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JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

PTR No.292 of 2012

Commissioner Inland Revenue

Versus

M/s Olympia Chemicals Ltd., Lahore

J U D G M E N T

Date of hearing:	01.06.2021.
Applicant by:	Raja Sikandar Khan, Advocate. Barrister Ameer Abbas Ali Khan, A.A.G. on Court's call.
Respondent by:	Mr. Usman Khalil, Advocate.
Research by:	Mr. Ahmad Zia Ch., Civil Judge / Research Officer, LHCRC.

MUHAMMAD SAJID MEHMOOD SETHI, J.- Through instant Reference Application under Section 133 of the Income Tax Ordinance, 2001 (**"the Ordinance of 2001"**), following question of law, urged to have arisen out of impugned order dated 04.05.2012, passed by learned Appellate Tribunal Inland Revenue, Lahore Bench, Lahore **("Appellate Tribunal")**, has been proposed for our opinion**:-**

> "Whether on the facts and circumstances of the case, the Tribunal has not erred in law by rejecting the interpretation of Sindh High Court's judgment in **Constitution Petition No.D-2408 of 2010** in the case of *North Star Textile Limited* made by the Commissioner (Appeals) on the issue of accrual of vested right in his appellate order?"

2. Brief facts of the case are that respondent-taxpayer, a public limited company, deriving income from manufacturing and sale of chemical products, filed income tax return for tax year 2009, which was treated as assessment order in terms of Section 120 of the Ordinance of 2001. The concerned DCIR noticed that the taxpayer had claimed adjustment under Section 113(2)(c) on account of

minimum tax paid during the tax years 2004 to 2008, therefore, a notice under Section 221 was issued requiring it to explain as to why the earlier tax liability was not shown in the revised return as it was adjusted against minimum tax under Section 113 *ibid* brought forward from previous tax years. In response, it was explained that the proviso to Section 113 (repealed by Finance Act, 2008) provided that minimum tax would be carried forward in succeeding five years and adjusted against the demand under the normal law. Being dissatisfied of taxpayer's explanation on the ground that Section 113 *ibid* was deleted vide Finance Act, 2008, therefore, brought forward tax credit was not available for adjustment, the DCIR rectified the order under Section 221. In appeal, learned CIR maintained the said order. Feeling aggrieved, respondent-taxpayer filed second appeal before learned Appellate Tribunal, which was allowed and orders of authorities below were vacated. Hence, instant Reference Application.

3. Learned Legal Advisor for applicant-department contends that no matter the minimum tax paid by the respondent-taxpayer exceeded the normal tax liability during tax years 2004 to 2008, however, since the provisions of Section 113 were not on the statute book for the purposes of determination of income tax liability for the tax year 2009, therefore, it could not claim the adjustment of minimum tax paid during preceding years. He adds that right of adjustment was required to be seen with regard to position of statute as it stood on 01.07.2009 and on the said date aforesaid provision of law was not existing, thus, no vested right was accrued to the taxpayer. He contends that though vested rights cannot be taken away save by express words or necessary intendment in the statute, however, legislature has full plenary powers to legislate retrospectively or retroactively and vested right can be taken away and such legislation cannot be struck down on that ground. In the end, he submits that impugned order is unsustainable in the eye of

law. He has referred to *Molasses Trading & Export (Pvt.) Limited v. Federation of Pakistan and others* **(1993 SCMR 1905)**.

4. On the contrary, learned counsel for respondent-taxpayer defends the impugned order. He contends that a right had accrued in taxpayer's favour on the assessment of his taxable income for the previous years and in spite of deletion of Section 113, it was entitled to adjust the brought forward tax credit against its tax liability for the year 2008. He adds that learned forums below were not justified to deny the adjustment to respondent-taxpayer as the payment of excess minimum tax during the years 2004 to 2008 constituted a vested right in favour of respondent-taxpayer and adjustment of the same, claimed against normal tax liability regarding tax year 2009, was lawful and proper. In support, he has referred to *Idrees Ahmad and others v. Hafiz Fida Ahmad Khan and 4 others* **(PLD 1985 Supreme Court 376)**, *Gulshan Spinning Mills Ltd. and others v. Government of Pakistan and others* **(2005 PTD 259)** and *Shahnawaz (Pvt.) Ltd. through Director Finance v. Pakistan through the Secretary Ministry of Finance Government of Pakistan, Islamabad and another* **(2011 PTD 1558)**.

5. Arguments heard. Available record perused.

6. The admitted position of the case is that respondent-taxpayer claimed adjustment of minimum tax in the return of tax year 2009, in terms of Section 113(2)(c) of the Ordinance of 2001, which was paid during tax years 2004 to 2008 but the same was declined on the ground that said provision was not available in the Statute in 2009 as same was deleted through the Finance Act, 2008. Now, the moot question for our determination is whether payment of excess minimum tax over normal tax liability in years 2004 to 2008 constituted a vested right which remained intact notwithstanding the abolition of Section 113 from the Ordinance of 2001, by way of the Finance Act, 2008, and respondent-taxpayer has right for adjustment of excess minimum tax against normal tax liability arising during succeeding five years. The provision of section

113(2)(c) of the Ordinance was firstly enacted by the Finance Act, 2004, which reads as under:-

> "where tax paid under subsection (1) exceeds the actual tax payable under Part I, Division II of the First Schedule, the excess amount of tax paid shall be carried forward for adjustment against tax liability under Part I, Division II of the First Schedule of the subsequent tax year:
>
> Provided that the amount under this clause shall be carried forward and adjusted against tax liability for five years immediately succeeding the tax year for which the amount was paid."

This provision was repealed by the Finance Act, 2008, and re-enacted through Finance Act, 2009, with the following text:-

> where tax paid under subsection (1) exceeds the actual tax payable under Part I, Division II of, the First Schedule, the excess amount of tax paid shall be carried forward for adjustment against tax liability under the aforesaid Part of the subsequent tax year;
>
> Provided that the amount under the clause shall be carried forward and adjusted against tax liability for three years immediately succeeding the tax year for which the amount was paid.

The re-enacted section 113 was further amended through the Finance Act, 2011 and the word "three" in the proviso was substituted with the word "five".

7. It is clear from the above that period provided for carrying the tax credit forward was "five" years for tax years 2005 to 2008 and 2011 onward, whereas it was "three" years for the tax years 2010 and 2011. In the instant case, the excess amount of tax paid which was carried forward related to tax years 2004 to 2008 and under the repealed section 113(2)(c), prevailing at the relevant time, the said amount was adjustable against tax liability for five years immediately succeeding the tax year for which the amount was paid. The subsequent change in law through re-enacted section 113(2)(c) where period was reduced to three years, will not curtail the period for adjustment, as substantive and vested right already accrued in favour of the respondent-taxpayer to adjust excess amount carried forward against tax liability for five years under the repealed section 113(2)(c) prevailing at the relevant time. Section

113(2)(c) was simply repealed through Finance Act, 2008 and after gap of one year was re-enacted through Finance Act, 2009 and was to be applied prospectively.

8. Needless to say that once vested right is accrued in favour of a party under a statute, and if that statute is subsequently repealed, such right cannot be disregarded. This principle is now found enshrined in Article 264 of the Constitution of Islamic Republic of Pakistan, 1973 ("**the Constitution**") which is reproduced as under:--

> **264. Effect of repeal of law.---**Where a law is repealed, or is deemed to have been repealed, by, under, or by virtue of the Constitution, the repeal shall not except as otherwise provided in the constitution,---
>
> (b) affect the previous operation of the law or anything duly done or suffered under the law;
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the law;

Section 6 of the General Clauses Act, 1897 (**"General Clauses Act"**) also prescribes similar effect regarding repeal of law which is reproduced hereunder:--

> **6. Effect of repeal.----**Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not----
>
> (a) ...
>
> (b) ...
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed;

9. The purpose of Article 264 of the Constitution and Section 6 of the General Clauses Act is to provide protection to rights, liabilities accrued and penalties incurred under repealed enactment / provision under the Constitution or the Act. It is well settled principle of interpretation of statutes / provisions that, in absence of a stipulation to the contrary, any change in law affecting

substantive rights has to have prospective effect. Reference can be made to *F.B. Ali v. State* **(PLD 1975 SC 506)**; *Sutlej Cotton Mills Ltd. v. Industrial Court* **(PLD 1966 SC 472)**; *Shohrat Bano v. Imsail* **(1968 SCMR 574)**; *Garikapati v. Subbiah Chaudhry* **(AIR 1957 SC 540)**; *P.I.A. Corporation v. Pak Saaf Dry Cleaners* **(PLD 1981 SC 553)**; *Nazir Begum v. Qamarunnisa* **(1982 CLC 2271)** and *Muhammad Ibrahim v. Surrayiaun Nisa* **(PLD 1992 SC 637)**.

10. Regarding retrospective application of a legislation, it is well-settled now that the Courts lean against giving retrospective operation where no vested rights or past transactions prejudicially affected or exist. A legislation does not operate retrospectively if it touches a right in existence at time of passing of legislation. Statutes are presumed to be applicable to cases and facts coming into existence after their enactment unless there be clear intention to give them retrospective effect. Statute needs not to be read in such a way as to change accrued rights, the title to which consists in transaction past and closed. Rights of parties are to be decided according to law existing when action began unless provision made to contrary. Where statute itself does not make its operation retrospective, it would be extravagant to claim that by necessary implication it has retrospective operation. Change in substantive law, which divested and adversely affected the vested rights of the parties should always have prospective application, unless by express word of the legislation and/or by necessary intendment/implication such law had been made applicable retrospectively. Substituted section cannot obliterate accrued rights. Reference can be made to *Nagina Silk Mill, Lyallpur v. The Income Tax Officer, A-Ward Lyallpur and another* **(PLD 1963 SC 322)**, *Adnan Afzan v. Capt. Sher Afzal* **(PLD 1969 SC 187)**, *Nabi Ahmed and another v. Home Secretary, Government of West Pakistan, Lahore and 4 others* **(PLD 1969 SC 599)**, *Province of East Pakistan v. Sharafatullah and 87 others* **(PLD 1970 SC 514)**, *Sona and another v. The State and others* **(PLD 1970 SC 264)**, *Hassan*

and others v. Fancy Foundation **(PLD 1975 SC 1)**, *The Collector, Customs and Central Excise, Peshawar and others v. M/s. Rais Khan Limited through Muhammad Hashim* **(1996 SCMR 83)**, *Malik Gul. Hasan and Co. and 5 others v. Allied Bank of Pakistan* **(1996 SCMR 237)**, *Manzoor All and 39 others v. United Bank Limited through President* **(2005 SCMR 1785)**, *Commissioner of Income Tax v. Messrs Eli Lilly Pakistan (Pvt.) Ltd.* **(2009 PTD 1392)**, *Muhammad Tariq Badr and another v. National Bank of Pakistan and others* **(2013 SCMR 314)** and *Badshah Gul Wazir v. Government of Khyber Pakhtunkhwa through Chief Secretary and others* **(2015 SCMR 43)**.

In *Mian Rafiud Din v. Chief Settlement and Rehabilitation Commissioner* **(PLD 1971 SC 252)**, the Hon'ble Supreme Court observed as under:-

> "It is well settled that when the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun and not the law that existed at the date of the judgment or order. This is, however, subject to the exception that the new law shall apply if it is a mere rule of procedure or if it has been applied retrospectively to pending proceedings. This rule, as stated in Craies on Statute Law, Sixth Edition, page 400 is as follows: --
>
> "It is general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. But there is an exception to this rule, namely, where enactments merely affect procedure and do not extend to rights of action."

11. The effect of repeal, provided in the General Clauses Act, has also been discussed by Indian Courts in a number of cases. In *D.P. Wool Company v. Union of India Etc.* **(ILR 1979 Delhi 27)**, the Court observed that the repealing statute itself is subject to section 6 of the General Clauses Act, which keeps the repealed statute alive for the purposes of enforcing the past liabilities. It prevents the repealed statute from having the effect as would have been the case under the common law when the presumption was that a repealed statute had never been enacted at

all. If a past right or obligation is inconsistent with the repealing Act, then it is enforceable under the repealed Act. In *M/s M.S. Shivananda v. Karnataka State Road Transport Corporation and Others* **[(1980) 1 SCC 149]**, the Court held that after repeal of the Act whether it applies or not depends on the intention of the legislature which is reflected by the language used in the subsequent Act passed by the legislature. The Court also observed that if, however, the right created by the statute is of an enduring character and has vested in the person, then that right cannot be taken away because the statute by which it was created has been repealed. In *M/s. Gurcharan Singh Baldev Singh v. Yashwant Singh and others* **[1992 (1) SCC 428]**, the Supreme Court of India has observed that the objective of Section 6(c) of the General Clauses Act, 1897 is to ensure protection of any right or privilege acquired under the repealed Act. The only exception to it is legislative intention to the contrary. That is, the repealing Act may expressly provide or it may impliedly provide against continuance of such right, obligation or liability. Reliance is further placed upon *Basant Singh v. Rampal Singh* **(AIR 1919 Oudh 217)**, *State of Punjab v. Mohar Singh* **[(1955) 1 SCR 893]**, *State of Orissa v. M.A. Tulloch and Co.* **[(1964) 4 SCR 461]** and *Brihan Maharashtra Sugar Syndicate v. Janardan* **(AIR 1960 Supreme Court 794)**.

In the case of *Brihan Maharashtra Sugar Syndicate* supra, while discussing the effect of repeal, the Supreme Court of India, on appeal, reversed the decision and upheld the conviction applying Section 6 of the General Clauses Act. The relevant observations are as under:-

> "Section 6 of the General Clauses Act provides that where an Act is repealed, then, unless a different intention appears, the repeal shall not affect any right or liability acquired or incurred under the repealed enactment or any legal proceeding in respect of such right or liability and the legal proceeding may be continued as if the repealing Act had not been passed. There is no dispute that Section 153- C of the Act of 1913 gave certain rights to the share-holders of

> a company and put the company as also its directors and managing agents under certain liabilities. The application under that Section was for enforcement of these rights and liabilities. Section 6 of the General Clauses Act would therefore preserve the rights and liabilities created by Section 153-C of the Act of 1913 and a continuance of the proceeding in respect thereof would be competent in spite of the repeal of the Act of 1913, unless of course a different intention could be gathered."

12. The legal position which existed in England, before Section 38(2) was inserted in the Interpretation Act of 1889, is reflected in *Kay v. Goodwin* ***(1830) 6 Bing. 576***: English Reports (Volume 130). At page 1403, Tindal, Chief Justice observed that the effect of repealing a statute is to obliterate it as completely from the records of the Parliament as if it had never been passed; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law. Likewise, Lord Tanterden in ***Surtees v. Ellison - (1829) 9 B & C. 750 : English Report (Volume 109)*** at page 278 observed that when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed. In England, to obviate such result a practice was developed to insert a saving clause in the repealing statute with a view to preserve rights and liabilities already accrued or incurred under the repealed enactment. When it was found cumbersome to insert a saving clause in every statute, then in order to dispense with the necessity of having to insert a saving clause on each occasion,

13. Needless to say that clause (c) of subsection (2) of section 113 was introduced to allow the facility of carrying forward the minimum tax for the next five years for adjustment against normal tax liability. The matter in hand pertained to tax years 2004 to 2008, when this provision was on the statute book and not with reference to tax year 2009 (when said provision was not in existence), therefore, vested right accrued in favour of respondent-taxpayer. This provision is in fact giving the taxpayer a credit of tax already paid in excess, thus, being a beneficial provision, must be construed

liberally. No doubt, the repealed law is considered a law that never existed, however, for the purpose of those actions which were commenced, prosecuted and concluded, it would be considered as an existing law. In these circumstances, the observation of CIR (Appeals), with reference to **Constitution Petition No.D-2408 of 2010** titled *North Star Textile Limited*, passed by Sindh High Court and *Molasses Trading & Export (Pvt.) Limited* supra, that vested right accrues in favour of taxpayer on the basis of provision of statute as it stands "on the first day next succeeding the last day of the tax year", which in instant case is 01.07.2009, when provision of Section 113 was not available, is misconceived and not legally valid. The case of *Molasses Trading & Export (Pvt.) Limited* supra, being distinguishable is not applicable to the facts, circumstances and legal position of instant case as in the said case vires of Section 31-A of the Customs Act, 1969 were challenged and even otherwise, the Hon'ble Apex Court while interpreting said provision of law, inter-alia, observed that insertion of section 31-A so as to operate retrospectively does not have the effect of destroying or reopening the past and closed transactions. In these circumstances, learned Appellate Tribunal has rightly held that the right continued to accrue under the law applicable for respective tax years during which the payments were made; and that the availability of credit was the right and claiming of adjustment was exercise of the right, therefore, respondent-taxpayer was justified to claim the adjustment notwithstanding the position that provisions of Section 113 were not on the statute book during the tax year 2009. Learned Legal Advisor for applicant-department failed to pinpoint any illegality or legal infirmity in the impugned order.

14. In view of the above, our answer to the proposed question is in ***affirmative*** i.e. in favour of respondent-taxpayer and against the applicant-department.

15. This Reference Application, being without any merits, is ***decided*** against the applicant-department.

16. Office shall send a copy of this judgment under seal of the Court to learned Appellate Tribunal as per Section 133 (5) of the Ordinance of 2001.

(Abid Hussain Chattha)
Judge

(Muhammad Sajid Mehmood Sethi)
Judge

APPROVED FOR REPORTING

Judge **Judge**

Sultan/A.H.S.