[Inland Revenue Appellate Tribunal]

Before Nazir Ahmad, Judicial Member and
Mian Masood Ahmad, Accountant Member

I.T.As. Nos.1377/LB and 1378/LB of 2012, decided on 6th March, 2013.

Imran Afzal, FCA, for Appellant.

Shahid Safdar, D.R. for Respondent.

Date of hearing: 4th October, 2012.

ORDER

MIAN MASOOD AHMAD, ACCOUNTANT MEMBER.---The appellant private limited company has come up in appeal to assail a consolidated appellate order dated 27-8-2012 which was passed by the learned CIR(A), Lahore confirming two separate assessment orders both dated 19-4-2012. Appellant's main grievance is that the taxation officer was not justified in calculating appellant's tax liability under section 221 of the Income Tax Ordinance, 2001 (the Ordinance) by misinterpreting the provisions of section 153 of the Ordinance. Also that the learned CIR(A) was not justified in confirming the same. The impugned order is challenged on the following grounds of appeal which are common to both the years:--

(2) That the learned officers below erred in law by re-adjudicating/re-appreciating the facts of the case which action is beyond the scope of the provisions of section 221 of the Income Tax Ordinance, 2001 (Ordinance).

(3) That the learned officers below erred in applying the third proviso to clause (iii) of subsection (6) of section 153 in case of the corporate sector.

(4) Without prejudice to ground No.3 the learned officers below erred in law by considering the tax deductible under section 153(1) to be minimum tax under section 153(6)(iii) of the Ordinance instead of actual tax deducted.

2. The learned AR reiterates the stance taken before the taxation officer. He vehemently contends that the taxation officer has enlarged the scope of said section 221 beyond all reasonable imaginations, also that there has been mis-appreciation of the said section 153 of the Ordinance. The learned DR, on the other hand, supports the impugned orders for the reasons recorded therein.

3. The moot point requiring adjudication is as to whether appellant's receipts were liable to taxation under normal law tax regime or whether the tax deduction under section 153(1)(b) was to be treated as the minimum tax. Before proceeding further section 153 is reproduced below:--

> **153. Payments for goods and services.**---(1) Every prescribed person making a payment in full or part including a payment by way of advance to a resident person or permanent establishment in Pakistan of a non-resident person--
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> (a) for the sale of goods;
>
> (b) for the rendering of or providing of services;
>
> (c) on the execution of a contract, other than a contract for the sale of goods or the rendering of or providing of services,
>
> shall, at the time of making the payment, deduct tax from the gross amount payable at the rate specified in Division III of Part III of the First-Schedule.
>
> (1A) Every exporter or an export house making a payment in full or part including a payment by way of advance to a resident person or permanent establishment in Pakistan of a non-resident person for the rendering of or providing of services of stitching, dying, printing, embroidery, washing, sizing and weaving, shall at the time of making the payment, deduct tax from the gross amount payable at the rate specified in Division-IV of Part III of the First Schedule.
>
> (2) The gross amount payable for a sale of goods shall include the sales tax, if any, payable in respect of the sale.
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> (4) The Commissioner may, on application made by the recipient of a payment referred to in subsection (1) and after making such enquiry as the Commissioner thinks fit, allow, by order in writing, any person to make the payment without deduction of tax.
>
> (5) Subsection (1) shall not apply to--
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> (a) a sale of goods where -
>
> (i) the sale is made by the importer of the goods;
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> (ii) the importer has paid tax under section 148 in respect of the goods; and
>
> (iii) the goods are sold in the same condition they were in when imported;

(b) a refund of any security deposit;

(ba) a payment made by the Federal Government, a Provincial Government or a Local Government to a contractor for construction materials supplied to the contractor by the said Government or the authority;

(bb) a cotton ginner who deposits in the Government Treasury, an amount equal to the amount of tax deductible on the payment being made to him, and evidence to this effect is provided to the "prescribed person",

(c) the purchase of an asset under a lease and buy back agreement by a modaraba, leasing company, banking company or financial institution; or

(d) any payment for securitization of receivables by a Special Purpose Vehicle to the Originator.

(6) The tax deducted under this section shall be a final tax on the income of a resident person arising from transactions referred to in subsection (1) or (1A):

Provided that subsection (6) shall not apply to companies in respect of transactions referred to in clause (b) of subsection (1):

Provided further that this subsection shall not apply to payments received on account of -

(i) advertisement services, by owners of newspapers and magazines;

(ii) sale of goods and execution of contracts by a public company listed on a registered stock exchange in Pakistan; and

(iii) the rendering of or provision of services referred to in sub-clause (b) of subsection (1):

Provided that tax deducted under sub-clause (b) of subsection (1) of section 153 shall be minimum tax.

(6A) The provisions of subsection (6) in so far as they relate to payments on account of supply of goods from which tax is deductibles, under this section shall not apply in respect of a company being a manufacturer of such goods.

(8) Where any tax is deducted by a person making a payment to a Special Purpose Vehicle, on behalf of the Originator, the tax is credited to the Originator.

(9) In this section, -

"prescribed person" means -

(a) the Federal Government;

(b) a company;

(c) an association of persons constituted by, or under law;

(cc) a non-profit organization;

(d) a foreign contractor or consultant;

(e) a consortium or joint venture;

(f) an exporter or an export house for the purpose of subsection (1A);

(g) an association of persons, having turnover of fifty million rupees or above in tax year 2007 and onwards;

"services" includes the services of accountants, architects, dentists, doctors, engineers, interior decorators and lawyers, otherwise than as an employee

"sale of goods" includes a sale of goods for cash or on credit, whether under written contract or not.

"manufacturer" for the purpose of this section means, a person who is engaged in production or manufacturing of goods, which includes?

(a) any process in which an article singly or in combination with other articles, material, components, is either converted into another distinct article or produce is so changed, transferred, or reshaped that it becomes capable of being put to use differently or distinctly; or

(b) a process of assembling, mixing, cutting or preparation of goods in any other manner.

4. The following 'proviso' had been inserted through Finance Act, 2009:--

"Provided that tax deducted under sub-clause (b) of sub-section (1) of section 153 shall be minimum tax."

5. The amendments were effective July 4, 2009. After the amendments had become effective (on July 1, 2009), the Federal Board of Revenue issued following guidelines/instructions regarding the aforesaid amendments:--

(i) Instructions dated July 1, 2009 in which LTUs/RTOs were

advised that the tax deducted under section 153(1)(b) of the Income Tax Ordinance, 2001 was a `minimum tax '

(ii) Circular No. 3 of 2009 dated August 18, 2009 in which it was clarified that "..... tax deducted on payments made for rendering or providing of services will be considered as minimum tax and henceforth all the taxpayers falling in the ambit of section 153(1)(b) shall file return under the normal tax regime instead of statement under final tax regime"; and

(iii) Circular No. 6 of 2009 dated August 18, 2009 in which it was clarified that the 'proviso' treating the tax deducted as 'minimum tax' was not applicable to corporate sector and as such for these taxpayers the provisions of section 113 of the Income Tax Ordinance, 2001 would remain applicable regarding 'minimum tax'.

6. No further guidelines/instructions/circulars were issued in the context of the aforesaid provisions/amendments until April 26, 2011 when further instructions were issued by the Federal Board of Revenue vide C.No. 1(25)WHT/2009 in which it was clarified that:--

> the matter has been examined again and it is ruled in supersession of the earlier instructions issued through Circular No. 6 of 2009 that the tax deducted on payments made for rendering or providing of services is to be treated as minimum tax and the taxpayers falling in the ambit of section 153(1)(b) of the Ordinance shall file return of income instead of a statement under Final Tax Regime.

7. In order to properly appreciate the legal provisions, it would be appropriate if the relevant provisions of section 153 of the Ordinance are examined/analyzed as a whole. An analysis of the relevant provisions of law, as reproduced above, suggests that there are number of 'provisos' with reference to subsection (6) and these need to be interpreted under the principles of `harmonized construction'. It is to be kept in mind that a 'proviso' is generally something engrafted on the main enactment. The role and function of a 'proviso' is to create an exception out of a previous enactment in an earlier part of a section, something which but for the 'proviso' would have fallen within the scope of enactment. It must be considered only in relation to, and harmoniously with, the principal matter to which it stands as a 'proviso' and not as qualifying or modifying some other enactment. The proper canon of constructing a section which has several 'provisos' is to read the section and the 'provisos' as a whole, try to reconcile them and give a meaning to the whole of the section along with the 'provisos' with its comprehensive

and logical meanings 1999 SCMR 563 = 1999 PTD 1173, PLD 1971 SC 252, 1977 SCMR 371, PLD 1961 SC 119 etc.].

8. Under these principles, it follows:--

(i) First of all, the entire subsection (1), covering sales, services and contracts was brought in the final tax regime for all residents **[subsection (6)]**;

(ii) Through first 'proviso' the corporate sector was excluded from the scope of final tax regime to the extent of 'services rendered/provided---leaving behind, within the scope of final tax regime, the 'sale' and 'contract' for all resident recipients and services for resident non-corporate sector **[first proviso]**;

(iii) This was followed by another exclusion (this is evident from the fact that the legislature introduced the expression '**provided further**' which means that earlier exclusion remains intact and the latter was in addition to the earlier exclusion) having an effect of excluding **[second proviso]**:

(a) advertisement services by the owners of newspapers/magazines (this exclusion pertained to resident non-corporate recipients - corporate recipients were already out of final tax regime through first proviso); and

(b) sale/contract receipts in the case of listed companies---earlier these remained within the scope of final tax regime without being taken out/ excluded by first proviso;

(iv) This was followed by the amendments introduced vide Finance Act, 2009 which modified the aforesaid second proviso (again leading to conclusion that first proviso remained intact) through insertion of **sub-clause (iii)** in the second proviso, the effect of which was to exclude from the ambit of final tax regime the **'remaining'** services (i.e. the services rendered by non-corporate sector---which were previously there, by default, due to exclusion of corporate sector);

(v) In connection with the aforesaid 'latest' exclusion another proviso was added to state that tax deducted in such cases would be a minimum tax **[proviso to sub-clause (iii)]**;

9. The fact that the latest proviso pertained to the most recent xclusion is evident from the **'placement'** of the proviso which relates xclusively to sub-clause (iii) and not generally. The proviso had been ppended to sub-clause (iii) which referred to exclusion of services endered by non-corporate sector only as the corporate sector stood lready excluded through first proviso. The position with respect to

'corporate sector' remained unchanged being covered by the first proviso and taxable otherwise on net-income basis. Consequently, taxation of corporate service providers (generally) continued to be governed by normal taxation and on net income basis and as such minimum tax regime was not applicable.

10. The aforesaid interpretation derives further strength from section 113 of the Income Tax Ordinance, 2001. The 'minimum tax regime' introduced through section 153 of the Income Tax Ordinance, 2001 could not be said to be applicable to 'corporate sector' because in this case the minimum tax regime was already in place in terms of section 113 of the Ordinance which was (then) restricted to corporate taxpayers only. This minimum tax regime under section 153 of the Income Tax Ordinance, 2001 was applicable to non-corporate taxpayer/ service providers who were otherwise not the subject matter of section 113 of the Ordinance. If the position was otherwise, clearly legislature could have incorporated some exclusion in section 113 of the Income Tax Ordinance, 2001 to provide that in such cases minimum taxation would be governed by section 153 of the Income Tax Ordinance, 2001.

11. It, therefore, follows from the above-referred systematic analysis that:--

(i) in the case of the corporate service providers (generally) only the first proviso was relevant;

(ii) the second proviso specified exclusions over and above the first proviso i.e. those not covered by the first proviso;

(iii) the amendments made through Finance Act, 2009 only modified the second proviso as these did not alter, in any way, the first proviso and exclusions covered therein;

(iv) the amendment providing minimum tax was a proviso to sub-clause (iii) which in itself related to non-corporate service providers; and

(v) in the case of corporate service providers, the minimum tax regime under section 113 of the Ordinance remained applicable;

12. It has been a practice for decades that soon after the placement of Finance Bill before the National Assembly every year commentaries are published by almost all the leading chartered accountants, setting out their understanding of the proposed amendments. It transpires that their understanding of the subject amendment was the same. This is evident from the following:--

(i) **KPMG Taseer Hadi** - Final Tax Regime applicable to

commercial importers, importer of edible oil and packing material, exporters and non-corporate service sector withdrawn, tax deducted/collected to be treated minimum tax;

(ii) **Deloitte M. Yousaf Adil Saleem** - By virtue of the proposed amendment the tax deducted under subsection (b) of section 153, while making payment for rendering of services, is to be treated as minimum tax in the case of an individual and association of persons;

(iii) **Ernst & Young Ford Rhodes Sidat Hyder** - It is relevant to note that tax deducted for payment for rendering of services by a non-corporate taxpayer is presently treated as "final tax". The Bill now proposes to insert clause (iii) in the second proviso of subsection (6) of this Section to the effect that such tax deducted shall be a "minimum tax" instead of same being treated presently as "final tax";

(iv) **A. F. Ferguson** - The tax suffered pursuant to section 153 by a taxpayer on rendering or providing of services will be considered as 'Minimum tax', Henceforth, similar to the cases of Companies, all other taxpayers will also be required to file a return under the normal regime instead of statement under FTR;

(v) **Anjum Asim Shahid Rahman** - Rendering or providing services was brought under final tax regime through an amendment vide Finance Act, 2006 for non-corporate taxpayers. **The bill proposes to exclude such services rendered by** non-corporate taxpayer from the ambit of final tax regime and to treat the tax deducted as minimum tax payable by such service providers if the tax payable on net income is lower than the amount so deducted;

(vi) **Riaz Ahmad, Siqib, Gohar - A major shift has been proposed for calculation of tax liability of persons (other than a company) rendering or providing services**. Under the existing provisions of law, the tax deducted from payment received on account of rendering of or providing of services is treated as final tax on such income that is now proposed to be minimum tax.

13. It was, thus, a general understanding that the amendment only applied to non-corporate service providers and as such there was no modification/alteration regarding the scheme of taxation applicable to corporate service providers. In the context of the matter under consideration, there is also a need to critically analyze the preceding and

succeeding clarifications issued by the Federal Board on the matter. It reveals:

(i) The provisions of Circular No. 3 of 2009 dated July 17, 2009 stated "as a result of amendment made in subsection (6), tax deducted on payments made for rendering or providing of services will be considered as minimum tax and henceforth **all the taxpayers falling in the ambit of section 153(1) (b) shall file return under the normal tax regime instead of statement under final tax regime**".

14. It could arguably be read to suggest that the amendment applied only to such service providers which were previously covered in the scope of 'final tax regime'. Since, the companies were previously taxable under normal regime without any cap or ceiling, these continued to remain subject to the then existing regime:--

(ii) The clarification dated April 26, 2011 provided "the matter has been examined again and it is ruled in supersession of the earlier instructions issued through Circular No. 6 of 2009 that the tax deducted on payments made for rendering or providing of services is to be treated as minimum tax **and the taxpayers falling in the ambit of section 153(1)(b) of the Ordinance shall fill return of income instead of a statement under Final Tax Regime.**"

15. This clarification again could be read to refer to the amendment exclusively applicable to those service providers which, prior to amendments, were taxable under final tax regime. Since the corporate service providers were not covered by the final tax regime under the then existing law therefore the amendment did not apply to such service providers.

16. There is also a need to examine the matter in the context of position emerging post amendments introduced vide Finance Act, 2011. Through Finance Act, 2011 the entire section 153 of the Income Tax Ordinance, 2001 was redrafted and as such the entire service sector, comprising both corporate and non-corporate service providers, were brought into a minimum tax regime.

17. Upon receiving representations from various quarters the Federal Government notified S.R.O. 1003(I)/2011 and incorporated clause 79 in Part IV of the Second Schedule to the Income Tax Ordinance, 2001. Through this insertion corporate service providers were again taken out of minimum tax regime thus reinstating the position that was generally understood to be applicable prior to this.

On the basis of the above discussion it is concluded that:

(i) The understanding expressed in Circular No. 6 of 2009 was not contrary to the provisions of law. Almost all the leading practitioners expressed the same understanding in the commentaries published soon after the placement of Finance Bill before the National Assembly. On the other hand, for arguments sake, if the understanding expressed in the Circular was so patently contrary to law this could have been withdrawn soon after;

(ii) The clarifications issued by the Federal Board of Revenue both prior to and subsequent to issuance of Circular No. 6 of 2009 also did not unequivocally clarified to the contrary. In both the clarifications reference with regard to the amendment was made to such service providers which were previously covered by the final tax regime. Since the corporate service providers were previously covered by the normal tax regime, therefore, the text of these clarifications could be construed to suggest that the amendment only altered the tax regime in cases where previously final tax regime was applicable; and

(iii) The position, even after the amendments introduced vide Finance Act, 2011, has not changed since the issuance of S.R.O. 1003(I)/2011 has reinstated the position for corporate service providers in a manner that in such cases tax liability would be governed by the normal tax regime without any cap, or ceiling.

18. Another issue in the instant appeals is application of said section 221. While we agree to the proposition that a wrong tax calculation may be corrected under section 221 of the Ordinance but this has to remain within the parameters of rectification of error as defined by the courts of this country. By now, it is a well settled that controversial or debatable issues are outside the ambit of rectification. And that is precisely what has been done in the instant case.

19. Result of above discussion is obvious. The impugned orders of two authorities below are found to be suffering from legal as well as factual infirmities. These merit cancellation. It is ordered accordingly.

20. Consequently appeals filed by the taxpayer succeed.
