall be chargeable to tax at the rate provided in paragraph (2) of Division-I, Part-I of First Schedule."

It is contended that vide the same Finance Act, following paragraph (2) was added to Part-1 of Division-I to the First Schedule to the Income Tax Ordinance, 2001:--

> "The rate of tax payable on bonus on IDPT as income tax shall be @ 30% percent for the tax year 2010."

The above piece of law was made applicable for all the corporate employees to whom bonus is being paid or payable shall pay tax at the rate 30% on the bonus as IDPT. After detailed discussion on the addition of second proviso to section 12(2) of the Income Tax Ordinance, 2001, the Honorable Sindh High Court came to the following conclusion:--

> "40.In the above cited judgment the honourable Supreme Court has clearly held that though the Legislature and other taxing authorities have the power to classify persons or properties into categories and to subject them to different rates of taxes, however, that incidence should be based in a way that similarly placed persons should not be dealt with dissimilarly or discriminately. In the present case only the corporate employees, who are receiving salary income of one million rupees or more, have been charged with this tax on bonus which does not appear to be a rational and reasonable classification as employees working in others sectors and drawing salary income in the same slab have been left out. The term "employee" has also been defined in the Ordinance as per section 2(20) of the Ordinance according to which "employee" means any individual engaged in employment. Perusal of section 12 of the Ordinance would reveal that this section deals with employees meaning thereby that there is indiscrimination or distinction between the employees working in the corporate sector and the employees working in any other sector.

41. It is a trite law that tax laws should be imposed on the similarly placed persons as the honourable Supreme Court in the case of *I.A. Sharwani and others v. Government of Pakistan and others* (1991 SCMR 1041) has specifically held that "persons equally placed be treated alike not only in privileges conferred but also with regard to the liabilities imposed." However, in this case, the liabilities imposed on corporate employees have been enhanced as compared to the similarly placed employees in other organizations. It is also a trite law that while interpreting fiscal statutes the Courts have struck down those laws which are violative of Article 25 of the Constitution which are not found to be established on any reasonable distinction and classification and which are discriminatory in nature. Reference in this regard may be made to PLD 2005 Karachi 55.

42. Equality has to be between persons who are placed in the same state of circumstances. There is no distinction as regard to taxability of employees and all the employees working for any type of employer are charged and taxed as per the provisions of section 12 of the Ordinance. Hence the discrimination created by adding the said proviso in the said subsection of the Ordinance whereby only those employees who work for the corporate sector have been singled out for levy of tax at the rate of 30 of the bonus paid or payable to such employees and while leaving out other employees working in other sector, is discriminatory and violative of Article 25 of the Constitution as is not based on any reasonable classification or distinction.

43. While imposing tax on the bonus paid or payable to corporate employee in the above manner and leaving out all other employees working in other walks of (life?) to be absolved of this levy/tax does not appear to be a reasonable classification. A classification of persons or things would be rational and reasonable only if it is based on an intelligible differentia or distinction. The only ground urged before us by the learned counsel for the contesting respondent was that, firstly, the legislature has the authority to tax a subject in the manner it deems fit and secondly, that the corporate employees, who are receiving salary income of rupees one million or more and to whom bonus is paid or is payable, are a group of persons who have the capacity to bear the same and hence they have been charged with this. The learned counsel also submitted that neither there was any pick and choose nor any discrimination occurred resulting in violation of Article 25 of the Constitution. However, no convincing argument was put forward nor was it controverted by them as to why only corporate employees have

been burdened with this tax leaving out all the other employees drawing such salary and bonus in other section. For the purposes of income taxation a corporate employee earning a sum more than Rs. one million stands on the same footing as any other individual or employees earning the same sum who is not a salaried employee of a company. The noted and declared objective of the impugned legislation as found in the para wise comments of the respondent and also argued before us is that this is a contribution to meet the expenditure of re-settling internally displaced persons. Why only the corporate employees have been made to bear the brunt of such expenditure has not been explained at all. In fact, to our mind this is nothing but adverse, arbitrary and hostile discrimination clearly imitating Article 25 of the Constitution as person earning similar incomes (i.e. Rs. one million and more) have been discriminated without any rationality or intelligible differentia i.e. one set of persons being corporate employees earning Rs. one million or more are made to pay the impugned tax whereas other persons who are not corporate employees but who are also earning Rs. one million more are not subjected thereto. And there is no attempt by the respondents to explain at all why such a discrimination tax has been levied.

44. In view of the above discussion and in the light of the authoritative pronouncements made by the honourable Supreme Court in the above quoted decisions, we are of the opinion that imposition of tax at the rate of 30% on the bonus paid or payable to corporate employees only who are receiving salary income of one million rupees or more, leaving out all other persons who are also receiving same salary income and bonus but not working in corporate sector, is a discriminatory act and is violative of the provisions of Article 25 of the Constitution."

He has contended that the application of a 'proviso' was also discussed in details in the said judgment and a few of them are extracted herein below:--

"While section of an Act dealt with particular field proviso would except or take or carry out from the field specific portion, therefore, before proviso could have any application, section itself must apply."

"Indeed it cannot be disputed, that a proviso must be construed and treated as if it were, not a parallel positive enactment, but a limitation on a proposition which is direct and objective."

"Exception to substantive provision, to be construed in light of main provision of section."

"Proviso to be construed as subordinate to main clause should not he given greater effect than necessary."

"Proviso only creates an exception to the main provision, but cannot override the section to which it forms part."

"Irreconcilable inconsistency between a charging section and the Schedule, Schedule is to yield to the Act:

"Conflict between main statute and Schedule of the statute, provisions of main statute to prevail."

"If person has to be brought within the ambit of a tax the same has to be specifically mentioned that the said person falls within the ambit of the charging section by clear words otherwise he cannot be taxed at all."

"Declaring the rule as discriminatory and striking it down on the ground of inequality under Article 25 of the Constitution, therefore, was justified."

It was requested by the learned AR that since similar controversy is involved in this case which should be decided in favour of the respondent considering the findings recorded by the honorable Sindh High Court in the above referred judgment as the action of the Revenue is discriminatory and against the equality as enshrined in the Constitution. The second proviso was found not applicable and tenable and it was found without lawful effect, therefore, the IDPT on bonus was termed as unlawful, in the presence of the said second proviso on the Statute.

The learned AR placed reliance on the case reported as 2004 PTD 1949 decided by the Honorable Lahore High Court in the case of *Olympia Synthetic v. Secretary, Industries Department Punjab and others*. The Industrial Policy Circular dated 2-5-1992 and S.R.O. 897(I)/92, dated 15-9-1992 defined the "Rural Area" as the area excluding the existing limits of Municipal Corporation and 10 Kilometers area around the same and the petitioner being located outside the 10 kilometers area limits of Municipal Corporation Sheikhupura entitled to the requisite certificate. The Revenue contended that the imported machines were being installed by the petitioner at its unit which was within 30 kilometers of the limits of Lahore Metropolitan Corporation and therefore the incentives were denied. The Honorable Lahore High Court allowed the petition and held that the petitioner is entitled to benefits and incentives of the scheme and SRO mentioned supra. The

relevant findings recorded in the above reported judgment are extracted herein below:--

> "Where language of a statute in its ordinary meaning and grammatical constructions leads to a manifest contradiction of apparent purpose of the enactment or to same inconvenience or absurdity, hardship or injustice, then a construction may be put upon the same to modify the meaning of words or even the structure of sentence---Such construction must, however, advance purpose of the enactment and should be in accord with the requirements of justice and economic equities. [P. 1955]C
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> "Where a statute or legal instrument is open to two interpretations, then one beneficial to citizens would be adopted---In case of ambiguity, confusion or absurdity created by authors and framers of law/policy notification, then lean would be given in favour of citizens and against those who created confusion or absurdity."

The learned AR contended that in case there is any absurdity, it would be interpreted in the favour of citizen. In other case reported as 2011 PTD 1 in the case of *Alkaram CNG and others v. Federation of Pakistan and others*, on the issue that petrol pump operators and CNG stations are covered under PTR as provided under sections 156A and 234A, respectively, and that they shall not be entitled to claim of any adjustment of withholding tax collected or deducted under any other head. The Honorable High Court held that after discharge of final tax under the Ordinance, the petitioners are being subjected to deduction of transitional amount of tax under section 235 which is not chargeable and therefore will invariably be refunded. A taxpayer cannot be deprived of is property just because he is entitled to refund at some later stage. The honourable court has held as under:

> "It is settled law that where literal construction or plain meaning causes hardship, futility, absurdity or uncertainty the purposive or contextual construction is preferred to arrive at a more just, reasonable and sensible result. "Every law is designed to further the ends of justice and not to frustrate it on mere technicalities. Though the function of the courts is only to expound the law and not to legislate, nonetheless legislature cannot be asked to sit to resolve the difficulties in the implantation of its intention and the spirit of the law. In such circumstances, it is the duty of the court to mould or creatively interpret the legislation by literally interpreting the statute. The statutes must be interpreted to advance the cause of statute and not defeat it'. Reliance is placed on Interpretation of Taxing Statutes by Mittal." [page 107] G
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> "That theory of reading down is a rule of interpretation which is

resorted to by the court when they find a provision read literally seems to offend a fundamental right or falls outside the competence of the particular Legislature."

The learned counsel referred a judgment of the honourahle High Court Lahore reported as 2010 PTD 2502 wherein the controversy revolving around conflict between sections 147 and 235 of the Income Tax Ordinance, 2001 were resolved holding that once the liability of advance tax estimated by the taxpayer is discharged during currency of the tax year, the transitional advance tax must also come to an end, on the principle of interpretation statute, the relevant findings are reproduced herein below:--

> It is settled law that where literal construction or plain meaning causes hardship, futility, absurdity or uncertainty purposive or contextual construction is preferred to arrive at a more just, reasonable and sensible result. "Every law is designed to further the ends of justice and not to frustrate it on mere technicalities". [page 23] H.
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> In such circumstances it is the duty of the court to mould or creatively interpret the legislation by liberally interpreting the statute and the statutes must be interpreted to advance the cause of statute and not to defeat it. "Reliance is placed on Introduction to Interpretation of Statutes by Dr. Avtar Singh (Reprint Edition 2007). [page 24]."
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> And finally decided in para 37 as follows:--
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> "(37) In view of above, this court is confronted with two possible options; either is to strike down impugned section 235 Income Tax Ordinance, 2001 being ultra virus the Constitution and fundamental rights of the citizens or in the alternate, to resort to the time honoured rule of interpretation of employing the theory of reading down and looking beyond the literal meaning of the provision) see Elahi Cotton Mill's case supra)."

The learned counsel for the appellant also cited following cases of the Indian jurisdiction:--

(i) 1080 SCC Tax 124 wherein it is held that where Result in absurdity, injustice and unconstitutionality---law not tenable.

(ii) 208 ITA 649:

Provision of law not to be adopted if it leads to discriminatory or incongruous results---language can be modified to accord with intention of pertinent and to avoid absurdity.

(iii) 2001 PTD 2258:

Interpretation must avoid absurdity.

(iv) 2001 PTD 2484: Leading to unreasonable and absurd consequences not to be applied.

9. We have heard the learned representatives from both the sides on this issue and have also perused the impugned order of the learned CIR(A), the order passed under section 122(5A), the case-law referred, relevant provisions of law and the available record of the case.

We have noted that the Clause (57) of Part IV of Second Schedule to the Income Tax Ordinance, 2001 was introduced vide Finance Act, 2005 which was explained vide Circular No. 1 of 2005 dated 5-7-2005 with an aim to exclude the Large Trading Houses from PTR (Presumptive Tax Regime). Waiver from payment of minimum tax in the case of such Houses was also introduced vide Finance Act, 2006 and a proviso was also added to the effect that these Houses have been exempted from the application of minimum tax for the first ten years starting from the tax year in which the business operations commences. This leads to the controversy as the Revenue states that this is a valid and lawful provision giving exemption only to the new business and not to the old ones irrespective of the fact that they fulfill all the conditions as set forth in Clause (57) ibid.

We have considered the basis on which the order under section 122(5A) of the Income Tax Ordinance, 2001 has been framed. The Revenue is of the view that since the second proviso is there, therefore, they have levied the minimum tax correctly and lawfully.

The learned AR has come with the arguments that this is applicable for taxpayers who are covered with the definition of "tax year" as defined in section 74 of the Income Tax Ordinance, 2001 where "assessment year" has not been mentioned and this gives support to the findings of the learned CIR(A).

He has placed his reliance on the reported case-law 2010 PTD 1924 wherein it is held that the second proviso attached to clause (57) is discriminatory. That reported judgment in its all four is also applicable in this case as tax laws should be imposed on similarly placed persons as provided in Article 25 of the Constitution and duly interpreted by the superior courts holding that classification of persons or things would be rational and reasonable only if it is based on an intelligible differentia or distinction.

When we read the second proviso, it leads to absurdity that a class of persons have been exempted from the payment of minimum tax by fulfilling of certain conditions and a class of persons who are also fulfilling all the conditions as set forth in clause (57) have been excluded

from availing the exemption available under the said clause. The main object of introducing clause (57) was to exclude the Large Trading Houses from Presumptive Tax Regime (PTR) and further giving the waiver from payment of minimum tax. Those taxpayers, who regularly have been contributing revenue to the exchequer under PTR, have been excluded from the benefits, whereas new businesses were given the exclusion from PTR and also the waiver of minimum tax. This inequality on similarly placed persons is beyond any rationale, justification, reason and also violates the intention of the legislature clearly mentioned in Circular No. 1 of 2005, dated 5-7-2005. We are of the opinion that the case reported as 2011 PTD 1 and 2010 PTD 2502 and principles enunciated therein also favours the Taxpayer.

Referred cases of Indian jurisdiction also highlight the issue that the absurdity, injustice, unconstitutionality, discriminatory or incongruous results and absence of intent of pertinent, unreasonable consequences also favours the stance of the taxpayer. The learned counsel of the taxpayer referred to the following para from the book entitled as "N S Bindra's Interpretation of Statutes", tenth edition:

> As a result, the court should strive to avoid a construction which will tend to make the statute unjust, oppressive, unreasonable, absurd mischievous or contrary to public interest. One should avoid construction which would result in absurdity and a give a harmonious construction so as to avoid making one provision of the Act conflict with the other. "(page 276)

Considering the above position, it is clear that the impugned order of the learned CIR(A) deleting the payment of minimum tax under section 113 of the Ordinance, 2001 in the light of fulfilling all the conditions of clause (57) of Part-IV of Second Schedule to the Income Tax Ordinance, 2001 is not open to exception, therefore, the same remains undisturbed and the departmental appeal on this score is also dismissed as effect of the second proviso attached to the Clause (57) of Part-IV of Second Schedule to the Income Tax Ordinance, 2001 putting embargo on exemption from payment of minimum tax by the respondent, being a Large Trading House, who had fulfilled all the required conditions is discriminatory, unjust, unreasonable, absurd mischievous and violative of Article 25 of the Constitution as is not based on any reasonable classification or distinction.

Consequently both the appeals filed by department are dismissed and the relief allowed by the learned CIR(A) for both the tax years is confirmed accordingly.

Both the appeals are decided in the manner referred above.
