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JUDGMENT SHEET
IN THE LAHORE HIGH COURT, RAWALPINDI BENCH, RAWALPINDI
JUDICIAL DEPARTMENT

Income Tax Reference No.03 of 2023

Zubair Khan **V/S** *Commissioner Inland Revenue Jhelum Zone etc*

J U D G M E N T

Date of hearing	**02.04.2024**
Applicant (s) by	Malik Hamzah Sarwar, Advocate.
Respondent(s) by	Malik Itaat Hussain Awan, Advocate.

JAWAD HASSAN, J. This Reference Application under Section 133 of the Income Tax Ordinance, 2001 (the ***"Ordinance"***) has been filed by the Applicant, being dissatisfied by the order dated 02.03.2023 passed by the Appellate Tribunal Inland Revenue, Division Bench-I, Islamabad, (the ***"Appellate Tribunal"***) in I.T.A.No.372/IB/2023 (Tax Year 2018). The following questions of law are said to arise out of the impugned order.-

QUESTIONS OF LAW

1). *"Whether under the facts and circumstances of the case the learned ATIR was justified in upholding the orders of both the authorities below?*

2). *"Whether under the facts and circumstances of the case the order of learned ATIR is a speaking order and is maintainable in the eye of law?*

3). *"Whether under the facts and circumstances of the case the learned ATIR was not justified by not considering that order passed by Respondent No.5 has without*

issuing mandatory separate/independent notice for making the additional u/s 111 of Ordinance?

4). *"Whether under the facts and circumstances of the case the learned ATIR has misdirect himself by not considering that addition un/s 111(1)(b) can be made only after confronting by separate notice u/s 111(1)(b)?*

5). *"Whether under the facts and circumstances of the case the learned ATIR be read in isolation without making reference to Section 122(1), 122(5) and 122(9) of the Ordinance?*

2. Brief facts of the case are that a show cause notice dated 14.12.2021 under Section 122(9) of the "Ordinance" for the tax year 2018 was issued against the applicant on the basis of definite information that he purchased property during aforesaid year but did not disclose its source. Reply to said show cause notice was filed but the Respondent No.5, being dissatisfied, passed assessment order on 05.03.2022, which was appealed before the Respondent No.3/Commissioner Inland Revenue (III), Rawalpindi. The said appeal was rejected vide order dated 22.12.2022. Being dissatisfied, the applicant assailed aforesaid order before the "Appellant Tribunal" that met with the same fate vide order dated 02.03.2023. Hence, instant reference application.

3. Learned counsel for the applicant *inter alia* submitted that the impugned order is illegal and contrary to the law and facts of the case; that compliance of mandatory provisions of Section 111 of the *"Ordinance"* was not made; that the proceedings under Section 122(5) of the *"Ordinance"* can only be initiated if there is "definite information" because the information provided under Section 111 of the *"Ordinance"* is not "definite information" rather is mere information; that the *"Appellate Tribunal"* has not passed the above referred order in accordance with law and has fallen into error by dismissing appeal of the applicant.

4. On the other side, learned counsel for the Respondents submitted that the impugned order has been passed strictly in accordance with law and does not require any interference by this Court. He justified the decision merited towards the applicant and stated that no prejudice to the applicant has been made as substantial compliance of ~~said~~ provisions of law was in place and further submitted that as notice under Section 122(9) of the *"Ordinance"* was issued, therefore, there was no need to issue separate notice under Section 111 of the *"Ordinance"*.

5. Arguments heard. Record perused.

6. This case pertains to the issue of mandatory requirement for the issuance of separate notice under Section 111 of the *"Ordinance"* while conducting proceedings under show cause notice dated 14.12.2021 issued under Section 122(9) of the *"Ordinance"*, pursuant thereto, the Respondents Department concluded the proceeding against the applicant on the basis that he had purchased immoveable properties worth Rs.6,694,036/- but failed to declare its actual value and that he received a loan from individuals to the tune of Rs.12,500,000/- during the tax year 2018. It is evident from show cause notice dated 14.12.2021 that it was issued under Section 122(9) of the *"Ordinance"* requiring the applicant to file reply and explain the sources, failing which, it would be added into income defined under Section 2(29) of the *"Ordinance"* and assessment would be amended in terms of Section 122(1) read with Section 111 of the *"Ordinance"*. The question that looms large before us is whether before invoking the provisions of Section 122 of the *"Ordinance"*, a separate notice to the taxpayer in terms of Section 111 of the *"Ordinance"* is pre-requisite to include unexplained income/assets in income chargeable to tax and without such notice substantial compliance of said provisions of law could be made or not and whether a notice under Section 122(9) of the *"Ordinance"* is enough to initiate proceedings for amendment of the assessment on the

grounds mentioned in Section 111 of the *"Ordinance"*? The case of the applicant is that the Respondent-department was required to issue a separate notice under Section 111 of the *"Ordinance"* while the stance of the Respondents-department is that there is no need to issue a sperate notice under the aforesaid section for proceeding under Section 122 of the *"Ordinance"*. The issuance of a separate notice under Section 111 of the *"Ordinance"* has been held as mandatory for the purpose of addition on account of unexplained income or assets by learned Division Bench of this Court in *"COMMISSIONER INLAND REVENUE, T.R.O., FAISALABAD versus FAQIR HUSSAIN and another"* **(2019 PTD 1828)** wherein it has held as under:

> *"8. Perusal of the provisions of Section 111 of the Ordinance of 2001 shows that if the instances / categories of unexplained income and assets, mentioned therein, come to the knowledge of the Commissioner, he is not obliged to form an opinion on the basis of information so gathered rather is required to issue notice to the taxpayer seeking explanation, confronting the information collected that its case comes within the head(s) specified in subsection (1). Though word "notice" is not specifically mentioned in the said provisions of law but words "... the person offers no explanation..." and "or the explanation offered by the person is not, in the Commissioner's opinion, satisfactory..." clearly suggest that for an explanation to be offered by the person, he must have been issued a notice. After said notice and failure on the part of taxpayer to offer satisfactory explanation, such addition can be made in the income of the taxpayer. For an explanation to be offered by a registered person, he must have been issued a notice without which no explanation could be offered, within the contemplation of Section 111 of the Ordinance of 2001. Reference can be made to the cases of Messrs Ranipur CNG Station and Muhammad Shafique supra."*
>
> *"10. Non-issuance of separate notice under Section 111 has caused prejudice to respondent-taxpayer as substantial compliance of said provisions of law has not been made. The ordinary meanings of "Notice" as referred to by learned*

> *Legal Advisors, with reference to various dictionaries, are not applicable to the issue in hand. Non-issuance of proper notice in order to invoke provisions of Section 111 cannot be taken lightly and its non-compliance may lead to render the proceedings not in conformity with or according to the intent and purpose of law. In the instant case, neither notice under Section 111 of the Ordinance of 2001 has been issued to the taxpayer nor was the taxpayer specifically confronted with such proposed addition so that the taxpayer could have advanced some explanation in this regard. Thus, impugned addition appears to be without any lawful authority."*

This view was further fortified by one of us in *"COMMISSIONER INLAND REVENUE, MULTAN ZONE versus FALAH UD DIN QURESHI"* **(2021 PTD 192)** holding the issuance of notice under Section 111 of the *"Ordinance"* as mandatory and observed that *"prior separate notice under Section 111 of the Ordinance, 2001 to confront the respondent for explaining his unexplained income and assets has not been issued prior to making of addition of income for tax purpose"*. It is noted that the decision given by learned Division Bench in the case of *"FAQIR HUSSAIN and another"* supra, was challenged before the Supreme Court of Pakistan through Civil Petition No.2447-L of 2022 which has recently been decided on 01.02.2024. The relevant paras Nos.9 and 10 of the said judgment are given as under:

> *"9. Therefore, pursuant to Section 122(5) of the Ordinance, the terminus a quo for initiation of proceedings under Section 122 is when the Commissioner, on the basis of definite information acquired from an audit or otherwise, is of the opinion that any of the grounds mentioned in Section 122(5)(i), (ii) or (iii) is applicable. Thereafter, a notice under Section 122(9) of the Ordinance, specifying the above ground(s), is sent to the taxpayer. If the taxpayer satisfactorily responds to the notice sent under Section 122(9), the proceedings can be dropped. Where, however, the response is not satisfactory, and the Commissioner is satisfied that*

any of the grounds in Section 122(5) are applicable, the Commissioner can amend the assessment order under Section 122(1) or further amend an amended assessment under Section 122(4) read with Section 122(5). As such, for initiation of proceedings under Section 122, the Commissioner must assess if any of the grounds under Section 122(5) are applicable, and such an assessment is to be based on definite information acquired from an audit or otherwise, which is the prerequisite to attract the provisions of Section 122(5) of the Ordinance.

10. It is in this sequence of proceedings that the initiation and culmination of proceedings under Section 111 of the Ordinance becomes necessary before action can be taken under Section 122 to amend assessments on the basis of proceedings undertaken under Section 111. As noted above, the information available with the department under Section 111(1) is mere information. It is only after the taxpayer is confronted with this information through a separate notice by calling for an explanation, and when no explanation is offered or the explanation is not satisfactory in the opinion of the Commissioner under Section 111(1), that it transforms or crystallizes into "definite information" for the purposes of action under Section 122(5) for amendment of assessment under Section 122. The taxpayer will then be confronted with the grounds applicable under Section 122(5) through a notice under Section 122(9) of the Ordinance. As such, where the Commissioner has formed an opinion against the taxpayer as to the fulfilment of one of the grounds mentioned in Section 111(1)(a) to (d) of the Ordinance, and is of the view that any of the grounds in Section 122(5) is applicable, the process under Section 122 is to be initiated to amend assessments through a notice under Section 122(9). Thus, unless the proceedings under Section 111(1) are initiated and completed, Section 122(5) cannot be given effect to and no notice under Section 122(9) can be issued for the purposes of amending an assessment through an addition contemplated under Section 111. It is to be noted that the present cases are related to tax years up till 2020. After the amendment introduced in Section 122(5) of the Ordinance through the Finance Act, 2020, the words "definite information acquired from an audit or otherwise" have been substituted with "audit or on the basis of definite information". Therefore, the interpretation rendered

> *above as to the applicability of Section 122(5) may not be applicable to cases post 2020 and the effect of the substituted expression will have to be determined in an appropriate case in the future.*

7. So far as the question what becomes "definite information", has also been decided in above referred Civil Petition No.2447-L of 2022. Relevant part thereof reads as under:

> *"Before an assessment can be amended under Section 122 on the basis of Section 111, the proceedings under Section 111(1) are to be initiated,* ***the taxpayer is to be confronted with the information and the grounds applicable under Section 111(1) through a separate notice under the said provision, and then the proceedings are to be culminated through an appropriate order in the shape of an opinion of the Commissioner. This then becomes definite information for the purposes of Section 122(5), provided the grounds mentioned in Section 122(5) are applicable****. The taxpayer is then to be confronted with these grounds through a notice under Section 122(9) and only then can an assessment be amended under Section 122.9 This view has also been recently taken by this Court in Bashir Ahmed wherein it has also been held that a notice under Section 111 can be simultaneously issued with a notice under Section 122(9), however, proceedings under Section 111 have to be finalized first in terms of an opinion of the Commissioner so as to constitute definite information, as is required under Section 122(5) of the Ordinance".*

Emphasis supplied

8. Since the issue regarding "definite information" has already been elaborated and interpreted by the Supreme Court of Pakistan from time to time firstly in *"Messrs CENTRAL INSURANCE CO. and others versus THE CENTRAL BOARD OF REVENUE, Islamabad and others"* **(1993 SCMR 1232)** whereby it was held that *"We are inclined to hold that the expression "definite information" will include factual information*

as well as information about the existence of a binding judgment of a competent Court of law/forum for the purposes of section 65 of the Ordinance, but any interpretation of a provision of law by a functionary which has not been entrusted with the functions to interpret such provision judicially, cannot be treated as a "definite information". Secondly, in *"INCOME TAX OFFICER and another versus M/s CHAPPAL BUILDERS"* **(1993 PTD 1108)** wherein it has held that *"The expression "definite Information", and similar other expressions used in the above-noticed provisions or other related provisions certainly meant much more than mere material so as to cause a reasonable belief or even such evidence which might lead to a definite belief. Unless there is definite direct information and there is no further need to put the said definite information to trial by putting in further supporting material the process of self-assessment could not be reopened. In this case in order to establish through so-called `definite information', the department had to rely upon further reasoning in order to clothe their information with credibility what to talk of definiteness"*. Thirdly, in *"CHIEF COMMISSIONER INLAND REVENUE, RTO, Peshawar versus Messrs SABRINA TENT SERVICES"* **(2019 SCMR 1639)** holding that *"Definite information' does not mean a reanalysis of existing information or an analysis of further information that was previously accessible but had not been taken into account"* and fourthly, in Civil Petition No.2447-L of 2022, referred above. While examining Sections 122 and 111 of the *"Ordinance"* in the perspective of *"definite information"*, the principles enunciated in above-referred judgments by the Supreme Court of Pakistan has been followed which are binding under Article 189 of the Constitution of Islamic Republic of Pakistan, 1973.

9. Furthermore, the Federal Board of Revenue Inland Revenue, Revenue Division, Government of Pakistan has already issued instructions through notification

No.2(22)Rev.Bud./2020 dated 25th May, 2021 to the Chief Commissioners Inland Revenue, LTOs, MTO, CTOs, RTOs in the following manner:

> *'Representations have been received in the Board suggesting that field officers are recklessly issuing notices u/s 122(5) read with 122(9) of Income Tax Ordinance, 2001 (hereinafter "the Ordinance") where purportedly the threshold of "definite information" as defined u/s 122(8) is not met. It goes without saying that amendment proceedings u/s 122(5) of the Ordinance, merely on the basis of audit suspicion picked from within the declarations lodged by the taxpayers themselves, is an enforcement travesty and need to abate. The scheme of law warrants that a taxpayer must be dealt with precisely as per principles of justice and fair play"*.

10. Needless to add that above instructions have also been brushed aside while passing the impugned orders from Assessing Officer till the "Appellate Tribunal".

11. In view of law laid down in aforementioned judgments, our answer to the proposed questions is in affirmative i.e. against the Respondents-Department and in favour of the applicant.

12. Office shall send a copy of this order under seal of the Court to the *"Appellate Tribunal"* as per Section 133(5) of the *"Ordinance"*.

(MIRZA VIQAS RAUF)
JUDGE

(JAWAD HASSAN)
JUDGE

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