BEFORE THE APPELLATE TRIBUNAL INLAND REVENUE, LAHORE

ITA NO. 1098/LB/2014
Tax Year 2010

ITA NO. 1097/LB/2014
Tax Year 2011

Abacus Consulting Technology (Pvt) Limited
Abacus House, 4- Noon Avenue
New Muslim Town Lahore. ..... **Appellant**

VERSUS

The Commissioner Inland Revenue
Zone-I, Large Taxpayers Unit,
Lahore. .....**Respondent**

Appellant by:	**Mr. M. Iqbal Hashmi (Advocate)** **Mr. Qadeer Ahmad (I.T.P)**
Respondent by:	**Tariq Javaid (D.R)** **Asif Rasheed (Author)**
Date of hearing:	**10/06/2014**
Date of order:	**10/06/2014**

O R D E R

These two appeals have been filed by the taxpayer for Tax Year 2010 & 2011 respectively against impugned orders of the learned CIR (A) dated 12/05/2014 and 13/05/2014. The learned CIR Appeals orders were passed against the order of the Assessing Officer dated 31/12/2013 for tax year 2010 and order dated 29/11/2013 for tax year 2011.

The brief facts of these appeals are that taxpayer is a Private Limited Company deriving income from providing management, consultancy services

and export of software & outsourcing services as professional organization. The impugned orders have been contested on the following grounds:-

Grounds of Appeal (Tax Year 2010)

2. ***"The Commissioner Inland Revenue (Appeals) is not justified to reject the contention of the appellant that proper opportunity of being heard was not provided to the appellant. The observation of the Commissioner Inland Revenue (Appeals) that "officer finalized the impugned order on 31-12-2013 i.e. after almost six months of proceedings" is without any basis and factually not correct. That only two days time was granted to submit the reply of show cause notice.***

3. ***That order is liable to be cancelled as the same has been passed on 31-12-2013 whereas the case was not fixed for hearing on 31-12-2013 case was fixed for hearing on 30-12-2013.***

4. ***That order u/s 122(1)/122(5) of Income Tax Ordinance, 2001 has wrongly been passed and have wrongly been confirmed by the Commissioner Inland Revenue (Appeals) therefore the same is liable to be cancelled.***

5. ***That case of the appellant has wrongly been selected u/s 214C read with section 177 of Income Tax Ordinance, 2001 for total audit hence order is liable to be cancelled.***

6. ***That addition amounting to Rs. 82,233,476/- u/s 24 on account of Licensing Fee has wrongly been made and the same has wrongly been confirmed by the Commissioner Inland Revenue (Appeals) which is liable to be deleted.***

7. ***That licensing fees has wrongly been amortized for 10 years u/s 24 of Income Tax Ordinance, 2001 which is liable to be deleted. That addition u/s 24 of Income Tax Ordinance, 2001 is without definite information.***

8. ***That addition amounting to Rs. 950,847/- u/s 21(c) of Income Tax Ordinance, 2001 on account of Short Deduction on account of Car Parking has wrongly been made and has wrongly been confirmed by the Commissioner Inland Revenue (Appeals) which is liable to be deleted.***

9. ***That addition amounting to Rs. 5,721,597/- u/s 21(c) of Income Tax Ordinance, 2001 on account of Difference in Rate of deduction on***

account of payment against rent has wrongly been made and has wrongly been remanded by the Commissioner Inland Revenue (Appeals) which is liable to be deleted.

10. ***That addition amounting to Rs. 143,778/- u/s 21(c) of Income Tax Ordinance, 2001 on account of Out of Pocket Expenses has wrongly been made and has wrongly been confirmed by the Commissioner Inland Revenue (Appeals) which is liable to be deleted.***

11. ***That addition amounting to Rs. 3,241,735/- u/s 21(c) of Income Tax Ordinance, 2001 on account of Short Deduction of Tax on account of "out sourcing work" has wrongly been made and has wrongly been remanded by the Commissioner Inland Revenue (Appeals) which is liable to be deleted.***

12. ***That addition amounting to Rs. 228,509/- u/s 21(c) of Income Tax Ordinance, 2001 on account of Short Deduction of Tax on account of Internet Hosting has wrongly been made and has wrongly been remanded by the Commissioner Inland Revenue (Appeals) which is liable to be deleted.***

13. ***That addition amounting to Rs. 2,843,075/- u/s 21(l) of Income Tax Ordinance, 2001 on account of Office Stationery has wrongly been made and has wrongly been confirmed by the Commissioner Inland Revenue (Appeals) which is liable to be deleted.***

14. ***That addition amounting to Rs. 8,503,570/- u/s 24 of Income Tax Ordinance, 2001 on account of Staff Training has wrongly been made and has wrongly been confirmed by the Commissioner Inland Revenue (Appeals) which is liable to be deleted.***

15. ***That staff training expenses has wrongly been amortized over a period of five years u/s 24 of Income Tax Ordinance, 2001. Therefore addition on account of amortization is liable to be deleted as the same is without definite information.***

16. ***That minimum tax u/s 153(1)(b) of Income Tax Ordinance, 2001 amounting to Rs. 53,846,959/- has wrongly been charged and has wrongly been confirmed by the Commissioner Inland Revenue (Appeals) which is liable to be deleted.***

17. ***That taxation officer has wrongly charged tax amounting to Rs. 53,846,959/- u/s 153(1)(b) of Income Tax Ordinance, 2001 and has wrongly been confirmed by the Commissioner Inland Revenue (Appeals) as tax on account of Services is not minimum tax in the case of the company".***

Grounds of Appeal (Tax Year 2011)

2. ***"That proceedings under section 122(5A) of Income Tax Ordinance 2001 have wrongly been initiated and has wrongly been confirmed by the Commissioner Inland Revenue (Appeals) hence order is liable to be cancelled.***

3. ***That addition on account of proration of expenses amounting to Rs. 35,303,556/- has wrongly been made and has wrongly been confirmed by the Commissioner Inland Revenue (Appeals) which is liable to be deleted. Details is as under:-***

Income determined u/s 122(5A)	***Rs. 12,141,813***
Loss Declared	***Rs. (23,161,743)***

4. ***That proration of expenses has wrongly been changed and has wrongly been confirmed by the Commissioner Inland Revenue (Appeals) therefore addition on account of proration of expenses is liable to be deleted.***

5. ***That working of addition on account of proration of expenses has not been confronted to the appellant therefore addition on account of proration of expenses has wrongly been made which is liable to be deleted.***

6. ***That minimum tax u/s 153(1)(b) of Income Tax Ordinance, 2001 amounting to Rs. 38,527,047/- has wrongly been charged and has wrongly been confirmed by the Commissioner Inland Revenue (Appeals) which is liable to be deleted.***

7. ***That tax on account of services has wrongly been treated as Minimum Tax in the case of company and has wrongly been confirmed by the Commissioner Inland Revenue (Appeals)".***

Appeal for Tax Year 2010

The learned ARs of the appellant argued that proper opportunity of being heard was not provided to the appellant. It is submitted that the appellant filed complete books of accounts alongwith vouchers before the assessing officer on 24-06-2012 which is also mentioned at Page No 2 of the order. Relevant Portion reads as under:

"The taxpayer was requested to provide ledgers vide this office letter No 10923 dated 06-06-2012 for 11-06-2012 which was filed on 24th June 2012 in two volumes and vouchers in 5 box files"

The assessing officer issued notice under section 122(9) read with section 122(5) of Income Tax Ordinance 2001 vide letter dated 03-12-2013 for compliance on 11-12-2013. Subsequently, the assessing officer issued final notice No 5414 dated 24-12-2013 for compliance on 30-12-2013. In the last notice computerized date are mentioned as 26-12-2013, 28-12-2013 & 29-12-2013 which were holidays. Only one day was provided by the assessing officer to the appellant for filing of reply of notice which is against the law laid down by the Honourable Lahore High Court Lahore vide case law reported as 2012 PTD 964 (LHC) and as per Circular No 7(2) dated 01-02-1994. Relevant para 5 of the order is reproduced as under:

"5. At the out-set it is pertinent to notice that the C.B.R. Circular No.7(2) dated 1-2-1994 manifests that three opportunities of clear 15 days should be offered to the assessee before making estimation/ assessment. In the instant case the Assessing Officer issued first notice to the respondent on 14-4-2010 allegedly served on 17-4-2010 with a date of compliance i.e. 22-4-2010 whereas the second notice was issued on 24-5-2010 allegedly served on 26-5-2010 with a date of compliance i.e. 31-5-2010. It is crystal clear that in both the notices only five days time (each) was provided to the respondent assessee to make the explanation/reply violative to the CBR Circular cited above. Therefore amended assessment order passed on 31-5-2010 was obviously made without providing reasonable opportunity of explaining the position and thus the same was not tenable in law."

Reliance was also placed on case law reported as 2013 PTD 1186 (Trib). Relevant Para reads as under:

"4. After hearing both the parties and going through the relevant orders, I am of the considered view that the addition under section 111(1)(b) has wrongly been made since no definite/correct information was available with the department because only one vehicle belongs to the taxpayer which was also obtained on lease under hire purchase agreement from bank Alfalah Limited, Multan and in this regard three installments were paid upto 30-6-2010, hence the same cannot be treated as investment. The second vehicle did not belong to the taxpayer for the reason that the department has failed to verify the ownership as well as the exact invested amount which means no definite information was available with the department as envisaged in section 122 of the Income Tax Ordinance, 2001, The above infirmities clearly establish that the proceedings of assessment are altogether illegal and not warranted by the law. Even otherwise, no proper opportunity of being heard was allowed to the taxpayer which is also against the fundamental rules of

natural justice since no one can be condemned unheard as held in the reported judgment cited as 1994 SCMR 2232."

The learned AR of the appellant submitted that the learned CIR(A) is not justified to say that proper opportunity of being heard was provided to the appellant whereas only one day was provided by the assessing officer.

The learned AR argued that it is clear that proper opportunity of being heard has not been provided to the appellant therefore order is liable to be cancelled.

The learned ARs argued that licensing fee amounting to Rs 82,233,476 has wrongly been amortized. According to the learned AR the assessing officer made addition on account of licensing fee amounting to Rs 82,233,476 with the observation that "***as per Note No 21 to the accounts, you have claimed payments to sub-contractor amounting to Rs 92,470,529. Scrutiny of ledger reveals that expenses have been booked as software licensing fees. As the benefit of expense is not confined to one year therefore is liable to be amortized in terms of section 24 of the Income Tax Ordinance, 2001 over a period of useful life of the expenses. By determining the useful life of expense as ten years***"

It is argued that the appellant sells software to different clients after purchase from the SAP Malaysia and license fee is paid to use the software which is necessary for maintaining/running approved software and no tangible assets has been created. The appellant is engaged in purchase and sale of software and difference is offered for taxation. In these circumstances question of acquiring the intangible asset does not arise.

The learned ARs of the Taxpayer also submitted chart showing sale and purchase of software which is reproduced as under:

CLIENT	INCOME	EXPENTITURER	NET

			OFFERED FOR TAXATION
Fauji Fertizers Company	21,436,853	17,864,145	3,572,708
Fauji Fertizers Company	49,845,767	39,169,687	10,676,080
FFBL	18,645,000	18,041,411	603,589
FFBL	10,671,464	9,339,700	1,331,764
FFBL	3,340,806	2,888,307	452,499
Farugue (Private) Limited	2,080,875	1,904,309	176,566
Academy Annual Program fee	-	273,600	(273,600)
Academy Lic Fee	-	752,268	(752,268)
Academy Mustafa, Ali, Khan	953,000	385,578	567,422
Academy Aftab, Rehman, M. Afif	718,907	391,437	327,470
Academy Zafar Saeed	123,763	123,763	-
Academy Irfan Ahmad Khan	273,075	123,763	149,312
Academy Laila Ijaz (employee)	-	123,763	(123,763)
Academy Kazim Ali	265,000	123,763	141,237
Academy Fakhra Gulzar (Employee)	-	123,763	(123,763)
Cacademy Sufwan Ahmed (Employee)	-	123,763	(123,763)
Academy Javed Iqbal (employee)	-	123,763	(123,763)
Academy Kamran, Mehvish, Furqan	790,000	360,215	429,785
Academy Exam Fee	136,450	113,463	22,987
Academy Muhammad Yasin	236,900	120,079	116,821
Total	109,517,860	92,470,540	17,047,320

The learned AR further submitted that useful life has wrongly been determined for 10 years without definite information regarding specific information for purchasing the asset. Determination does not mean estimation. Hence addition was made without definite information therefore the same is liable to be deleted. Reliance is placed on case law reported as 2013 PTD 884 (H.C Lahore). Relevant Para No 12 & 13 reproduced as under:

"12. The term "definite information" in section 122(5) of the Ordinance is not just any information but definite enough to satisfy the concerned officer that income chargeable to tax of an assessee has escaped assessment or total income of 'an assessee has been under-assessed, etc°. "Definite" means" indisputable, known for certain, explicitly precise, clearly defined, leaving nothing to established beyond doubt and cut and dried. Definite information is, therefore, that select information which falls within the restrictive meaning of the word "definite" explained above. The law also provides that definite information must be acquired from audit or otherwise. Applying the

interpretative tool/doctrine of ejusdem generis which literally means "of the same kind or class" and the doctrine provides that where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned the word "otherwise" appearing next to the word "audit" in section 122(5) of the Ordinance on the basis of the above doctrine means a methodology akin or similar to audit where some determined, final, certain, indisputable, calculated information is picked up from any available record of the assessee. "Otherwise," therefore, does not mean putting information through further process of calculation by the department. The word "acquired" used in section 122(5) of the Ordinance which literally means to "gain possession of" in the present context connotes that the information already exits and has to be picked up from the records or documents. This acquisition provides no margin for incomplete, imprecise and inexact information to be completed through further calculation or processing as that would not be acquiring information but analyzing it.

13. Reading of section 122(5) of the Ordinance, therefore, shows that information in a definite, final and conclusive form must already exist in some document or record at the time of acquisition, Any information which is incomplete or requires further processing falls outside the domain of definite information and can best 'pass for a departmental opinion, judgment, guesstimate, approximation or estimate.'

- ADDITION U/S 21© ON ACCOUNT OF SHORT DEDUCTION (CAR PARKING) (RS 950,847)
- ADDITION U/S 21(C) ON ACCOUNT OF SHORT DEDUCTION OF TAX ON ACCOUNT OF RENT (Rs 5,721,597)
- ADDITION UNDER SECTION 21(C) ON ACCOUNT OF OUT OF POCKET EXPENSES (Rs 143,778)
- ADDITION U/S 21© ON ACCOUNT OF SHORT DEDUCTION OF TAX (OUTSOURCING WORKS) (Rs 3,241,735)
- ADDITION U/S 21(C) ON ACCOUNT OF SHORT DEDUCTION OF TAX (INTERNET HOSTING) (Rs 228,509)

The learned AR of the appellant argued that tax has duly been deducted and deposited wherever it was applicable and also mentioned in the statement under section 165 of Income Tax Ordinance 2001 therefore addition has wrongly been made by the assessing officer on account of car parking, rent, out of pocket expenses, outsourcing works and internet hosting which should have been deleted by the learned CIR(Appeals).

He has argued that addition under section 21(l) on account of office stationary (Rs 2,843,075) has wrongly been made as all the payments made through banking channel therefore addition should have been deleted by the learned CIR(Appeals).

He has submitted that addition under section 24 amounting to Rs. 8,503,570/- on account of Staff Training has wrongly been made as the assessing officer had no definite information hence addition is liable to be deleted.

The learned AR of the appellant argued that staff training comprises of two distinct items. (i) Company conducted staff training under the KPK PRP Reforms Program for Officers of the Government of KPK. This was charged to the client and reflected as income of the company and expenses incurred on conducting the training has been charged as an expense. (ii) The company provides training to its staff to enhance their skills and technical ability and charged as an expense in the year in which training is conducted. In some of the cases, the company also gets a Bond signed from an employee for a specified period but it is normally limited to one year. In all the previous years department has already accepted these expenses as revenue expenditure therefore the addition is liable to be deleted. The learned AR submitted chart which reads as under: -

Sr. No.	Text	Amount
1	Training expense incurred on behalf of client	5,193,398
2	Seminar and workshop expense paid by company	365,902
3	Training expense paid by company	1,581,368
4	International training expense paid by company	3,488,795
	Total	10,629,463

The learned AR of the appellant argued that minimum tax u/s 153(1)(b) (Rs 53,846,959 for Tax Year 2010 and Rs 38,527,047 for Tax Year 2011 has wrongly been treated as minimum tax.

He has submitted that the assessing officer wrongly charged minimum tax amounting to Rs 53,846,959 & Rs 38,527,047 under section 153(1)(b) of Income

Tax Ordinance 2001 for Tax Year 2010 & 2011 and has wrongly been confirmed by the CIR(A) in both the tax years.

It is argued that issue of minimum tax under section 153(1)(b) of Income Tax Ordinance 2001 has already been decided by this Tribunal vide order in ITA No 763/LB/2012 dated 18-10-2012. Relevant para 10 of the order is reproduced as under:

"10. After hearing both the parties and perusing the assessment records and case laws referred by the learned Representative we are of the view that in the presence of specific proviso the sub section (6) is not applicable to companies and tax deducted under section 153(1)(b) on account of services rendered is not minimum tax in case of companies."

Refund application for Tax Year 2010 has wrongly been rejected by treating the tax deducted as minimum tax. Original order for Tax Year 2011 has wrongly been rectified under section 221 of the Income Tax Ordinance, 2001 and the Commissioner Inland Revenue Appeals has also wrongly directed the Assessing Officer to recover the short deduction under section 162 of the Income Tax Ordinance, 2001.

As a result of above discussion, orders of both the authorities below are hereby cancelled and both the appeals filed by the taxpayer tax year 2010 & 2011 are allowed while the cross appeal filed by the department for the tax year 2011 bearing ITA No 1354/LB/2012 is dismissed."

He has further argued that in another order of the Tribunal in ITA No. 2014/15/LB/2013 dated 20-11-2013 this issue has been decided in favour of the tax payer. Relevant para is reproduced as under:

> ***"We are of the view that in the presence of specific proviso under sub section (6) the said sub section is not applicable to companies and tax deducted under section 153 (1)(b) on account of services rendered is not minimum tax in case of companies. Even otherwise where an issue has been decided by this Tribunal, the Addition Commissioner Inland Revenue has no jurisdiction to violate the same while exercising powers under section 122 (5A) of Income Tax Ordinance, 2001. Hence, original deemed orders have wrongly been amended under section 122 (5A) of the Income Tax Ordinance, 2001 and the Commissioner Inland Revenue (Appeals) has rightly vacated the orders, we therefore require no interference in the matter."***

The learned AR of the appellant submitted that order passed in accordance with law laid down by this Tribunal cannot be termed as escaped assessment / under assessed or erroneous by the taxation officer therefore, the orders imposing minimum tax are not maintainable same is liable to be deleted. The learned AR of the appellant further submitted that issue already decided by the Higher Courts cannot be termed as erroneous by Additional Commissioner.

Tax Year 2011

The learned AR of the appellant argued that addition on account f proration of expenses (RS 35,303,556) has wrongly been made. No defect in computation chart has been specified / alleged. Without pointing out error proceedings u/s 122 (5A) have wrongly been initiated.

He has submitted that show cause notice is vague as no error in computation was specified and no addition was confronted. Reliance was placed on the case law reported as 108 TAX 188 of the Hon'ble Lahore High Court. Relevant pare no. 8 is reproduced as under:

> ***8. Show Cause Notice, is a foundational document, which is to comprehensively describe the case made out against the taxpayer by making reference to the evidence collected in support of the same. It is the narration of facts in the Show Cause Notice alongwith the supporting evidence which determines the offence attracted in a particular case. Show Cause Notice is not a casual correspondence or a tool or license to commence a roving inquiry into the affair of the taxpayer based on assumptions and speculations but is a fundamental document that carries definitive legal and factual position of the department against the taxpayer.***

The learned AR of the appellant submitted that addition was not confronted in the show cause notice hence, liable to be deleted. Reliance was placed on the case law reported as **101 TAX 293** Honorable Sindh High Court. Relevant page 296 para 7 is reproduced as under:

"It is a trite law that before making any addition the aggrieved party has to be given

an opportunity of hearing as enunciated in the principle "audi alteram partem". As no such notice was given by the A.C. the Tribunal was not justified in deleting the said addition made under the provisions of sections 111(1)(c) of the Ordinance by the A.C. The tribunal has further observed that the addition in respect of inadmissible expense claimed against rental income was also not correct since on the face of the record no such expense has been claimed by the respondent company. The decision therefore given by the Tribunal in our view is based upon ascertainment of the facts only"

Reliance was also placed on case law decided by this Tribunal in ITA No. 1468/LB/2009 dated 23-01-2010. Relevant Para reads as under:

"We, therefore, hold that the amount proposed to be adopted must be the confronted to the assesse under notice. The failure on the part of the asses. officer shall vitiate the addition altogether as running against spirit of the in Sec 122(9) of the Income Tax Ordinance 2001."

4. The learned DR on the other side, argued that the assessing officer rightly made the additions in both the tax years and the learned CIR(Appeals) rightly confirmed/remanded back the additions made by the assessing officer has rightly confirmed the tax charged under section 153(1)(b) of Income Tax Ordinance 2001 as the same is minimum tax in the case of company. The action of the Assessing Officer and the Learned CIR(Appeals) is in accordance with law.

The author of the order has also attend the proceedings and supported his order for Tax Year 2010 and stated that proper opportunity of being heard was provided to the appellant and the taxpayer failed to submit the reply of the notice and the learned CIR(Appeals) has rightly confirmed the order.

5. We have considered the arguments from both the sides and have also perused the impugned orders of the learned CIR(Appeals) and both the orders passed by the officers for the years under appeal and also have considered the relevant provisions and the case law referred. The chart submitted by the appellant showing purchase and sale of software makes it clear that no asset has been acquired by the appellant, hence we are of the

view that addition on account of licensing fee amounting to Rs 82,233,476 has wrongly been made and has wrongly been confirmed by the learned CIR(Appeals) as no asset was created by the appellant and appellant claimed these expenses on account of purchase of software and amount received from the customers has also been offered for taxation as income thereof licensing fees cannot be amortized for the reasons mentioned supra, hence the same is ordered to be deleted.

Regarding the addition made on account of staff training, we are of the view that addition on account of amortization of expense on account of staff training over 5 years is without any definite information, as the training provided to the staff of KPK Government cannot be termed as creation of assets. Second submission of the Appellant is that the taxpayer provides training to staff to enhance their skill and technical ability and to know day to day changes in the field of software technology, as the taxpayer is deriving income as software and IT enabled and Management Consultancy, this training cannot be said to have created as asset as such training may lose its utility within one year or even in less time due to rapid changes in technology hence addition is ordered to be deleted.

Regarding the additions under section 21© of Income Tax Ordinance 2001 on account of car parking, rent, out of pocket expenses, outsourcing work, internet hosting and addition on account of 21(l) of Income Tax Ordinance 2001, the learned AR of the taxpayer submitted that tax has properly been deducted and deposited in the government treasury and payment has been made through banking channels. After considering the submission of the learned AR, we are of the view that these additions under section 21© & 21(l) require further deliberation and are therefore, remanded back to the assessing officer with the direction to verify the factual position regarding deduction of tax for maintainability of section, action under section 21(c) and payments made through cross cheque for maintainability of action

under section 21(l) and after verification a speaking order should be passed after providing proper opportunity of being heard to the taxpayer.

Regarding the charging of minimum tax under section 153(1)(b) of Income Tax Ordinance 2001 for Tax Year 2010 and Tax Year 2011. This common issue has already been decided in many cases mentioned supra therefore respectfully following the cases decided by this Tribunal, it is held that tax under section 153(1)(b) of Income Tax Ordinance 2001 is not minimum tax in the case of company therefore demand created under section 153(1)(b) of Income Tax Ordinance 2001 in the case of taxpayer is hereby deleted for both the tax years i.e. (Tax Year 2010 & 2011).

Regarding the addition made on account of proration of expenses for Tax Year 2011, we are of the view that no specific notice was issued by the Taxation officer and the addition has been made on the basis of vague show cause notice and exact amount of addition was also not confronted to the taxpayer, hence addition on account of proration of expenses for Tax Year 2011 is hereby ordered to be deleted.

6. Both the appeals filed by the appellant / taxpayer are allowed to the extent and in the manner as indicated above.

(JAWAID MASOOD TAHIR BHATTI)
CHAIRPERSON

(FIZA MUZAFFAR)
ACCOUNTANT MEMBER