APPELLATE TRIBUNAL INLAND REVENUE OF PAKISTAN
DIVISION BENCH-II, ISLAMABAD

ITA No.519/MB/2022
(Tax Year, 2015)

Mr. M. Usman Khan,
1st Floor Ghaffar Building Opposite Haji Camp, Multan Cantt
NTN 36302274086059

Appellant

V/s

The Commissioner Inland Revenue, Multan Zone, RTO, Multan

Respondent

Appellant By : Mr. M. Imran Ghazi, Adv.
RespondentBy:Mr.M.Qaswar Hussain,DR

Date of Hearing: 23-08-2022
Date of Order :23-08-2022

O R D E R

MIAN ABDUL BASIT, (JUDICIAL MEMBER):- This is an appeal under section 131 of the Income Tax Ordinance, 2001 (**The Ordinance, 2001**) which have been filed by the taxpayer against the appellate Order dated 07.10.2021 for the tax years, 2015 passed by the learned Commissioner Inland Revenue (Appeals-I), Multan [**CIR(A)**] through which the assessment order passed under section 122(1) of the Income Tax Ordinance 2001 (**the Ordinance, 2001**), was upheld.

2. Brief facts of the case are that the taxpayer is an individual who derives income from salary and share from AOP for which the return for tax year 2015 was filed declaring salary income at Rs. 350,000/-, Share of Rs. 186,000/- from AOP namely Muhammadan Associates and income from other source at Rs. 176,625/-. The case of the appellant was selected for audit under section 214C of the Ordinance, 2001, ergo a notice under section

177 of the Ordinance, 2001 calling for record and documents for the tax year 2015 was issued to conduct the audit. The appellant, through the notice u/s 177 was asked to provide the record by 15.06.2017 but the appellant did not provide the record and the assessing officer went on to proceed under section 122(1) read with section 111 of the Ordinance, 2001 for the amendment in deemed assessment by issuing notice dated 09.02.2017 under section 122(9) of the Ordinance, 2001. The department, after a period of more than four years from first notice under section 122(9) of the Ordinance, 2001, issued three reminders dated 03.06.2021, 11.06.2021 and 21.06.2021, which as per the amended assessment order, were not responded. The assessing officer, therefore, amended the deemed assessment for tax year 2015 by adding Rs. 6,362,158/- appearing as opening asset value for the tax year 2015 and created the demand of tax at Rs. 1,613,115/- through the amended assessment order dated 21.06.2021 passed under section 122(1) of the Ordinance, 2001. Being aggrieved and dissatisfied with the treatment meted out by the Order dated 21.06.2021 passed by assessing officer for the tax year under question, the taxpayer preferred appeals before the CIR(A), who dismissed the appeal of the appellant and confirmed the amended assessment order through his impugned appellate order. The appellant being aggrieved by the order of learned CIR(A) has preferred the instant appeal hence this appeal.

3. On the date of hearing, Mr. Muhammad Imran Ghazi, Advocate appeared on behalf of the appellant/taxpayer company while Mr. M. Qaswar Hussain, DR attended on behalf of the department/respondent.

4. The learned AR appearing on behalf of the appellant, contended that the OIR erred in law by passing order u/s 122(1) of the Income Tax Ordinance, 2001 without issuing separate notice u/s 111 of the Ordinance. The learned AR contended that no notice for provision of record was received by the appellant and even the assessment proceedings were also finalized through the ex-parte order, which were not sustainable. It has also been argued that the assessing officer, in absence of provision of documents and record for audit, cannot proceed for amendment of assessment under section 122 of the Ordinance, 2001. The learned AR also contended that the opening assets value in the wealth statement for tax year 2015 was concerning to previous tax years and the same cannot be added in tax year 2015. Conversely, on the other hand, the learned DR submitted that the appellant did not provide the record in pursuance of the notice issued under section 177 of the Ordinance, 2001, it was therefore the assessing officer went on to proceed for amendment of deemed assessment on the basis of information available in wealth statement on the return of total income for the tax year 2015. The learned DR stated that it was obligatory upon the appellant to furnish the record to the assessing officer for conducting the audit of the record and in the event of non-provision of record there was no option available to the assessing officer except to amend the assessment on his own. The learned DR fervently supporting the orders of tax authorities, prayed for dismissal of the appeals.

5. We have heard both the parties through their representatives and gone through the appeal file as well. The basic issue involved in these

appeals is that whether the tax authorities can proceed to amend the deemed assessment order under section 122 in case when the taxpayer has not provided the record in pursuance to notice issued under section 177 of the Ordinance, 2001. It is an admitted position in this case that the case of the appellant was selected for audit under section 214C of the Ordinance, 2001; and in consequent to the said selection a notice u/s 177 for audit of the tax affairs of the appellant for tax year 2015 was issued to the appellant but the appellant did not provide the record to the assessing officer. The appellant has come with the plea that the appellant neither received any notice for provision of record nor did he receive the show cause notice under section 122(9) of the Ordinance, 2001. Nevertheless, the record was not furnished for conducting the audit in terms of section 177 of the Ordinance, 2001 and the amended assessment was finalized in ex-parte proceedings by resorting to section 122(1) of the Ordinance, 2001. The provision of the Ordinance, 2001 germane to present controversy is section 177, the relevant portion of which for ease of reference, is being reproduced hereunder:

> ***177. Audit.***— *(1) The Commissioner may call for any record or documents including books of accounts maintained under this Ordinance or any there law for the time being in force for conducting audit of the income tax affairs of the person and where such record or documents have been kept on electronic data, the person shall allow access to the Commissioner or the officer authorized by the Commissioner for use of machine and software on which such data is kept and the Commissioner or the officer may have access to the required information and data and duly attested hard copies of such information or data for the purpose of investigation and proceedings under this Ordinance in respect of such person or any other person:*
>
> *Provided that—*
>
> *(a) the Commissioner may, after recording reasons in writing call for record or documents including books of accounts of the taxpayer; and*
>
> *(b) the reasons shall be communicated to the taxpayer while calling record or documents including books of accounts of the taxpayer:*

Provided further that the Commissioner shall not call for record or documents of the taxpayer after expiry of six years from the end of the tax year to which they relate.

(2) After obtaining the record of a person under sub-section (1) or where necessary record is not maintained, the Commissioner shall conduct an audit of the income tax affairs (including examination of accounts and records, enquiry into expenditure, assets and liabilities) of that person or any other person and may call for such other information and documents as he may deem appropriate.

(2A) ----------

(2AA) ----------

(6) After compilation of the audit, the Commissioner shall, after obtaining taxpayer's explanation on all the issues raised in the audit, issue an audit report containing audit observations and finding.

(6A) ***After issuing the audit report, the Commissioner may, if considered necessary, amend the assessment under sub-section (1) or sub-section (4) of section 122****, as the case may be, after providing an opportunity of being heard to the taxpayer under sub-section (9) of section 122.*

(7) ----------

(8) ----------

(9) ----------

(10) Notwithstanding anything contained in sub-sections (2) and (6) ***where a person fails to produce before the Commissioner*** *or a firm of Chartered Accountants or a firm of Cost and Management Accountants appointed by the Board or the Commissioner under sub-section (8)* ***to conduct an audit****, any accounts, documents and records, required to be maintained under section 174 or any other relevant document, electronically kept record, electronic machine or any other evidence that may be required by the Commissioner or the firm of Chartered Accountants or the firm of Cost and Management Accountants for the purpose of audit or determination of income and tax due thereon,* ***the Commissioner may proceed to make best judgment assessment under section 121 of this Ordinance and the assessment treated to have been made on the basis of return or revised return filed by the taxpayer shall be of no legal effect****.*

(11) ----------

The study of the above provision of the Ordinance, 2001 conspicuously reflects that the amendment under section 122(1) of the Ordinance, 2001 can only be made after examining the record and documents of the taxpayer but in the instant case no audit was conducted which makes the order passed under section 122(1) of the Ordinance, 2001 as illegal and unwarranted by law. It is also noticed that no audit report in terms of subsection 6 of section 177 of the Ordinance, 2001 was issued which is a mandatory act to proceed

for amendment of deemed assessment by exercising the provision of section 122(1) of the Ordinance, 2001. This view is fortified by the judgments reported as CIR Vs Allah Din Steel & Re-rolling Mills (**2018 PTD 1444 = 2018 SCMR 1328**) and M/s Nestle Pakistan Ltd Vs Federal Board of Revenue (**2017 PTD 786**). In the case in hand the tax department neither had conducted the audit nor had issued the audit report, it is therefore the whole action of amendment of the deemed assessment for tax year 2015 was in total departure to the verdict of the judgments supra.

6. The provision of subsection 10 of section 177 caters the situation of the cases such as that of the appellant, which provides that in case of non-provision of record the assessing officer should proceed to make the best judgment assessment under section 121 of the Ordinance, 2001. But in this case the Assessing Officer, instead of resorting to Section 121 for best judgment, amended the deemed assessment orders by invoking the provisions of Section 122(1) of the Ordinance 2001 for tax years 205. We therefore of the considered view that the assessing officer should have proceed to frame the best judgment assessment under section 121 read with section 177(10) of the Ordinance rather to amend the assessment under section 122(1) of the Ordinance, 2001. It is therefore held that the order for amendment of assessment under section 122(1) of the Ordinance, 2001 in the event when the record was not provided to the assessing officer, is legally flawed and cannot be allowed to hold the field.

7. In view of forgoing circumstances, the orders of the tax authorities bellow are not legally sustainable as the same are in derogation to

the express provisions of section 121, 122 and 177 of the Ordinance, 2001. Resultantly the order of the assessing officer and that of the learned CIR(A) for tax year 2015 are hereby annulled by way of acceptance of the instant appeal.

8. The order consists of seven (07) pages, and I have affixed my signature on each page.

Sd/-

(MIAN ABDUL BASIT)
Judicial Member

Sd/-
(DR. MUHAMMAD NAEEM)
Accountant Member

Copy of the bench order forwarded to
1. The Appellant Mr Muhammad Usman Khan Multan Cantt
2. The Respondent
BY ORDER
ASSISTANT REGISTRAR
Appellate Tribunal Inland Revenue
Multan
26/08/2022