Citation: (2015)111 TAX 447 = 2015 PTD 2042

APPELLATE TRIBUNAL INLAND REVENUE, LAHORE BENCH, LAHORE]

I.T.A. No.2652/LB/2014 (Tax Year 2011), decided on 16-01-2015. Date of hearing: 16-1-2015

Present: Jawaid Masood Tahir Bhatti, Chairman and Fiza Muzaffar, Accountant Member

Muhammad Ijaz Ali Bhatti., Adv. for the Appellant. Farrukh Majeed, DR. for the Respondent

AMMAR STEEL INDUSTRIES, LAHORE

VS.

C.I.R., ZONE-IV, R.T.O. LAHORE

ORDER

The Order was passed by Jawaid Masood Tahir Bhatti, Chairperson:- Titled appeal has been filed at the instance of the taxpayer calling in question the impugned order dated 29/10/2014 passed by learned Commissioner Inland Revenue (Appeals) Zone- II, Lahore, on the following grounds:-

1. That order passed by both the authorities below are bad in law and against the facts of the case.

2. That order passed by the learned Commissioner Inland Revenue (Appeals), is unlawful, illegal, non-speaking and non-judicious hence liable to be quashed/cancelled.

3. That while deciding the appeal the learned Commissioner Inland Revenue (Appeals) has failed to adjudicate all the grounds of appeal contested before him with full force at the time of hearing of appeal, hence order of the learned Commissioner Inland Revenue (Appeals) is not sustainable in the eyes of law.

4. That order was passed u/s 121(1)(d) of the Income Tax Ordinance, 2001 without service of statutory notices upon the appellant, hence the Commissioner Inland Revenue (Appeals) has grossly erred to hold that non-compliance to the notices was deliberate and willful.

5. That findings/observations of the Commissioner Inland Revenue (Appeals) with regard to the fact and to hold that notices were served on the appellant are unlawful, arbitrary, unjustified, wild and without any reliable evidence which could have proved that notices were properly served upon the appellant.

6. That the very assumption of jurisdiction by the IRO, Audit Unit-02, Zone-IV, RTO, Lahore to pass order u/s 121(1)(d) of the Income Tax Ordinance, 2001 was unlawful, illegal and without any lawful jurisdiction/authority and the final order passed was equally unlawful and nullity in the eyes of law. Hence the Commissioner Inland Revenue (Appeals) is not justified to uphold the order u/s 121(1)(d) of the Income Tax Ordinance, 2001.

7. That order passed u/s 121(1)(d) of the Income Tax Ordinance, 2001 was unlawful, unjustified and nullity in the eyes of law. Hence the Commissioner Inland Revenue (Appeals) is not justified to uphold the order u/s 121(1)(d) of the Income Tax Ordinance, 2001.

8. That selection of case for audit u/s 214(c) by the FBR was unjustified, unlawful and consequently the final order passed was equally unlawful and unjustified. Hence the Commissioner Inland Revenue (Appeals) is not justified to uphold the order u/s 121(l)(d) of the Income Tax Ordinance, 2001.

9. That order u/s 121(1)(d) of the Income Tax Ordinance, 2001 has been passed without issuance of specific notice u/s 121(1)(d), hence order passed was unlawful, illegal and unjustified. Hence the Commissioner Inland Revenue (Appeals) is not justified to uphold the order u/s 121(l)(d) of the Income Tax Ordinance, 2001.

10. That order passed u/s 121(1)(d) is not best judgment order and was based on mere presumptions, surmises and guesswork, hence, not maintainable in the eyes of law. Hence the Commissioner Inland Revenue (Appeals) is not justified to uphold the order u/s 121(1)(d) of the Income Tax Ordinance, 2001.

11. That exparte order has been passed on a date not fixed for hearing, hence order was not maintainable in the eyes of law. Hence the Commissioner Inland Revenue (Appeals) is not justified to uphold the order u/s 121(1)(d) of the Income Tax Ordinance, 2001.

12. That addition on account of alleged suppressed sales made at Rs.17,999,971/- was unlawful, unjustified and void ab initio. Hence the Commissioner Inland Revenue (Appeals) is not justified to uphold the order u/s 121(1)(d) of the Income Tax Ordinance, 2001.

13. That addition on account of alleged concealed purchases u/s 111(l)(b) to the tune of Rs.5,840,278/- was unlawful, illegal and unjustified. Hence the Commissioner Inland Revenue (Appeals) is not justified to uphold the order u/s 121(1)(d) of the Income Tax Ordinance, 2001.

14. That addition made u/s 174(2) to the tune of Rs.15,000,000/- on account of alleged unexplained undocumented purchases/manufacturing expenses was unjustified, illegal and unlawful and was not maintainable in the eyes of law. Hence the Commissioner Inland Revenue (Appeals) is not justified to uphold the order u/s 121(1)(d) of the Income Tax Ordinance, 2001.

15. That addition made u/s 174(2) to the tune of Rs.l.200,000/- on account of alleged unexplained undocumented P&I expenses was unjustified, illegal and unlawful and is not maintainable in the eyes of law. Hence the Commissioner Inland Revenue (Appeals) is not justified to uphold the order u/s 121(1)(d) of the Income Tax Ordinance, 2001.

16. That income assessed at Rs.40,640,249/- against declared income of Rs.600,000/- was harsh arbitrary and against all the cannons of law and justice. Hence the Commissioner Inland Revenue (Appeals) is not justified to uphold the order u/s 121(1)(d) of the Income Tax Ordinance, 2001.

2. Brief facts relevant for the disposal of present appeal are that income tax return for the tax year 2011 was filed by the appellant taxpayer declaring income of Rs.600,000/-. Case of the taxpayer was selected for audit u/s 214C of the Income Tax Ordinance, 2001 by the FBR and intimation to this effect was conveyed to the taxpayer. Case was fixed for hearing before the Inland Revenue Officer, Audit Unit-02, Zone-IV, Regional Tax Office, Lahore. However, as per assessment order no compliance was made to the notices issued by the learned Inland Revenue Officer, therefore, he proceeded to pass order u/s 121(1)(d) of the Income Tax Ordinance, 2001 vide order dated 04.12.2013 The taxpayer/appellant being aggrieved with the said order filed first appeal before the learned Commissioner Inland Revenue (Appeals) Zone-II, Lahore on various legal and factual grounds. The learned Commissioner Inland Revenue (Appeals) vide his order dated 29.10.2014 has held that the action of the OIR in finalizing the assessment exparte u/s 121(1)(d) of the Ordinance, is held to be legally justified and he has accordingly confirmed assessment order dated 02.12.2013. The appellant aggrieved with the order of the learned Commissioner Inland Revenue, (Appeals)-II, Lahore has filed second appeal before this Tribunal praying for vacation of orders passed by both the authorities below.

3. Both the parties have been heard and relevant orders and records perused. The learned counsel for the taxpayer argued that exparte order u/s 121(1)(d) was passed in the case of appellant without service of statutory/mandatory notices upon the appellant which is a precedent condition for lawful assumption of jurisdiction to pass order u/s 121(1)(d). The AR has submitted that completion of assessment for the tax year 2011 came into the knowledge of appellant when recovery proceedings were initiated by the Assistant Commissioner Inland Revenue, Enforcement & Collection Unit-05, Zone-IV, RTO, Lahore and Inspector of the Unit visited the business premises of the appellant to pay tax demand of Rs.11053728/- outstanding with respect to tax year 2011. However, since no order for tax year 2011 was ever served on the appellant, therefore, the appellant applied for inspection of record vide letter dated 08.05.2014 and during the inspection of file it came to the knowledge of appellant that an order u/s 121(1)(d) of the Income Tax Ordinance, 2001 dated 02.12.2013 has been passed. He has further submitted that during the inspection of official record it was noted that the impugned order was sent through TCS vide consignment receipt No.40034238578. Service of the order was checked from the TCS online tracking verification and the tracking result was “there is no record available”.

“Therefore, the appellant requested for issuance of attested copy of the assessment order dated 02-12-2013 vide letter dated 08.05.2014 and attested copy of the order was supplied/served on the appellant for the first time on 12-5-2014 and after obtaining the attested copy of order the same was contested in first appeal before the learned Commissioner Inland Revenue (Appeals) Zone-II, Lahore and appeal has been treated, having been filed within the statutory time period required for filing of appeal. The AR further submitted that during the inspection of file it was noted that different notices were issued in the name of the appellant from time to time and copies of TCS acknowledgments were also available on record, but whether these notices were served on the appellant? No evidence in this regard was available on record.

The AR explained/submitted that as per official record one notice dated 10.10.2013 u/s 177(2) of the Income Tax Ordinance, 2001 for compliance on 21.10.2013 was issued to the appellant and this notice was sent through TCS bearing consignment receipt No.40032441566. To verify the status of service of the said notice, appellant has checked online tracking record from the website of TCS and online tracking result is “there is no record available.”

4. The learned AR has further submitted that as per official record and impugned order another notice u/s 122(9) read with 122(1)/1 11(1)(b) dated 07.11.2013 for compliance on 18.11.2013 was sent to the appellant through TCS bearing consignment receipt No.400 2492403. Whereas as per TCS online tracking, result is “there is no record available.” In support of these submissions, the AR has also produced copies of the online tracking results from the website of TCS as above documentary evidence to prove that the notices were not served on the appellant. He therefore, submitted that in the presence of this documentary evidence, it is clear without any shadow of doubt that order was passed without service of mandatory/statutory notice upon the appellant and findings of the learned Commissioner Inland Revenue (Appeals) on this issue of service of notices are unjustified and he has relied upon the copies of notices without knowing the status that whether such were served on the appellant. Hence, findings of the learned Commissioner Inland Revenue (Appeals) are evasive, arbitrary and unjustified. The AR has, therefore, submitted that order passed is unlawful, illegal and is not maintainable on this single score. Reliance has also been placed on the following reported judgments:

1971 SMCR 681
2013 PTD 881
20 8 PTD 1607
(2011) 104 Tax 351 (Trib.)=2011 PTD 2265
2002 PTD 102 (High Court Karachi)

5. The AR further submitted that in the impugned order the IRO has mentioned that in response to notice u/s 122(9) dated 07.11.2013 for compliance on 18.11.2013 a request for adjournment for two weeks was received which was allowed for 02/ 12.2013 and the Commissioner Inland Revenue (Appeals) in his order has also mentioned that appellant/taxpayer has availed adjournment. The AR submitted that finding of authorities below are completely unjustified and against the real and factual facts of the case. The AR submitted that notice u/s 122(9) read with 122(1) of the Income Tax Ordinance 2001 dated 07.11.2013 for compliance on 18.11.2013 was never served upon the appellant and in support thereof online tracking verification from TCS website has been submitted. The AR further submitted that the alleged application for adjournment available on record is bogus and fictitious, for the simple reason that when appellant has not received the show cause notice dated 07-11-2013, how he can apply for adjournment of the case. The bogus application also does not bear the signature of the applicant. He has submitted that signature available on the said application does not match with the signature of the applicant as are available on his CNIC. The signature available on the application are of some stranger who is an alien to the appellant. The AR further pointed out that perusal of this bogus application would reveal that so called adjourned date was not got noted by the IRO by the person who allegedly appeared to obtain adjournment. Copy of application has also been filed before us. An affidavit of the appellant

deposing all the above facts on solemn oath was submitted before the learned Commissioner Inland Revenue (Appeals) and has also been produced before us. The AR has submitted that in the presence of these facts this bogus adjournment has no legal value in the eyes of law. Therefore, findings of the IRO and learned Commissioner Inland Revenue (Appeals) are unjust and against the norms of justice and fair play and orders passed by the authorities below are not sustainable in the eyes of law.

6. On merits, it is contended by the learned AR that the assessing authority has miserably failed to pass a best judgment order. It is asserted by the AR that difference of sales between sales tax and income tax return was subjected to addition without mentioning the relevant clause or section under which the said addition was made. Similarly, the addition u/s 111(1)(b) was made on account of concealed purchases which is not permissible under the law as the same cannot be made under section 111(1)(b). It is contended by the learned AR that the additions. in P & L and manufacturing expenses were made on adhoc and lump sump manner which action is not permissible under the new scheme of Income Tax Ordinance, 2001.

7. The learned DR on his turn submitted that opportunity, as envisaged under the law, was duly accorded to the taxpayer by issuing a specific show cause notice but the taxpayer had failed to put appearance before the assessing authority, therefore, he was justified to proceed ex-parte and make the subsequent additions.

8. We have gone through the contention of the taxpayer with regard to non-providing of opportunity of being heard and non service of mandatory show cause notice upon the appellant before passing ex arte order u/s 121(1)(d) of the Income Tax Ordinance, 2001. From the available record and documents produced before us it is clear without any shadow of doubt that mandatory show cause notice and other statutory notice have not been served on the appellant and exparte order has been passed without service of statutory show cause notice upon the appellant. The appellant has ably demonstrated with the help of records/evidence that show cause notice u/s 122(9) and other notices as mentioned in the assessment order u/s 121(1)(d) were not served on him and the so called adjournment application which does not bear the signature of the appellant has no legal value in the eyes of law.

9. It is mandatory requirement of law and is also now settled law that assumption of jurisdiction is dependent on service of notice on an taxpayer and service of notice on the taxpayer shall be a condition precedent for assumption of jurisdiction. Service of notice means a valid and proper service as required under the law and not otherwise.

In the case reported as 2002 PTD 102 (Karachi High Court) it has been held:

"If a assessee is able to demonstrate that either the jurisdictional notice was not served at all or it was not served on assessee or a person duly authorized by the assessee in this behalf, the jurisdiction acquired by an Assessing Officer, which is contingent on a proper service of notice on the assessee or his legally authorized agent, shall result in vitiation of the entire proceedings."

“Assumption of jurisdiction is dependent on service of notice on an assessee, service of notice on the assessee shall be a condition precedent for assumption of jurisdiction. “Service of notice means a valid and proper service of notice as required under the law and not otherwise.”

10. Since from available records, it is established that mandatory notice u/s 122(9) was not served on the appellant taxpayer, therefore, respectfully following the above judgment of the Honorable Karachi High Court we feel no hesitation to hold that order dated 02.12.2013 passed by the IRO Audit-02, Zone-IV, Lahore u/s 121(1)(d) of the Ordinance, is unlawful and illegal and deserve quashment/cancellation and we order so.

11. Even on merit, we find that the impugned order is not a speaking and best judgment order. The impugned additions were made on adhoc, lump sum and without assigning any plausible reasoning. The assessing authority taken up the difference of sales and purchases in the sales tax returns and income tax return and subjected the same to additions on account of suppressed sales and on account of purchases. Addition made on account of suppressed sales was made without mentioning any relevant section or clause which action is not permissible under the law as the assessing authority has to mention the relevant charging provision under which he is going to proceed to make such addition. Similarly, the addition made on account of purchases u/s 111(1)(b) is not maintainable in the eye of law. The assessing authority has wrongly invoked the provisions of section u/s 111(1)(b) for tax year 2011 to make the said addition. For the sake of facility and ready reference, the provisions of section 111(1)(b) are reproduced hereunder:-

111. Unexplained income or assets:-(1) Where –

(b) a person has made any investment or is the owner of any money or valuable article;

A plain reading of sub-section (b) transpires that unless it could be established that the taxpayer had made an investment or was found to be owner of money or valuable article, no addition could be made u/s 111(1)(b), The amending authority failed to establish that the taxpayer made any investment or found to be owner of money or valuable article. Reliance in this behalf is placed on the reported judgment cited as 1988 PTD 117 (Trib) wherein it has been held that:-

Unless it could be shown that the assessee had made, an investment or was found to be owner of money or valuable article, no addition could be made u/s 13(1)(aa) of the ordinance.”

12. Even otherwise amendment under section 111 of Income Tax Ordinance, 2001 made by Finance Act, 2011 being a charging provision cannot be applied retrospectively hence addition merits deletion on this ground alone.

13. Furthermore, the issuance of a specific notice u/s 111 is a pre-requisite for making addition u/s 111(1). Perusal of record reveals that no such notice was ever issued in the case which renders the whole proceedings for making such addition as void and illegal. We are not convinced with the

contention of the learned DR that there is no need to issuance a specific notice u/s 111 as the taxpayer has duly confronted through notice issued u/s 122(9), The issue in hand has already been decided by the honorable Karachi High Court in the case reported as (2010) 101 Tax 293 (H.C. Kar,)=2010 PTD 704 and by this Tribunal in the case reported as 2010 PTD (Trib) 790.

14. Here, we further observe that the taxpayer is maintaining books of accounts on mercantile system of accounting where the transactions were to be recorded on accrual basis whereas sales tax rules allow the relaxation to a person to claim the input tax against purchases in the succeeding six months. Reliance in this behalf was placed by the learned CIR(A) on the case law reported as 2003 PTD 2689, wherein it was, inter alia, held by this Tribunal that timing differences in recording of transaction is quite common in business undertakings and any such differences cannot be made basis for treating the same as deemed income. Sales tax Income tax laws are two independent statutes which provide a different method of recording the transactions.

15. Looking at the matter at its entirety, we find no reason to uphold the additions made on account of suppressed sales and purchases which are hereby deleted. Orders of the authorities below in this regard are accordingly vacated.

16. The assessing authority made additions u/s 174(2) amounting to Rs,l5,000,000/- and Rs,l,200,000/- on account of manufacturing and P & L expenses respectively. We noted with great concern that the assessing authority as well as CIR(A) have unlawfully ignored the fact that no business can be done without incurring manufacturing/P & L expenses. The assessing authority had acted in a lumpsum manner by disallowing the expenses without even mentioning the methodology or specific heads of expenditure. There is no scope of making such additions in the new scheme of Income Tax Ordinance, 2001. It seems that the assessing officer was in the old frame of mind and could not bring on record anything to justify his section that the expenses incurred were not incidental to day to day business affairs. For making above additions, it was the responsibility of the assessing authority to point out any specific instance or substantiating his allegations with evidence that the expenditure is liable to be added back, Reliance in this behalf, is placed on the following judgments cited as (2006) 93 Tax 195 (Trib) & (2006) 94 Tax 289 (Trib). Such types of P & L additions on ad hoc, estimate basis is outside the scope of the provisions of law. Under such circumstances, both the additions as made in manufacturing and P & L account expenses, are not maintainable in the eye of law which are hereby deleted.

Orders of the authorities below in this behalf are accordingly vacated.

17. In view of the above, the taxpayer's appeal is accepted on legal as Well as factual grounds and order passed by the assessing authority u/s 121(1)(d) dated 02-12-2013 is cancelled and impugned order of the learned CIR(A) is hereby vacated.

Appeals accepted.