APPELLATE TRIBUNAL INLAND REVENUE, LAHORE BENCH, LAHORE.

ITA NO.544/LB/2014
(Tax Year 2011)

M/s. A. H.Y. Plastic Industries, Lahore. .....Appellant

Vs

The CIR, ZoneII, RTO, Lahore. .....Respondent

Appellant by:- Mr. Monim Sultan, Advocate

Respondent:- Mr. Sajjad Tasleem, D.R.

Date of hearing:-11-06-2014 Date of Order:-11-06-2014

ORDER

Through the titled appeal, the taxpayer/appellant has called in question the order No.44 dated 30-10-2013 passed by the learned CIR(Appeals-III), Lahore.

2. Facts in brief are that the taxpayer has been made to face the proceedings U/S 122(5) for amendment in the assessment treated to have been taken as assessment order U/S 120(1) by issuing Notice U/S 122(9) dated 20-12-2012, confronting at the very beginning the non disclosure of local purchases, then in the second step the issue of concealed portion of local purchases and imports, and thirdly variation of data with the sales tax returns were taken, but in replies these objections were not found as in existence. By the subsequent notices it was pointed out that the value of import purchases as given in Income Tax return/ financial record was more than what its value is shown on the FBR Custom portal, so there is difference empowering action by the department. In reply the Taxpayer/Appellant submitted that this difference is due to the fact that part

of the cost uptill the payment of custom duty etc. is reflected on the FBR Custom Portal, whereas cost incurred subsequent to it can't be shown here, such cost not shown includes clearing charges, financial charges, freight etc. which all are added in the cost and a sum total of it becomes a total landed cost as shown in the financial record and in the Income Tax return by the Appellant/Taxpayer. The other factors causing difference, explained in response to a notice were that the value of the imports assessed by the custom authorities was higher than the commercial invoice value but imposition of custom duty is made on the assessed value, whereas the payments for the imports are made by the banks of the Appellant/Taxpayer as per Law for the amount being the purchase price as given in the commercial invoice, so for the payment of the price of the imports the assessed value has no importance. It has been explained that the price given in the commercial invoice becomes the basis for commercial transaction between the parties. The bank on passing on the money to the seller abroad debits the amount to the account of Appellant/Taxpayer in its account books and issues debit note for this amount to the Appellant/Taxpayer. The difference in the value of imports intimated through notices were reconciled but yet another amount was required to be reconciled, for which the addition was made U/S 111. This amendment in assessment was contested but the learned first Appellate Authority maintained the same, which has brought the Appellant/ Taxpayer in appeal in this Tribunal.

3. The Learned A.R. has firstly submitted that in the instant case the issue of variation in the value of import purchases does not constitute definite information for an action U/S 122(5) as the entire material forming a

basis was on the record of IRS and was itself provided by the Taxpayer and importantly the points confronted to the appellant lacked absoluteness and certainty. To strengthen this argument, the reliance has been placed on the following reported Judgments.

1. M/s E.F.U General Insurance Ltd. And others vs. The Federation of Pakistan and others (1997) 76 Tax 213.
2. Inspecting Assistant Commissioner and another vs. Pakistan Herald Ltd. (1997) SCMR 1256).
3. Income Tax Officer and another vs. Chappal Builders (1993 SCMR 1108)
4. Abdul Hamid and others vs. Deputy Collector, Excise and Taxation / Income Tax Officer & CIT and others (1998 PTD 324).
5. Central Insurance Company and others vs. Central Board of Revenue, Islamabad, etc. (1993) 68 Tax 86(S.C.Pak).

   Commissioner Inland Revenue vs. M/s Khan CNG & Filling Station, etc. I.T.R No. 31/2012.

4. The Learned A.R. read out the paras from these Judgments as justification of his stance. By extensively quoting the paras from a recent judgment at serial No. 6 above authored by his lordship Mr. Justice Syed Mansoor Ali Shah, the Learned A.R laid stress that there was no definite information as clearly explained in these Judgments, firstly the IRS has no absolute, certain and indisputable information in its possession which is evident from record so in the absence of any definite information the Appellant / Taxpayer have been subjected to lengthy inquires/investigations and series of notices and replies to it. The Learned A.R as an-other important argument has submitted that proceedings U/S 122(5) by issuing a notice U/S122(9) have been solely undertaken on noticing concealment

of local purchases and imports which was proved as incorrect by the Appellant/Taxpayer by submitting a reply before the Taxation officer.

5. On the facts, the Learned A.R drew the attention of the court that one after the other figures of difference requiring reconciliation of the value of imports have been confronted which is quite visible from the order U/S 122(5) and the record for amendment in assessment. But for amending the assessment, addition U/S 111 has been made for a quite different figure than the figures earlier confronted and also without specifying the sub section and clauses under which this addition is required. The Learned A.R has also submitted that the addition has been made by ignoring the fact that it is commercial invoice value which alone becomes the basic criteria for making the payment to the seller for the goods imported. The Learned A.R pointed out form the details as reproduced in the impugned amendment order that difference in the value of imports has been for the reason that at some place assessed value had been taken and yet at another place the commercial invoice value has been taken for arriving at the total cost of imports. The Learned A.R concluded this argument by submitting that uniformly similar are to be taken by adding together for arriving at the total cost for reconciliation with another figure. The Learned A.R further argued that all the relevant record with details, that is, GDs/Bills of entry, bank debit notes, bank record, bills of clearing agents etc. duties paid were duly produced but none of such record could be proved as false or incorrect or lacks the evidentiary value, still through incorrect workings, difference in the total cost of imports have been arrived at. The Learned A.R with a stress has submitted that the figure of addition ultimately made was never confronted verbally or in writing.

6. On the other the Learned D.R has supported the orders passed by both the authorities below and submitted that these may be maintained but the Learned D.R has not referred to any judgment or order in support of amendment in assessment U/S122(5) being on the basis of definite information. The Learned D.R has also failed to distinguish the instant appeal and also the issues involved in it from the case Law as cited before us by the Learned A.R.

7. The arguments have been heard and the available record has been perused.

8. As is patently evident from the order dated 27-03-2013 for amendment in assessment that the proceedings in the instant case have been initiated U/S122 (5) by issuing notice U/S122(9)by stating that due to non disclosure of local purchases in the Income tax return addition is required in the second step the local purchases at Rs. 29,401,729/- and import purchases at Rs. 16,778,855/-, were confronted as concealed, in the third step not matching of figures with the sales tax returns were confronted but same were proved as incorrect by the Appellant/Taxpayer. Thereafter the value of imports declared in the income tax return on the basis of financial records was compared with the data on the FBR custom portal, that the value in the income tax return was found higher so difference was confronted to the Appellant/Taxpayer for reconciliation and was expressed that failure will entail an addition U/S 111(I)(b). In reply to it the Appellant/Taxpayer reconciled the figures, the matter did not end here but led to series of correspondence. At both the occasions the Appellant / Taxpayer on the basis of proof available on record reconciled the variation. The Taxation officer ended the matter by making an addition U/S111

without mentioning any subsection or clause empowering such an action, but with the simple comment that difference in the value of imports has been confronted without elaborating it further as to whether verbally or in writing that the matter was concluded and the order was passed. To sum up this issue, the taxation officer has been changing his worked out difference in the value of imports and ultimately addition has been made for another amount which has not been confronted and the figure so worked out is not merely incorrect but is as a result of adding together the dissimilar and similar, that is, at one place the assessed value has been taken in the total cost and at other place the commercial invoice value has been added towards the total cost of imports by all together ignoring the amount of debit notes issued by the bank on making the payment to the seller abroad. The money which is passed on to the seller from buyer is the material evidence of its true price, which is irrespective of the assessed value, whether such assessed value for custom duty is accepted or left to be agitated like in the instant case. So it has become very clear that there is no variation in the value of the imports on comparison with sales tax record or value as per FBR Custom portal.

9. Regarding existence of "Definite Information" here before us for quick understanding of the matter in hand it would be quite beneficial to reproduce the paras from the judgment appearing at serial No.6 relied upon by the Learned A.R.

> *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 define, leaving*

> *nothing to implication, establish 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 thing, 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, in disputable, 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 record or documents. This acquisition provides no margin from incomplete, imprecise and inexact information to be completed through further calculation or processing as that would not be acquiring information but analyzing it.*

10. 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 require further processing falls outside the domain of definite information and can best pass for a departmental opinion, judgment, guesstimate, approximation or estimate.

11. Lastly by respectfully following the finding as recorded in Judgments reported by the Learned A.R, no iota of doubt is left in holding that there is no definite information permitting for proceeding U/S 122(5) so on legal premises the Revenue Department has no case. The taxation officer has issued four notices u/s 122(5) / 122(9) respectively dated as 20-12-2012, 17-01-2013, 20-02-2013 and 07-03-2013, confronting in each notice a

different amount liable to addition u/s 111 due to variation in value of imports declared and worked-out. It is a settled issue and the Honourable Superior Judiciary has very clearly spelt out that keeping in view the facts of the case and the Law as laid down there is no definite information with the department for amending the assessment.

12. By keeping in view the discussion supra we hold that factually as well as legally there is no sustainable ground for amending the assessment, therefore we don't have any hesitation in vacating the order passed by the Learned Commissioner Inland Revenue Appeals III, and declaring the order dated 27-03-2013 passed U/S 122 (5) as illegal void ab initio which is cancelled, as a result the assessment order in terms of section 120(1) is restored to its original position.

13. The Appeal succeeds in the manner and to the extent as indicated as above.

(JAWAID MASOOD TAHIR BHATTI)
CHAIRMAN

(FIZA MUZAFFAR)
ACCOUNTANT MEMBER