

APPELLATE TRIBUNAL INLAND REVENUE, LAHORE BENCH, LAHORE

ITA No.736/LB/2010
(Tax Year 2006)

The CIR (Legal Division) RTO, Lahore.

....Appellant

Vs

M/S Deans Associates (Pvt.) Ltd,

101-Abid Market, Lahore.

....Respondent

Appellants by : Mr. Rashid Hussain Jamali, DR.
Respondent by : Mr. Mian Ashiq Hussain Advocate.
Mr. H. M. Majid Siddiqi, Advocate
Date of Hearing : 11.06.2014
Date of Order : 11.06.2014

ORDER

This Departmental Appeal arises from the appellate order dated 13.10.2009 passed by the Commissioner Inland Revenue (Appeals). The CIR(Appeals) annulled the impugned order passed under Section 122(1) of the Income Tax Ordinance, 2001 (the Ordinance) dated 29.12.2008 for the reasons that a selection of the case for audit under Section 177 was unlawful in view of the judgment of the Hon'ble Lahore High Court in Writ Petition No.4630 of 2009 dated 14.07.2009: (Mohsin Raza...Vs...Chirman FBR etc.).

The Department has preferred appeal with the prayer for the vacation of the impugned order and the restoration of the amendment order passed by the Assessing Officer on the following grounds of appeal:

- i). That the order of the learned Commissioner of Income Tax (Appeals) is contrary to law and against the facts of the case.
- ii). That the learned CIT(A) was not justified to annul the order passed under Section 122(1) of the Ordinance, 2001 by placing reliance upon the decision of the Hon'ble Lahore High Court, Lahore in the case of Mohsin Raza...Vs...Chirman FBR in W.P. No.4630/2009 dated 14.07.2009 as the above referred judgment of the court is

in personam and not Ram. The instant taxpayer is not a party in the Court proceedings.

- iii). That the learned CIT(A) was not justified to annul the order passed under Section 122(1) of the Ordinance, 2001 in view of the fact that the judgment of the Hon'ble Lahore High Court, Lahore, supra, has been challenged by the Department before the Hon'ble Supreme Court of Pakistan and the issue has not attained finality.
- iv). That the learned CIT(A) was not justified to annul the amended order under Section 122(1) of the Income Tax Ordinance, 2001 in view of the fact that the Hon'ble Lahore High Court has decided the issue of selection of the case for audit in the favour of the deponent in Writ Petition No.11166/2009 in the case of M/s Sadar Anjuman-e- Ahmadia...vs...CIT, etc along with other connected Writ Petition vide order dated 22.10.2009.
- v). That the appellant craves his right to alter, amend, modify or submit further grounds of appeal before the disposal of the present appeal.

The Departmental Representative reiterated the arguments as per grounds of appeal. It was averred that the respondent taxpayer was not a party in the referred judgment of the Hon'ble Lahore High Court; hence, was not entitled to relief given in the judgments. Besides, it was pointed out that there was divergence in the judgments of the Hon'ble High Court: in the judgments in the case of Mohsin Raza...Vs...Chairman FBR etc in Writ Petition No.4360/2009 dated 14.07.2009 and a case of Sadar Anjuman-e-Ahmadia.....vs...CIT, etc in Writ Petition No.11166/09 dated 22.10.2009 and the Department had challenged the judgment in the case of Mohsin Raza before the Hon'ble Supreme Court of Pakistan.

The Authorized Representative of the respondent taxpayer pointed out that both the judgments of the Hon'ble Lahore High Court, referred to by the Department in the grounds of appeal had been vacated by the Hon'ble Supreme Court of Pakistan. He, however, pointed out that the

Departmental Appeal was devoid of any merit and the appellate order passed by the Commissioner of Income Tax (Appeals-II) annulling the impugned amendment order was not liable to be interfered with. It was pointed out that the learned CIT(A) had annulled the amendment order on the basis of the additional ground questioning the illegality of audit proceedings. The impugned amendment order was liable to be cancelled in view of ground No.1 taken before the learned Appellate Authority in the Memo of Appeal. The respondent taxpayer had questioned the invocation of Section 122(1) of the Ordinance by the Assessing Officer; since such invocation presupposes the availability of definite information in terms of Section 122(5) of the Ordinance. It was emphasized that the impugned Show Cause Notice under Section 122(9) of the Ordinance does not disclose any definite information in terms of Section 122(5) of the Ordinance, the Assessing Officer unlawfully assumed jurisdiction under Section 122(1) of the Ordinance. It was contented that question of jurisdiction is the foundational fact and any super structure built on an unlawful Show Cause Notice is liable to be annulled. The AR pointed out that the subject matter of appeal was the cancellation of the impugned amendment order for want of jurisdiction. He further submitted although the learned CIT(A) annulled the amendment order on a different aspect of lack of jurisdiction, the order was liable to be confirmed on the basis of the other aspect of lack of jurisdiction. Reliance was placed on the judgment cited as PLD 1995 Supreme Court 66 (Particular Page 102): ***“Question of jurisdiction being very important and fundamental in nature, if a forum had no jurisdiction, the same could not be conferred upon it by consent of parties..... Court has to consider the question of jurisdiction even through not raised by the parties.”***

The AR of the respondent pointed out that the non-availability of definite information in terms of Section 122(5) of the Ordinance is evident on the face of the impugned Show Cause Notice. He has referred to the Show Cause Notice under Section 122(9) of the Ordinance dated 19.12.2008 which is reproduced as under:

“The case of your company in tax year 2005 was selected for audit and you were informed accordingly. During audit proceedings various documents were submitted by your authorized representative. You are requested to explain the following queries:

1) NATURE OF INCOME

You are informed that the nature of your income is,

- ❖ Property Income under section 15 of the Income Tax Ordinance, 2001.
- ❖ Interest Income under section 39(1)(c) of the Income Tax Ordinance, 2001

ALLOWABLE EXPENSES

You are also informed that expenses are allowable under section 17 of the Income Tax Ordinance, 2001, amended upto 30.06.2005.

As per provisions of section 17 of the Income Tax Ordinance, 2001, deduction under the head repairs, is allowable @ 1/5th of the rent chargeable to tax.

For claim of expenses under other heads of section 17 you have to provide the proof of the expense failing which it cannot be allowed.

2) EXPENSES NOT ALLOWABLE

You are informed that in view of your nature of income, following expenses are inadmissible,

Accounting Depreciation	Rs. 186,000/-
Insurance	Rs. 37,720/-
Legal and Professional Charges	Rs. 23,000/-
Profit on debt	Rs. 771,115/-
Rent rates and taxes	Rs.1,040,000/-
Salary wages and benefits	Rs. 240,000/-
Commission	Rs. 880,000/-
Miscellaneous	Rs. 535,454/-

You are requested to show cause why these expenses at Rs.3,713,389/- should not be disallowed and added to your income.

3) COLLECTION CHARGES

You have claimed expense under the head rent collection charges at Rs.240000/- but failed to provide the documentary proof of the same.

I therefore intend to disallow this expense.

4) FIXED ASSETS SHOWN IN THE BALANCE SHEET

Perusal of the balance sheet submitted by you during the period under consideration reveals following entries,

Fixed Assets	Rs.60,728,825/-
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You vide your reply dated 03.04.2008 explained that the breakup of the fixed assets is,

Unallocated expenses	Rs.14,264,859/-
Honda City	Rs. 930,500/-

The explanation to the extent of unallocated expenses is not acceptable in the light to of the fact that nature of income is,

- ❖ Property income under section 15 of the Income Tax Ordinance, 2001
- ❖ Interest Income under section 39(1)(c) of the Income Tax Ordinance, 2001.

In view of the nature of business no such expense can be incurred. The failure to proof this fixed asset renders your credit side unexplained to the extent of Rs.14,264,859/- within the meaning of section 111(1)(a) of the Income Tax Ordinance, 2001.

Since the year of discovery is tax year 2009 as per 111(2) of the Income Tax Ordinance, 2001, I intend to add this amount in your income declared for the tax year 2008.

5) ASSOCIATED UNDERTAKINGS AND CREDITORS

The perusal of the balance sheet revels in the credit entries for,

Associated undertakings	Rs.8,855,393/-
Sundry Creditors	Rs.1,010,000/-

You have filed to prove the transactions since no bank statement, detailed particulars of the parties involved have been provided. Further these transactions are not possible in the light of the nature of income you are earning.

Total credits at Rs.9,865,393/- are unexplained within the meaning of section 111(1)(a) of the Income Tax Ordinance, 2001.

Since the year of discovery is tax year 2009 as per 111(2) of the Income Tax Ordinance, 2001 I intend to add this amount in your income declared for the tax year 2008.

You are requested that if you have any objection to the treatment conferred above, attend the office of the undersigned with documentary proof in support of your contention on or before 24.12.2008.

Please note in case of non compliance or unsatisfactory reply your assessment for tax year 2003 will be amended under section 122(1) of Income Tax Ordinance, 2001, as confronted above."

The AR of the respondent taxpayer contented that the above Show Cause Notice was issued under Section 122(9) of the Ordinance for amendment of the assessment under Section 120 in terms of Section 122(1)

read with Section 122(5) of the Ordinance. Preconditions for assumption of jurisdiction under Section 122(1) have been provided in Section 122(5) i.e. "an assessment order shall only be amended on the basis of definite information acquire from an audit or otherwise" if the Commissioner is satisfied that:

- i) Any income chargeable to tax has escaped assessment or
- ii) Total income has been under assessed, or assessed at too lower rate or has been subject of excessive relief or refund or
- iii) Any amount under a head of income misclassified".

It was averred that the Show Cause Notice was issued without the availability of any definite information in terms of the above provisions. The Assessing Officer issued the Show Cause Notice on the impression that deductions under Section 17 of the Ordinance only were admissible against the property income under Section 15. The Show Cause Notice was issued in oblivion of the fact that deductions under Section 40 were also admissible against other income assessable under Section 39 of the Ordinance. Thus not to speak of availability of definite information before the issuance of Show Cause Notice, the Assessing Officer proceeded on inchoate impressions and in oblivion of the legal provisions even at the time of passing the assessment order. Instead of disclosing definite information based on some tangible material, the impugned Show Cause Notice is investigative one based on impressions. It was contended that such the impugned Show Cause Notice was unlawful, the consequent amendment order, too, was unlawful. Reliance was placed on the judgment of the Hon'ble Supreme Court of Pakistan cited as PLD 1990 Supreme Court 399 & the judgment of the Hon'ble Lahore High Court cited as 1988 PTD 1014 (Lahore High Court).

Faced with the question by this Tribunal that this aspect of lack of jurisdiction was not considered by the First Appellate Authority why the case should not be remanded to it for a fresh determination, the AR of the respondent taxpayer submitted that lack of jurisdiction in terms of Section 122(5) of the Ordinance was evident on the face of the impugned Show Cause Notice and no further enquiry into the facts was required. It was pointed out that in such cases of lack of jurisdiction remand was not legally justified.

Reliance was placed on the judgment of the Hon'ble Lahore High Court, Lahore, in the case of Jawa Chemicals (Pvt.) Limited....Vs....Assistant Collector cited as (2005) 91 Tax 405 (HC Lahore): ***"The learned Tribunal ought to have recoded its finding on the legal objections raised before it against maintainability of the departmental appeal. The remand of a matter to a lower authority should only be made if the material already available on record is not sufficient to dispose of the issues."*** Reference was also made to the judgment of the Hon'ble Supreme Court of Pakistan cited as 2005 SCMR 151: ***Remand can only be allowed when it becomes absolutely necessary and inevitable in view of insufficient or inconclusive evidence on record.***

The AR of the respondent taxpayer also referred to the judgment of the Full Bench of Gujrat High Court cited as (1985) 151 ITR 499. The Hon'ble High Court, after exhaustive review of the judgments of the Supreme Courts of India, came to the conclusion that Appellate Tribunal has the jurisdiction to entertain and grant relief on a different aspect of the subject matter which was not raised before or considered by the first appellate authority, provided the subject matter of the appeal remains the same. It was explained that the subject matter of the appeal: cancellation of the impugned amendment order for lack of jurisdiction was the same as it was before the first appellate authority. The first appellate authority annulled the assessment order for another aspect of lack of jurisdiction and the Appellate Tribunal Inland Revenue can lawfully confirm that order on the basis of another aspect of lack of jurisdiction.

We have heard rival arguments. The unambiguous legal position which emerges from the bare reading of the relevant legal provisions is that it was obligatory for the Revenue to show that the impugned Show Cause Notice was issued on the availability of definite information in terms of Section 122(5) of the Ordinance and the concerned Commissioner was satisfied that: any income chargeable to tax had escaped assessment or total income had been under assessed, or assessed at too low a rate or had been subject of excessive relief or refund or any amount under a head of income was misclassified. The impugned Show Cause Notice was issued, on the impressions without application of mind to the relevant legal provisions and

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without undertaking any fact finding enquiry which could culminate into the precondition for the issuance of such notice. The Assessing Officer did not even read the relevant legal provisions; hence, the Show Cause Notice was issued without application of mind.

We are inclined to agree with the arguments of the AR that the Assessing Officer failed to apply mind and issued the show cause notice on inchoate information without proper investigation and crystallization of information. The audit proceedings were without any conclusion and show cause notice under Section 122(9) was issued without any definite information in terms of Section 122(5) of the Ordinance. The requirement of definite information is sine qua non for the amendment of assessment under Section 122(1)/122(5) of the Ordinance but the Assessing Officer issued an investigative show cause notice for fishing enquiry. We, therefore, maintain the order of the CIT(Appeals) for a reason different from the one mentioned in the Appellate Order and for the reason that the impugned assessment order was passed without assumption of jurisdiction in accordance with law.

In view of what has been stated above, the Departmental Appeal is dismissed.

Sd/-
(NAZIR AHMAD)
Judicial Member

Sd/-
(FIZA MUZAFFAR)
Accountant Member