ITA No. 406/IB OF 2008 DECIDED ON 03/04/2009
CITATION: 101TAX238 ; 2010PTD1067 ;

Income Tax Ordinance, 2001 -- Section 114, 116, 120, 121, 121(1), 122, 122(5), 122(5A), 174, 177 --

Amendment of assessments -- Filing of return by assessee -- Declaration of P&L expense on higher side -- Selection of case for total audit -- Show Cause Notice -- Rejection of expenses for unvouched and without machine numbered -- Making of add backs by Assessing Officer -- Total income highly assessed -- Annulment of assessment by CIT(A) -- Validity -- Whether it is not case where only mother provision has been mentioned without mentioning subsection but it is case where combined notices of two independent sections i.e. 121 and 122 have been issued which is fatal because it is jurisdictional defect -- Held yes -- Whether jurisdiction in this case is only required by Taxation Officer after receiving of information from Audit Department by issuing notice under section 122(5) -- Held yes -- Whether without completion of pre-requisite of show cause notice and supply of grounds/reasons in clear words to ascertain as to under which section case would fall, demand of authorities has no legal consequence -- Held yes -- Whether it is case where notice under section 122(9) for amendment of assessment was to be issued, hence very basis for acquiring jurisdiction by issuing combined notice under two different sections is fatal -- Held yes --

Best judgment assessment -- Scope and application of sections 121, 122, 114 and 176, Income Tax Ordinance, 2001 -- Issuance of notices under multiple provisions of law -- Assessee contended that simultaneous application of independent provisions of Best Judgment Assessment under section 121 read with section 122 of the Income Tax Ordinance, 2001 was not justified, illegal and void ab initio and that combined notices issued under section 121 and section 122 of the Income Tax Ordinance, 2001 be declared illegal and void -- Validity -- Stance of the department was that assessment should not be annulled by not mentioning subsection of section 122 of the Income Tax Ordinance, 2001, but the case was quite different -- Present case was not the one of non-mentioning subsection but two different sections had been quoted without mentioning their subsection -- Assessee was being confronted by issuing a combined notice under section 121 and section 122 of the Income Tax Ordinance, 2001 that too without confronting of the relevant subsection -- Present was not the case where only mother provision had been mentioned without mentioning subsection but it was a case where the combined notices of two different independent sections i.e. sections 121 and 122 of the Income Tax Ordinance, 2001 had been issued which was fatal because it was the jurisdictional defect -- Jurisdiction was only required by the Taxation Officer after receiving of an information from the Audit department by issuing a notice under section 122(5) of the Income Tax Ordinance, 2001 -- Whether completion of pre-requisite of show cause notice and supply of the grounds/reasons was in clear words to ascertain as to under which section the case would

fall, the demand of the authorities had no legal consequence -- Such failure of the authorities issuing show cause notice to disclose the grounds and reasons rendered the notice invalid -- Section 121(1) of the Income Tax Ordinance, 2001 would not apply because the return had been filed under section 114 of the Income Tax Ordinance, 2001 -- Clause(c) of section 121(1) of the Income Tax Ordinance, 2001 would not apply as it was not the case of non-filing the wealth statement -- Section 121(1) of the Income Tax Ordinance, 2001 would only apply where person fail to furnish return of income under sub-sections (3) and (4) of section 114 or statement under section 116 of the Income Tax Ordinance, 2001 had not been filed or on the subsequent stage if the assessee failed to produce accounts and documents to be maintained under section 174 of the Income Tax Ordinance, 2001 required for the purposes for making of assessment of Income -- Section 121(1) of the Income Tax Ordinance, 2001 had no applicability in the present case for it was the case where notice under section 122(9) of the Income Tax Ordinance, 2001 for amendment of assessment was to be issued -- Very basis for acquiring the jurisdiction by issuing a combined notice under two different sections thus was fatal -- Order of First Appellate Authority was upheld by the Appellate Tribunal --

Best judgment assessment -- Concept -- Application of -- Concept of `best judgment assessment' shall apply only where the person had failed to file his return and in Commissioner's opinion, he was required to file his return of income having assessable income -- Commissioner may ask to file the return for a period of less than 12 months -- Where the return had not been filed due to the death of assessee, his legal heirs or representatives could be asked to file the return or a person had become bankrupt or gone into liquidation or in Commissioner's view a person was due to leave Pakistan permanently --

Best judgment assessment -- Scope -- Section 121(1) of the Income Tax Ordinance, 2001 would apply if the return had not been filed under section 114 of the Income Tax Ordinance, 2001 -- Such was the case of non-filing of return by non-residentialship owner, air craft owner; charter -- Subsections (c) and (d) of section 121 of the Income Tax Ordinance, 2001 were confronted with the situation where the return had been filed but the wealth statement had not been filed or if the record required to be maintained under section 174 of the Income Tax Ordinance, 2001 was not produced after selection of the case for audit under sub-section (2) or (4) of section 177 of the Income Tax Ordinance, 2001 --

Best judgment assessment -- Application and scope -- Return filed was a deemed assessment order which could only be amended under section 122 of the Income Tax Ordinance, 2001 -- Section 121 of the Income Tax Ordinance, 2001 caters for quite different situation embodied in the section from its clauses (a) to (d) -- Section 121 of the Income Tax Ordinance, 2001 applies where a return has not been filed or a return is invalid return reasons

may be for non-filing of wealth statement or the case was selected for audit under section 177 of the Income Tax Ordinance, 2001 --

Assessment -- Deemed assessment -- Despite the fact that case was selected for audit under section 177 of the Income Tax Ordinance, 2001, the deemed assessment shall remain in the field until it was amended under section 122(5) or (5A) of the Income Tax Ordinance, 2001 --

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[IN THE INCOME-TAX APPELLATE TRIBUNAL, ISLAMABAD BENCH, ISLAMABAD]

Present: MUNSIF KHAN MINHAS, JUDICIAL MEMBER and CH. NAZIR AHMAD, ACCOUNTANT MEMBER.

Department v. Assessee

I.T.A. Nos. 406/IB to 408/IB of 2008, Tax years 2004 to 2006, decided on 03-04-2009.

Shakeel Ahmed Shakeel, DR, for the Appellant.

Atif Waheed, Advocate, for the Respondent.

Date of hearing: 03-04-2009.

ORDER

[The Order was passed by MUNSIF KHAN MINHAS, JUDICIAL MEMBER].-- These departmental appeals have been filed against the combined order dated 10-05-2008 recorded by the learned CIT(A) Rawalpindi for the tax years 2004, 2005 and 2006 on the following common ground:--

``(i) That the learned CIT(A) was not justified to annul the assessment made u/s 122 of the Income Tax Ordinance, 2001 on the issue of mere not mentioning of the sub-section of the said section under which the notice was issued.''

2. Brief facts leading to these appeals are that the assessee, an AOP, derives income from running a hotel and restaurant, filed returns for the titled years declaring net income at Rs.616,597/-, Rs.431,884/- and Rs.479,825/- respectively. The case was selected for total audit by the Commissioner of Income Tax (Audit) due to the reason that profit & loss expenses had been declared on higher side. Notices were issued and assessments were finalized under section 122 of the Ordinance. For the reasons recorded in the assessment orders net income of the assessee was determined at Rs.976,918/-, Rs.676,736 and Rs.682,833/- for the years under appeals respectively. Being dissatisfied with the treatment accorded by the Taxation Officer

the assessee preferred appeals before the learned CIT(A) on the grounds given below:--

* That the assessment order passed u/s 122 of the Income Tax Ordinance, 2001 is legally not maintainable since the Taxation Officer failed to mention any specific provision of the section 122 (as held in ITA No. 188/IB/2007).

* That the add backs made under various heads of P&L account are unjustified and highly excessive because the appellant has been properly maintaining the expense ledgers duly supported by the relevant vouchers and the same have been produced before the Taxation Officer during the audit proceedings.

* That the Taxation Officer has failed to point out any discrepancy in the books of accounts (expense ledgers) and has rejected most of the expenses merely stating as ``unvouched and without machine numbered''. Also held in reported case as:--

  2004 PTD 2231, 89 Tax 42, 88 Tax 48, 87 Tax 129, 90 Tax 17, 91 tax 1, 85 Tax 21, 79 Tax 263, 91 Tax 177

* That without foregoing above contentions the add backs made are against the provisions of law and also against the history of the case.

* That without foregoing above contentions total income assessed at Rs.876,918/-, 676,736/- and Rs.682,833/- against declared at Rs.616,597/-, Rs.431,884/- and Rs.479,825/-, are highly excessive and unjustified being against the facts of the case.''

The learned Commissioner (Appeals) after detailed discussion of the facts of the case and relying upon the judgment of the learned ITAT vide ITA No.188/IB/2007 for the Tax Year 2005 dated 20-7-2007 annulled the assessments made under section 122 of the Ordinance. While disposing of the appeals the learned CIT(A) has observed as under:--

> ``In the case of the appellant throughout the proceedings no sub-section of section 122 has been mentioned so much so not in the assessment order. In the light of the learned ITAT's order as reproduced supra, non mentioning of relevant sub-section is fatal as it renders all the proceedings to be illegal.
>
> Respectfully following the Judgment of the learned ITAT, I conclude that proceedings initiated/completed u/s 122 of the Income Tax Ordinance, 2001 without mentioning the relevant sub-section are illegal and void ab-initio. Therefore, the impugned order being unsustainable in the

eyes of law is annulled. As the assessment is annulled on technical grounds, the other grounds are not required to be adjudicated upon.

Appeals for all 3 years succeed in the manner as indicated above.''

Hence the present appeal by the Department on the ground supra.

3. The learned DR appearing on behalf of the revenue has supported the action of the Department by contending that the learned CIT(A) was not justified to annul the assessment made u/s 122 of the Ordinance on the issue of mere not mentioning of the sub-section of the said section under which the notice was issued.

4. On the contrary the learned AR of the assessee-respondent supporting the action of the learned CIT(A) contends that section 122(1) itself provides that ``the Commissioner may amend an assessment order treated as issued under section 120 or issued under section 121 [2].'' Which means that an assessment order can only be amended under section 122(1) it the assessment stands finalized under either of the two provisions relating to assessments i.e. section 120 or section 121. If the Taxation Officer has himself initiated the proceedings under section 121 to make a Best Judgment Assessment through a notice dated 27-10-07 how is it possible to make assessment as well as amend the assessment at the same time. The learned AR also contends that provision of section 121 and 122 of the Ordinance cannot be applied simultaneously, also because the criteria and reasons for invoking both provisions are totally different. The provisions of section 122 are invoked having regard to the parameters defined in section 122(5) and 122(5A) of the Ordinance whereas provisions of section 121 are invoked having regard to the criteria/reasons provided in clause (a) to (d) of the section 121(1). Hence the combined notice issued under section 121 and 122 is liable to be declared null and void. The learned AR further contends that provisions of section 121 and 122 are even otherwise different and independent in their application and intention of legislature in this regard can also be verified from the fact that after making an assessment under section 121 the Commissioner shall issue the assessment order under section 121 (2) of the Ordinance whereas in the case of Amendment of Assessment under section 122, the amended order has to be issued under section 122(6) of the Ordinance. Similarly the limitation as well as the whole procedure regarding application of both provisions are provided separately and independently by the legislature. Therefore, simultaneous application of section 122 and section 121 is liable to be declared illegal and void ab initio on this ground also. The learned AR states that even otherwise, the case of taxpayer does not fall under any of the criteria provided in clauses (a) to (d) of section 121(1) therefore, invoking of provisions of section 121 is not justified. Taxpayer has not made any default to furnish a return or statement as specified in clauses (a) to

(c) of section 121(1). Even clause (d) of section 121(1) which is wider in scope as compared to other clauses does not cover the case of the taxpayer. Section 121(1)(d) can only be invoked for the purposes of Best Judgment Assessment where either no Assessment under section 120(1) has been made or the Assessment made under section 120(1) has been invalidated by the Commissioner under section 120(4) of the Income Tax Ordinance, 2001. Therefore simultaneous application of independent provisions of Best Judgment Assessment u/s 121 with section 122 is not justified, illegal and void ab initio. The learned AR finally prays that the combined notices issued under multiple provisions of law i.e. section 121 and section 122 of the Income Tax Ordinance, 2001 for the all the tax years under appeal may please be declared illegal and void.

5. We have heard the respective submissions of the parties and perused the relevant record. For the sake of convenience and ready reference the provisions of sections 121, 177(4), 114 and 115 are reproduced below:--

121.Best judgment assessment.- (1) Where a person fails to-

(a) furnish a return of income as required by a notice under sub-section (3) or sub-section (4) of section 114; or

(b) furnish a return of income as required under section 143 or section 144; or

(c) furnish the statement as required under section 116; or

(d) produce before the Commissioner, or any person employed by a firm of chartered accountants under section 177, accounts, documents and record required to be maintained under section 174, or any other relevant document or evidence that may be required by him for the purpose of making assessment of income and determination of tax due thereon.

the Commissioner may, based on any available information or material and to the best of his judgment, make an assessment of the taxable income of the person and the tax due thereon.

(2) As soon as possible after making an assessment under this section, the Commissioner shall issue the assessment order to the taxpayer stating-

(a) the taxable income;

(b) the amount of tax due,

(c) the amount of tax paid, if any; and

(d) the time, place and manner of appealing the assessment order.

(3) An assessment order under this section shall only be within five years after the end of the tax year or the income year to which it relates.

6. The concept of best judgment assessment shall apply only where the person has failed to file his return and in Commissioner's opinion, he is required to file his return of income having assessable income. The Commissioner may ask to file the return for a period of less than 12 months. Where the return has not been filed due to the death of an assessee and his legal heirs or representatives can be asked to file the return or a person has become bankrupt or gone into liquidation or in Commissioner's view a person is due to leave Pakistan permanently.

7. To the nutshell, section 121(1) will apply if the return has not been filed under section 114. Secondly again it is the case of non filing of return by non-residential-ship owner, air craft owner; charter. Sub-sections (c) and (d) of section 121 are confronted with the situation where the return has been filed but the wealth statement has not been filed or if the record required to be maintained under section 174 is not produced after selection of the case for audit under sub-section (2) or (4) of section 177. In our opinion every return filed is a deemed assessment order which can only be amended under section 122. Section 121 caters for quite different situation embodied in it from (a) to (d). It applies where a return has not been filed or a return is invalid return reasons may be for non filing of wealth statement or the case is selected for audit under section 177. Needless to mention here that despite the fact that his case is selected for audit under section 177 the deemed assessment shall remain in the field until it is amended under section 122(5) or 5A). So there is misconception in the mind of the assessing regarding the applicability of two different sections catering for different needs/situations. In this case, combined notices under section 122 read with section 121 of the Income Tax Ordinance, were issued. This stance of the Department that the assessment should not be annulled by not mentioning sub-section of section 122, but here the case is quite different. It is not the case of non-mentioning subsection but two different sections have been quoted without mentioning their subsection. The assessee is being confronted by issuing a combined notice under section 121 and section 122 that too without confronting of the relevant sub-section. As already discussed that it is not the case where only mother provision has been mentioned without mentioning subsection but it is case where the combined notices of two different independent sections i.e. 121 and 122 have been issued which is fatal because it is the jurisdictional defect. As already discussed the jurisdiction in this case is only required by the Taxation Officer after receiving of an information from the Audit Department by issuing a notice under section 122(5). Without completion of pre-requisite of show cause notice and supply of the grounds/reasons in clear words to ascertain as to

under which section the case would fall, the demand of the authorities had no legal consequence. Such failure of the authorities issuing show cause notice to disclose the grounds and reasons rendered the notice invalid. Section 121(1) will not apply because the return has been filed u/s 114 clause C of section 121 will not apply as it is not the case of non filing wealth statement. Section 121(1) will only apply where person fail to furnish return of Income under sub-section (3) and (4) of section 114 or statement under section 116 has not been filed or on the subsequent stage if the assessee fail to produce accounts and documents to be maintained u/s 174 required for the purposes for making of assessment of Income. So in this case section 121(1) has no applicability. It is the case where notice under section 122(9) for amendment of assessment was to be issued. Hence the very basis for acquiring the jurisdiction by issuing a combined notice under two different sections is fatal. So we have been left with no alternative except to uphold the order of the learned CIT(A).

8. As a result the departmental appeal being bereft of any merit stands dismissed.

Appeal dismissed.

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