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## TAXATION

## APPELLATE TRIBUNAL INLAND REVENUE

| No. OF CASE | YEAR | DATE | DTL_AT |
|---|---|---|---|
| 1266/LB | 2006 | 06/07/2007 | 3007 |

| TAXATION | PTD | PTCL |
|---|---|---|
| 97TAX313 | | |

Income Tax Ordinance, 1979 -- Sections 13(1)(aa), 13(1)(e), 63 --

Best Judgment assessment -- Acceptance of revised reconciliation without verification of sources by C.I.T. (A) -- Deletion of addition - Condonation of delay -- Validity -- Assessee deriving income from running paint store -- Case selected for total audit through random ballot - Assessment made ex-parte -- Additions deleted by C.I.T. (A) and delay condoned -- Challenge to -- Whether it has been established before C.I.T. (A) that service upon assessee was not proper as service of demand notice must be on proper person -- Held yes -- Whether in revenue matter, prayer for Condonation of delay by assessee/citizen should all the more be considered sympathetically -- Held yes -- Whether appellant was prevented by sufficient cause from presenting appeal within due time limit and C.I.T. (A) has rightly condoned delay in filing appeal -- Held yes --

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[IN THE INCOME TAX APPELLATE TRIBUNAL, LAHORE BENCH, LAHORE]

Present: JAWAID MASOOD TAHIR BHATTI, JUDICIAL MEMBER.

I.T.A. No. 1266/LB of 2006 (Assessment year 2001-2002), decided on 06-07-2007.

Department v. Assessee

Mrs. Sabiha Mujahid, D.R., for the Appellant.

Mumtaz Hussain Khokhar and Mrs. Afreen Maqsood, Advocates, for the Respondent.

Date of hearing; 16-06-2007.

ORDER

[The Order was passed by Jawaid Masood Tahir Bhatti, Judicial Member.] - Though this appeal, the appellant Department has objected to the impugned order of the learned CIT (A) dated 09-03-2006 for the assessment years 2001-02 on the following grounds:-

1) That the order of the learned CIT (A), Multan is bad in view and contrary to the facts of the case.

2) That the learned CIT (A), Multan was not justified to condone the delay in filing first appeal and to accept the time barred one.

3) That the additions made under the various heads of section 13 have been deleted without considering the facts of the case.

4) That the learned CIT (A), Multan has accepted the revised reconciliation without verification of sources and cogent reason.

5) That the learned CIT (A), Multan was not justified to accept defected nature of gift deed dated 20-1-1990.

The learned DR representing the Department has asserted the arguments on the basis of above said ground of appeal and has requested for restoration of the assessment order.

On the other hand, Mr. Mumtaz Hussain, Advocate representing the assessee/respondent has contended that appeal filed by the revenue is illegal, hence not sustainable in the eyes of law, as the appeal in the instant case pertain to the assessment year 2001-02, meaning thereby that the same fell within the purview of repealed Income Tax Ordinance, 1979, but the Department erroneously filed this appeal u/s 131 of the Income Tax Ordinance, 2001. He has contended that the appeal in the instant case pertain to the assessment year 2001-02, hence all intents and purposes, proceedings would be considered to be pending and thus were to be governed by the repealed law. He has in this respect placed reliance on the decision of Hon'ble High Court reported as (2004) 89 Tax 55 (H.C. Lahore). In this case, constitutional petition was filed before the Hon'ble High Court. This issue which came up for adjudication was that revision petition filed against the assessment order u/s 138 of the I.T. Ordinance, 2001 was rejected by the Commissioner of Income Tax (Appeals) on the ground that new Ordinance did not provide any provision of revision. It was held by the Hon'ble High Court that the word "pending" does not mean physical pending but would also include within its definition what is proposed to be filed within unexpired periphery of time and thus held that the order of rejection of revision petition passed by the CIT (A) was without legal basis. The learned counsel has contended that in somewhat similar situation, where Income Tax Act, 1922 was repealed and the Income Tax Ordinance, 1979 was promulgated on 1-7-1979, the Hon'ble Sindh High Court in the reported judgment cited as (1988) 58 Tax 60 (High Court Karachi) observed as under:-

``The effect of the operation clauses (a) and (i) of sub-section 166 of the Ordinance is that all proceedings including an application for reference to the High Court in relation to the assessment year in respect of which the return of income was filed before July 01, 1979 must be dealt with under the repealed Act as if the Ordinance had not been passed. As a result of above findings, these applications are dismissed as not maintainable. We don, however, made any order at to costs''.

Learned counsel has argued that this Tribunal on the basis of above referred decisions while deciding ITA Nos. 5803 & 5804/LB/2003 (assessment years 1996-97 & 1997-98) has held as under:-

``I am constrained to observe that the department appeals are liable to be dismissed in limine for the reason that the same were filed under the new Ordinance though assessment years which were subject matter of appeal pertain to 1996-97 and 1997-98 which were to be governed by the old law''.

Learned counsel in this respect has also referred the decision of this Tribunal reported as (1996) PTD Trib. 334. Learned counsel has contended that the Hon'ble High Courts have laid down that when law requires something to be done in particular manner, same must be done in that manner.

On the facts of the case, learned counsel has contended that the learned CIT (A) has rightly condoned the delay, because service of demand notice was not proper which according to law was necessary no proper person as has already been observed by this Tribunal in a case reported as (1986) 53 Tax 18 (Trib.). He has argued that the question of limitation against order which was not maintainable in the eyes of law does not arise as has been held by this Tribunal in a case cited as (2004) 89 Tax 499 (Trib.)=(2004) PTD (Trib.) 1517. He has contended that the learned CIT (A) has rightly deleted the additions made u/s 13(1)(aa) & 13(1)(e), because investment was made before assessment year 2000-01. TAS declaration was also made by the assessee. Return for the assessment year 2000-01, wealth statement as on 30-6-2000 along with reconciliation statement filed by the assessee were accepted in good faith by the

Department, but while making addition of Rs.39,908/- u/s 13(1)(e), the assessing officer has ignored the element of intangible. He has argued that there was no accretion in immovable assets during 30-06-2001. This solid fact is evident from the reconciliation statement already filed before the assessing officer. He has submitted that the first wealth statement was filed in 1985. Total assets as on 30-6-1985 were Rs.22,000/-. Second wealth statement was filed on 30-06-2000 declaring total assets at Rs.4,33,800/-. Accretion between these two was of Rs.4,11,800/-. He has in this respect placed before me the reconciliation statement, which is reproduced hereunder:-

| | + | - |
|---|---|---|
| Total assets as on 30-6-00 | | 433,800 |
| Total assets as on 30-6-85 | | 22,000 |
| Accretion | | 411,800 |

| | | | |
|---|---|---|---|
| L.B. Capital as on 1-7-85 | 15,000 | Capital as on 30-6-00 | 100,000 |
| Gift from father (supported by gift deed & affidavit of Donor Haji Khurshid Ahmed | 300,000 | Purchase of House In the name of Minors During asstt year 90-91 in the name of Minors During asstt year 90-91 | 445,500 |
| Encashment of Prize Bonds 3-12-88 to 7-3-95 from SB of Pak. (Multan Branch) | 80,000 | Purchase of House During asstt. year 1996-97 | 304,800 |
| Sales Ornaments on 26-2-96 to 28-2-96 received as gift from mother (Supported by affidavit Mst. Hanifa Bibi (Donor) | 100,000 | Personal expenditure during 80-87 to 99-00 Personal expenditure during 00-01 | 360,350 40,000 |
| TAS declaration | 220,330 | Cash | 5,000 |
| Income 2000-01 | 76,500 | TAS Tax | 27,000 |
| Income 86-87 to 99-00 | 5,14,850 | Furniture & Fixture | 24,000 |
| Grand Total | 1,306,650 | Grand Total | 1306650 |

Details of TAS Declaration

filed on 25-9-2000

| Sources | | Purchase of Properties | |
|---|---|---|---|
| 1) Gift | 300,000 | H. No. 1787/65A Basti Ahmed Abad, Multan during 90-91 (In the name of minors) | 445,500 |
| 2) Encashment of Prize Bonds | 80,000 | | |
| 3) Savings | 50,000 | H. No. 410/411-D Shah Rukan Alam Colony, Multan | 304,800 |
| 4) Sales of Ornaments | 100,000 | | |
| 5) TAS declaration | 220,300 | | |
| Total | 750,300 | | 750,300 |

Learned counsel has contended that the investment was made before

assessment year 2000-01. TAS declaration was also made during the assessment year 2000-01 7 accepted in goods faith. Wealth statement as on 30-06-2000 was compulsory requirement of return filed under SAS was accepted in goods faith by the Department. Return for the assessment year 2000-01 was accepted u/s 59(1) in good faith. Prize bonds were purchased and encashed during 3-12-88 to 7-3-95. It was beyond control of assessee to declare these in wealth statements 30-6-85, 30-6-00 or 30-6-01. Genuineness of the gift made on 21-1-1990 while doing so, he has ignored that it is a typing mistake due to which date was endorsed 1st January, 1990 instead of 21st January, 1990 and the assessing officer has ignored the affidavit of Haji Khurshid Ahmed the Donor. Learned counsel has contended that genuineness of a document cannot be doubted on technicalities. He has in this respect referred the decision of this Tribunal reported as (2004) 89 Tax 427 (Trib.)=2004 PTD (Trib.) 1523, wherein it has been held that oral gift can be made. Learned counsel has contended that no notice u/s 148 was issued to the said Donor nor any cogent reasons were brought no record which this factor can be doubted that at the time of making gift, such amount was available with him or not. He has argued that the amount declared as cash after sales of jewellery was doubted by the assessing officer with the only plea that as per wealth statement as on 30-06-1985, the assessee was owner of 10-Tolas gold ornaments, on the other hand, he has shown sale of 25-Tolas. Assessing officer in this respect has ignored the affidavit of Mst. Hanifa Bibi, mother of the assessee. No notice u/s 148 was issued to the goldsmith, which according to law was necessary. Learned counsel has contended that while making addition of Rs.39,908/- u/s 13(1)(d), the assessing officer was has ignored the element of intangible. He has submitted that sales declared were at Rs.718,550/-, which have been estimated at Rs.1,000,000/-, while GP declared was at Rs.107,782/-. The assessing officer has applied GP at Rs.150,000/- and the addition of Rs.42,418/- has been made. According to the learned counsel, the addition of Rs.39,908/- is covered by the addition of Rs.42,218/- made in the trading account. According to the learned counsel, the assessing officer has taxed the assessee twice, which according to the learned counsel has rightly been deleted by the learned CIT (A).

I have heard the learned representatives from both the sides and have also perused the impugned order of the learned CIT (A) and the assessment order.

Brief facts of the case are that the assessee in this case is an individual deriving income from running a paint store. His case for the assessment year 2001-02 was selected for Total Audit through random ballot. Following results were declared by the assessee:-

| | | |
|---|---|---|
| Sales | | 718,550 |
| GP @ 15% | 107,782 | |
| P&L Expenses | 22,842 | |
| Net Income | 84,940 | |

Assessing officer after obtaining documents, issued notice u/s 13(1)(aa) on 17-02-2003 requiring to make compliance up to 25-02-2003. Another notice u/s 13(1)(e) dated 12-03-2003 was issued. Assessee was asked to make compliance of same up to 21-03-2003. As per Department, no one attended the proceeding nor any reply or application for adjournment was received on due date. On 15-04-2003, after obtaining approval from IAC, the case was decided u/s 63 on 16-4-2003. It is pertinent to not that as per the assessment order, no notice u/s 61 was accompanied neither with the above cited notices nor issued before 16-04-2003 that is the date of order. Exparte order has been passed u/s 63 for default of notice u/s 13(1)(aa) & 13(1)(e) in the following manner:-

| | | |
|---|---|---|
| Sales estimated | | 10,00,000 |
| GP @ 15% | 15,000 | |
| Less P&L Expenses as claimed | 22,842 | |

| | |
|---|---|
| Net business Income | 127,158 |
| Addition u/s 13(1)(aa)/(e) | 519,908 |
| Total assessed income | 647,066 |

The assessing officer has made the following additions u/s 13 of the repealed Income Tax Ordinance, 1979.

| Nature of addition | Reason | Amount |
|---|---|---|
| U/s 13(1)(aa) | Gift deed of Rs.300,000/- Found bogus as stamp paper was purchased on 20-1-90 as was executed on 01-01-1990 | 3,00,000 |
| U/s 13(1)(aa) | As per wealth statement as on 30-06-1985, 10-Tola gold ornaments were shown whereas the assessee claimed sale of 25-tola gold. Hence addition on account of sale of 50-tola gold was made | 1,00,000 |
| U/s 13(1)(aa) | The assessee shown encashment of prize bonds at Rs.80,000/- as prize bonds were not mentioned in the earlier W/statements. | 80,000 |
| U/s 13(1)(e) | The assessee claimed household expenses at Rs.45,000/- which was calculated at.Rs.84,908/-, hence balance was added | 39,908 |
| | Total Additions | 519,908 |

The above said additions have been deleted by the learned CIT (A) being made without any basis with the following observations:-

``I have heard contentions of both the parties in the light of prevalent facts of the case and I have come to the conclusion that:-

1. Assessment was made before assessment year 2000-01.

2. TAS declaration was also made during assessment year 2000-01 and accepted in good faith.

3. Wealth statement as on 30-6-2000 was compulsory requirement of return filed under SAS was accepted in good faith by the Department.

4. Return for the assessment year 2000-01 was accepted u/s 59 (1) in good faith.

5. Prize bonds were purchased and encashed during 3-12-1988 to 07-3-1995. It was beyond the control of assessee to declare these in w/statements 30-6-86, 30-6-00 or 30-06-01

6. Genuineness of the gift made on 21-1-90 has been doubted with the only plea that stamp paper was purchased on 20-1-90 and was executed on 1-1-1990. While doing so he has ignored these solid facts that:-

   a) It is a typing mistake due to which date was endorsed 1st January, 1990 instead of 21st January, 1990, he has ignored the affidavit of Haji Khurshid Ahmed, the Donor.

   b) It was held by the Hon'ble ITAT in a case cited at (2004) 89 Tax 427 (Trib.)=2004 PTD (Trib.) 1523. Oral gift can be made. Genuineness of a document cannot be doubted on technicalities. Mian factor is that no notice u/s 148 was issued to the said donor nor any

cogent reasons were brought on record which this factor can be doubted that at the time of making gift such amount was available with him or not.

7. Amount declared as cash after sales of jewellery was doubted with the only plea that as per W/S as on 30-6-1985 assessee was owner of 10-Tolas of gold ornaments on the other hand, he has shown sale of 25-Tolas. Assessing officer in this respect has ignored the affidavit of Mst. Hanifa Bibi mother of assessee appellant that he had gifted 15-T to his son. Same were sold in 1996 by the Appellant. No notice u/s 148 was issued to the goldsmith which according to law was necessary.

8. While making addition of Rs.39,908/- u/s 13(1)(d), assessing officer has ignored the element of intangible.

| | |
|---|---|
| Sales declared | 718,550 |
| Sales estimated | 1,000,000 |
| GP declared | 107,782 |
| GP estimated | 150,000 |
| Addition | 42,218 |

Addition of Rs.39,908/- is covered by the addition of Rs.42,218/- made in the trading account. Legally he has taxed the assessee twice.

In these facts and circumstances of the case, I have no alternative but to delete the following additions amounting to Rs.519,908/- being made without any valid basis:-

| Head | Section | Amount |
|---|---|---|
| Gift | 13(1)(aa) | Rs.3,00,000 |
| Sale of Gold | 13(1)(aa) | Rs.1,00,000 |
| Prize Bonds | 13(1)(aa) | Rs.80,000 |
| Household Exps. | 13(1)(e) | Rs.39,908 |
| Total Addition u/s 13 | | Rs.519,908 |

After considering the above said observations of the learned CIT, I find no warrant for interference in the impugned order of the learned CIT (A), which is upheld and the appeal filed by the Department is dismissed.

Regarding the ground of appeal objecting the acceptance of appeal by the learned CIT (A), which was time barred, I have found that on behalf of the assessee, it has been established before the learned CIT (A) that the services upon the assessee was not proper. Service of demand notice must be on proper person as has already been held by this Tribunal in a case reported as (1986) 53 Tax 18 (Trib.). In this regard, decision of this Tribunal cited as (2004) 89 Tax 499 (Trib.)=2004 PTD (Trib.) 1517 has been referred, wherein it has been held that there is no limitation against the void order. On behalf of the assessee, a decision of Hon'ble High Court cited as 2002 PTD (H.C. Lah.) has been referred wherein placing reliance on the decision of Indian Supreme Court cited as (1987) 56 Tax 130, it has been observed that:-

i) Ordinarily, a litigant does not stand to benefit by lodging an appeal late.

ii) Refusing to condone delay can result in a meritorious matter being thrown out at very threshold and cause of justice being defeated. As against this, when delay is condoned, the highest than can happen is that a case would be decided on merits after hearing the parties.

iii) Every day's delay must be explained "does not mean that a pedantic? Approach should be made, why not every hour's delay, every second's delay? The doctrine must be applied in rational, common sense and pragmatic manner.

iv) When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserve to be preferred for other side cannot claim to have vested right in justice being done because of a non-deliberately delay.

v) There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.

vi) It must be grasped that the judiciary is respected not on account of his power to legalize injustice on technical grounds, but because it is capable of removing injustice and is expected to do so.

Considering the observations and decisions of this Tribunal, I am of the view that in revenue matter, prayer for condonation by an assessee/citizen should all the more be considered sympathetically. In the light of the above discussion and the judgments of the superior courts, I am satisfied that the appellant was prevented by sufficient cause from presenting the appeal within due time limit and the learned CIT (A) has rightly condoned the delay in filing the appeal. The appeal filed by the Department is, therefore, dismissed on this score also.

Appeal dismissed.