

Judgment Sheet
IN THE LAHORE HIGH COURT BAHAWALPUR BENCH
BAHAWALPUR

JUDICIAL DEPARTMENT

ITR No.01/2012/ BWP

**(Commissioner Inland Revenue versus Zulfiqar Ali Proprietor M/s
Ali Electronic Spare Parts)**

JUDGMENT

DATES OF HEARING: 01.03.2012.

PETITIONER Mr. Muhammad Siddique Chohan,
(Commissioner Inland Advocate.
Revenue) BY:

Respondent (Zulfiqar Sh.Zafar-ul-Islam and Mr. Niaz Ahmad
Ali Proprietor M/s Ali Khan, Advocates.
Electronic Spare Parts

ABDUS SATTAR ASGHAR, J.- In this Reference
Petition under section 133(4) of the Income Tax Ordinance, 2001, the
Revenue through Commissioner in-land Revenue Legal Division,
Zone Rahimyar Khan, Regional Tax Office, Bahawalpur claims that
following question of law arises out of the order of the Appellate
Tribunal Inland Revenue, Lahore Bench (Camp at Multan), Lahore
dated 18.10.2011:-

“Whether on the facts and in the circumstances of the case,
the Tribunal has not erred in law by not cognizance of fact
that the Commissioner (Appeals) had admitted the
documentary evidence without establishing that the
taxpayer was prevented by sufficient cause from providing
such evidence before the Taxation Officer as provided in
sub-section (5) of Section 128 of the Income Tax Ordinance,
2001”

2. Contents of the Reference Petition reveal that the
respondent/assessee is an individual. He filed return of his income
at Rs.1,10,000/- for the Tax Year 2009. Later on the Department got
information that the respondent had purchased a plot situated at
Sohail Market, Rahimyar Khan for consideration of Rs.15,00,000/- on

18.03.2009. On scrutiny of the return filed by the respondent it revealed to the Department that the income declared by him did not commensurate with his investment. Consequently the Department initiated proceedings against the respondent by issuing statutory notices calling for explanation of source of investment. On his failure in submission of requisite explanation/reply to the notices on the due date despite opportunities, the Deputy Commissioner inland Revenue amended the assessment at Rs.17,60,000/- and charged the tax thereon at Rs.4,40,000/- vide order dated 31.05.2010.

3. Being aggrieved the respondent filed an appeal before the Commissioner In-land Revenue (Appeals), Multan on various technical and legal grounds. The appeal was allowed vide order dated 27.01.2011 and amended assessment was cancelled mainly on the grounds, firstly that the respondent (appellant) was not furnished reasonable opportunity of explaining the position as stipulated in the CBR's Circular letter No.7(2) dated 01.02.1994, and secondly that reconciliation statement as at 30.06.2009 filed by the respondent (appellant) shows availability of funds to make investment in the property duly taken into consideration in exercise of powers under section 128(5) of the Income Tax Ordinance, 2001 vested in the Commissioner (Appeals). The Department impugned the order of the learned CIRA dated 27.01.2011 before the learned Appellate Tribunal Inland Revenue, Lahore Bench (Camp at Multan) through an appeal mainly on the grounds that the learned Commissioner (Appeals) was not justified to entertain the wealth statement as on 30.6.2009 under section 128(5) of the Income Tax Ordinance, 2001 in the absence of any sufficient cause which had prevented the respondent from producing such material or evidence before the learned Commissioner. The appeal lodged by the Department however was dismissed vide order dated 18.10.2011, hence the Reference.

4. We have given patient hearing to the learned counsel for Revenue as well as the respondent and gone through the record carefully.

5. At the out-set it is pertinent to notice that the CBR Circular No.7(2) dated 01.02.1994 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 14.04.2010 allegedly served on 17.4.2010 with a date of compliance i.e. 22.04.2010 whereas the second notice was issued on 24.05.2010 allegedly served on 26.5.2010 with a date of compliance i.e. 31.05.2010. 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 31.05.2010 was obviously made without providing reasonable opportunity of explaining the position and thus the same was not tenable in law.

6. At this stage, it may be expedient to reproduce the relevant provision of section 128 (5) of the Income Tax Ordinance, 2001, which reads below:-

“The Commissioner (Appeals) shall not admit any documentary material or evidence which was not produced before the Commissioner (Appeals) unless the Commissioner (Appeals) is satisfied that the appellant was prevented by sufficient cause from producing such material or evidence before the Commissioner.”

7. The learned Appellate Tribunal vide order dated 18.10.2011 dismissed the appeal while taking into consideration the legal points of opportunity of hearing as well as the Authority of the Commissioner (Appeals) in terms of section 128(5) of the Ordinance *ibid*. Concluding para of the order dated 18.10.2011 is reproduced hereunder:-

“The department has objected the cancellation of the orders but while perusal of the impugned order, we have found that the order passed by the Taxation officer has been cancelled with the observations that the reasonable opportunity to the taxpayer in this case was not allowed and the reconciliation statement filed by the taxpayer was showing availability of funds to make investment in the property on the basis of which the addition has been made and the amended order has been passed by the Taxation Officer. The learned CIR (A) after considering the details

furnished by the taxpayer has cancelled the order being satisfied that there was no valid reasons to amend the already completed assessment. The learned DR is unable to point out that the order passed by the Taxation Officer has been cancelled without any justification. The appeal filed by the department is, therefore, dismissed.”

8. There is no cavil to the proposition that sub-section (5) of Section 128 of the Ordinance *ibid* empowers the Commissioner Inland Revenue (Appeals) to entertain any documentary material or evidence although such admission is subject to his satisfaction that the appellant was prevented by sufficient cause from producing such material or evidence before the Deputy Commissioner Inland Revenue. The expression “to his satisfaction” used in sub-section (5) of Section 128 of the Ordinance bears grave importance. In his order dated 27.01.2011 Commissioner (Appeals) has categorically expressed his satisfaction to exercise his powers under sub-section (5) of Section 128 of the Ordinance *ibid*. In this case record reveals that the Department did not question the “satisfaction” of the Commissioner Inland Revenue (Appeals) when he entertained and examined the wealth statement as on 30.06.2009 furnished by the respondent. In the peculiar circumstances of this case since the respondent was not provided ample opportunity to explain his position through reply of the notices, therefore he could not be penalized for default on the part of the Assessment Officer. Learned Appellate Tribunal therefore has rightly observed that there was no valid reason with the Taxation Officer to amend the already completed assessment.

9. It is pertinent to mention that jurisdiction of this Court in terms of Section 133(4) of the Ordinance *ibid* is of advisory nature clearly distinct and distinguishable from its appellate or revisional jurisdiction. The purpose of reference therefore should be only to resolve problematic and debatable legal question instead to get a decision for or against a party. In this Reference question raised by the Department appears to be ‘point of law’ which could not be equated with the expression ‘question of law’. The object of the Reference before this Court under section 133(4) of the Ordinance

ibid remains that an affirmative or negative reply to a question referred to this Court should furnish guidance to the parties for useful, comfortable and effective assessment proceedings on substantial legal issues of general interest. Certainly general practice on the part of the Department or the assesseees to convert the factual controversy into legal issues not falling within the purview of "question of law" cannot be approved at all. Reliance is made upon, (i) The Lungla (Sylhet), Tea Co. Ltd. vs Commissioner of Income Tax Dacca Circle Dacca (1970 SCMR 872), (ii) Commissioner of Income Tax/Wealth Tax, Multan Zone vs Muhammad Rafi, Medical Officer, D.H.Q. Khanewal (2007 PTD 333-Lahore) .

10. For the above discussion and reasons we are of the considered view that the above question as framed in the Reference Petition is neither a question of law nor it involves a substantial legal issue between the parties. Therefore, we decline to entertain and answer the aforesaid question. This petition is disposed of accordingly.

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(AMIN-UD-DIN KHAN)
JUDGE

(ABDUS SATTAR ASGHAR)
JUDGE

APPROVED FOR REPORTING.

JUDGE

'Sarwar'