2012 SCMR 371

[Supreme Court of Pakistan]

Present: Sarmad Jalal Osmany and Amir Hani Muslim, JJ

COMMISSIONER OF INCOME TAX and another---Petitioners
Versus
Messrs PAKISTAN PETROLEUM LTD. and 2 others---Respondents

Civil Petitions Nos. 340-K, 385-K to 389-K, 520-K of 2009, 392-K to 394-K and 627-K to 630-K of 2011, decided on 19th December, 2011.

Under S. 156 of Income Tax Ordinance, 1979, Revenue had power to correct a mistake in tax calculation resulting in a short levy after terming such mistake to be apparent on face of record---**When a mistake resulting in a short levy could be termed as one apparent on face of record and rectifiable, then a mistake resulting in excess payment on part of taxpayer could be similarly treated, otherwise its denial would violate Art. 4 of the Constitution guaranteeing everyone equality before law**—

Commissioner of Income-Tax Company's-II, Karachi v. Messrs National Food Laboratories 1992 SCMR 687; Pak-Arab Fertilizers (Pvt.) Limited v. Income Tax Appellate Tribunal of Pakistan and others 2006 PTD 42; Commissioner of Income Tax, Peshawar v. Messrs Gul Cooking Oil and Vegetable Ghee (Pvt.) Ltd. and 6 others 2008 PTD 169 and Sindh High Court Bar Association through Secretary and another v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others PLD 2009 SC 789 ref.

Commissioner of Income Tax, Karachi v. Abdul Ghani 2007 PTD 967 distinguished.

SARMAD JALAL OSMANY, J.---The facts and the law are common in all the petitions and hence the same are being disposed of through this judgment.

2. Briefly stated the facts of the matter are that the respondents had, for the assessment years 1998-99 to 2002-03, voluntarily paid contributions under the Workers' Welfare Fund Ordinance, 1971 (hereinafter referred to as "the Ordinance") and the assessing officer accordingly had reflected this fact in the respective assessment orders. The respondents challenged the original assessments by way of appeals in various appellate forums but never claimed exemption from payment under the Ordinance.

However later on the respondents moved rectification applications for all the five years under consideration under section 156 of the repealed Income Ordinance, 1979 contending that they had made payments under the Ordinance due to a bona fide and inadvertent mistake, whereas in fact the same was exempted under the provisions of the exception to section 2(f) thereto Consequently it was prayed that the mistake apparent on the record should be rectified and refunds made/adjusted.

3. All the rectification applications were dismissed by the assessing officer and being aggrieved therefrom the respondents preferred appeals before the CIT (Appeals) who in turn also dismissed the same. **Being aggrieved by the above Orders the respondents filed appeals before the Income Tax Appellate Tribunal wherein there was a difference of opinion between the learned Members and the following two questions were referred for adjudication to a third Member:--**

(1) **Whether the rectification application of the assessee applicant come within the ambit of section 221 of the Income Tax Ordinance, 2001 as the issue of levy of WWF at the assessment stage had attained finality when it had not agitated the levy of WWF in the related appeals filed with the appellate authorities**?

(2) Whether the assessee appellant was falling in the purview of the exclusionary clause of section 2(f)(vi) of the Workers Welfare Fund?

4. **The learned third Member answered the first question in favour of the petitioners and against the respondents** but the second question was decided in favour of the respondents with the result that the appeals were dismissed. Being aggrieved by such dismissal the respondents approached the learned High Court which vide impugned Judgment decided both the questions in favour of the respondents and held that indeed the respondents fell within the exclusion provided in section 2(f) of the Ordinance and are therefore exempted from the said levy and hence these petitions.

5. Mr. Akhtar Ali Mehmood, learned Advocate Supreme Court appearing for the petitioners in Petitions Nos.340-K, 385-K to 389-K and 520-K of 2009 has firstly submitted that under section 156 of the Income Tax Ordinance, 1979 (hereinafter referred to as the "Ordinance 1979") which is more or less similar to section 221 of the Income Tax Ordinance, 2001 (hereinafter referred to as the "Ordinance 2001"), the mistake must be apparent on the face of the record and hence does not apply to a past and closed transaction. In support of his submission learned Advocate Supreme Court relied upon Commissioner of Income-Tax Company's II, Karachi v. **Messrs National Food Laboratories (1992 SCMR 687)** and Commissioner of Income Tax, Karachi v. Abdul Ghani (2007 PTD 967). Consequently the assessments which have attained

finality could not be re-opened in the manner sought by the respondents i.e. the rectification applications were not maintainable. On merits learned Advocate Supreme Court has submitted that the exclusion under section 2(f) of the Ordinance provides for three types of entities. Firstly an establishment/concern either owned by the Government or by a Corporation established by the Government or by a Corporation the majority of the shares of which are owned by the Government. Per learned Advocate Supreme Court, this is a factual inquiry and hence could not be determined by the learned Tribunal or High Court for which he has cited Pakarab Fertilizers (Pvt.) Limited v. Income Tax Appellate Tribunal of Pakistan and others (2006 PTD 42).

6. Mr. Nasrullah Awan, learned Advocate Supreme Court appearing for the petitioners in Civil Petitions Nos.392-K to 394-K and 627-K to 630-K of 2011 has adopted the arguments of Mr. Akhtar Ali Mehmood.

7. Mr. Makhdoom Ali Khan, learned Senior Advocate Supreme Court appearing for the respondents in Civil Petitions Nos.340-K, 385-K to 389-K of 2009 and 627-K to 630-K of 2011 has argued that in the learned Tribunal the decision was split regarding maintainability and the merits but the third Member ruled in favour of the respondents vis-a-vis maintainability but against them regarding its merits. Hence, before the learned Tribunal two to one, the respondents prevailed on maintenance but did not succeed on merits. However before the learned High Court the maintenance of the rectification application was never challenged by the petitioners. Hence this issue could not now raised by them before this Court. Per learned Senior Advocate Supreme Court even the learned High Court has observed that the maintenance aspect of the matter was never challenged before it. Insofar as the merits of the case are concerned learned Senior Advocate Supreme Court has fully supported the Judgments and reasoning which prevailed upon the learned Judges to arrive at the conclusion that the petitioners had a good case and hence allowed the applications. In this regard he has submitted that the respondent Company's (PPL) majority shares are owned by the Government and hence it squarely comes within the exception clause to section 2(f) of the Ordinance which fact is an admitted one.

8. Mr. Salman Pasha, learned Advocate Supreme Court appearing for respondents in C.Ps. Nos. 392 to 394 of 2011 has adopted the arguments of Mr. Makhdoom Ali Khan. He has further submitted that this Court in Commissioner of Income Tax, Peshawar v. Messrs Gul Cooking Oil and Vegetable Ghee (Pvt.) Ltd. and 6 others (2008 PTD 169) has overruled the case of Abdul Ghani (supra).

9. Mr. Akhtar Ali Mehmood, learned Advocate Supreme Court in rebuttal has submitted that though the issue of maintainability may not have been pleaded in the High Court but yet it is a question of law and hence it can be considered by this Court.

He has further submitted that additional legal pleas have always been allowed by this Court for which proposition he has relied upon the Judgment reported as Sindh High Court Bar Association through Secretary and another v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others (PLD 2009 SC 789). Finally learned Advocate Supreme Court has argued that since the ultimate decision handed down by the learned Tribunal was in favour of the Revenue hence there was no need to challenge the maintainability before the learned High Court.

10. We have heard all the learned ASCs and also perused the impugned Judgments as well as the record with their assistance.

11. Insofar as the maintainability of the petitions are concerned it would be seen that section 156 of the Ordinance 1979 and section 221 of the Ordinance 2001 as well as section 35 of the Income Tax Act, 1922, all address the same issue viz rectification of mistakes which are apparent on the face of the record. In the present matter the rectification applications were filed under section 156 of the now repealed Income Tax Ordinance, 1979. In the case of National Food Laboratories (supra) this Court has ruled that such mistake should be apparent from the record i.e. floating on the surface and consequently there should not be any controversies or investigation into the matter or reassessment of any evidence in order to decide whether or not such mistake needs to be rectified. This principle has been reaffirmed in the case of Abdul Ghani (supra). In the present case the respondents in their rectification applications have sought exemption, which according to them is clearly available under the proviso to section 2(f) of the Ordinance as they had paid the levy under the said Ordinance by mistake as they were exempted. **In our opinion it cannot be said that seeking an exemption for a payment made by mistake is not apparent on the face of the record. In this connection it would be seen that the wording of section 156 of the Ordinance 1979 contemplates that where such mistakes have the effect of enhancing an assessment or reducing a revision or otherwise increasing the liability of the assessee, notice is to be given under subsection (2) of the said section**. Hence this provision does give the Department the right to correct any mistakes in tax calculation in cases of short levy etc. which is then termed to be apparent on the face of the record. **Therefore, where a mistake resulting in a short levy can be termed as one apparent on the face of the record and hence is rectifiable, there is no reason why such a mistake resulting in excess payment on the part of the tax payer cannot be similarly treated. To deny this would be a violation of Article 4 of the Constitution which guarantees everyone equality before the law**. The cases cited by the learned Advocate Supreme Court viz Commissioner of Income-Tax Company's II, Karachi v. Messrs National Food Laboratories (1992 SCMR 687) and Commissioner of Income Tax, Karachi v. Abdul

Ghani (2007 PTD 967) in our opinion are not relevant to the matter at hand because therein the principle discussed was that the rectification should not involve any exercise whereby any investigation into the controversy is required or any reassessment of the evidence etc. is undertaken etc. The matter before the Income Tax authorities as well as the forums below was very simple i.e. whether or not the respondents were exempted from payment of the charge in question under section 2(f) of the Ordinance. This is our opinion does not involve any exercise as aforementioned and was a simple question i.e. whether or not the respondents are a Corporation owned by the Government or a Corporation established by the Government or one in which the majority of the shares are owned by the Government. In fact this has never been controverted by the petitioners at any stage and hence is an admitted one that indeed the respondents are Corporations in which the majority of the shares are owned by the Government etc.

12. It would also be seen that the term Corporation has not been defined in the Ordinance. In Black's Law dictionary it has been defined as an entity having authority under law to act as a single person distinct from its shareholders who own it and having rights to issue stock and exist indefinitely. Consequently it follows that the word Corporation is synonymous with that of a Company as understood in ordinary parlance. Admittedly the respondents are either public or private limited companies in which the majority of the shares are owned by the government and as observed above this fact has never been disputed at any stage and hence in our opinion squarely covered under the exclusion clause of section 2(f) of the Ordinance.

13. For the foregoing reasons we find no reason to interfere with the impugned judgments. The petitions stand dismissed and leave declined.

S.A.K./C-1/SC Leave refused.

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