

**APPELLATE TRIBUNAL INLAND REVENUE, LAHORE**  
**SPECIAL SINGLE BENCH (Camp Multan)**

**ITA No. 1640/LB/2015**  
(Tax Year-2009)

Commissioner Inland Revenue, R.T.O., Bahawalpur .....Appellant

***Versus***

M/s Bhatti Paint House, Gri Ganj Bazar, Bahawalpur ..... Respondent

For Appellant / Department	:	Mr. Akhtar Soraj,DR
For Respondent / Tax payer	:	Mr. Imran Ghazi, Advocate
Date of Hearing	:	23.06.2020
Date of Order	:	23.06.2020

**ORDER**

**MIAN ABDUL BAIST, JUDICIAL MEMBER:** Through the instant appeal the department has assailed the order dated 16-04-2014 passed in appeal No.33 pertaining to tax year 2009 by the Learned Commissioner Inland Revenue (Appeals), Bahawalpur under Section 129 of the income Tax Ordinance, 2001 on the grounds set forth in the appeal memo.

2. That the brief facts, I find from the perusal of the appeal file, are that the respondent taxpayer is an AOP and derived income from running a business as a paint store. Return of income was filed at Rs.(287,800/-) which was deemed as assessed under section 120(1)(a). Later on the taxpayer was called for to produce records including books of accounts u/s 177(1) of the ordinance by the then Commissioner Inland Revenue, Audit Division, Regional Tax Office, Bahawalpur on the basis of risk areas mentioned in the notice letter. Compliance letter was issued, but no compliance was made. IDR for production of books of accounts was also issued, which remained un-complied with. However on 12.05.2011, the taxpayer has revised his income tax return declaring taxable income of Rs.268,241/- u/s 114 (6) of the Income Tax Ordinance, 2001. The deemed assessment finalized u/s 120(1)(a) of the said ordinance stand amended under the provisions of section 122(3)(a) of the

Ordinance, 2001 and the return so revised was taken for all the purposes of the ordinance to be amended assessment order on the said date i.e. 12.05.2011 u/s 122(3)(b) of the ordinance. After that the assessing officer issued notice but no compliance was made by the taxpayer. A final show cause notice bearing No.1899 dated 04.06.2014 was issued with the intention to finalize the audit proceedings ex-parte under section 121(1)(d) of the ordinance, which met the same fate. Ultimately, the assessing officer finalized proceedings ex-parte under section 121 of the Income Tax Ordinance, 2001 assessed the total income at Rs.2,109,484 vide order dated 30.06.2014. The appellant being aggrieved by the order of the learned Assessing Officer preferred an appeal under section 127 of the Ordinance, 2001 before the learned CIR (Appeals), Multan who annulled the assessment order on the strength of the order of the Honourable High Court Lahore in the following manner: -

*“Arguments of the AR have been considered and facts of the case also examined. It is observed that order has been passed u/s 121 of the Ordinance, 2001 due to no-production of record/ books of accounts. The issue of best judgment assessment framed under section 121 of the income tax Ordinance, 2001 has been examined, in the light of judgment of Honorabel Lahore High Court, Lahore **2013 PTD 837 (H.C. Lah)** cited above. Therefore, following the principle of consistency, the order found illegal and void and is **annulled** hereby”*

3. The case was taken up for hearing on 23.06.2020, the Departmental Representative as well as counsel for taxpayer's company appeared on behalf of appellant and respondent respectively. The representative of appellant's department argued that the Commissioner Inland Revenue did not encompass the amendment, brought about in Section 121(1)(d) and Section 177 of the Ordinance 2001 through Finance Act 2010, legally and judicially with respect to concept and scheme of both the statutory provisions. He also maintained that the amendment brought about in Section 121(1)(d) and Section 177 (10) through Finance Act, 2010 was a procedural one and no one can take benefit of the said provision prior to amendment in order to escape from the assessment even after filing a return of total income under Section 114 of the Ordinance, 2001. On the other hand, the counsel appeared on behalf of

the respondent taxpayer company submitted that in the case in hand the return of total income for the tax year, 2009 had already been filed and thereafter, the provision of Section 121(1)(d) of the Ordinance, 2001 as stood prior to Finance Act, 2010 cannot be applied. The said provision will come into play only when a valid return of total income is not submitted or a return submitted has been declared as invalid. It is also maintained that the return of total income furnished under Section 114 of the Ordinance, 2001 had already been become a deemed assessment order under Section 120 of the Ordinance, 2001 and the legislative scheme does not provide any amendment of a deemed assessment order by an Assessing Officer under Section 121(1)(d) of the Ordinance, 2001 prior to the amendment brought through Finance Act 2010 in Section 121 and 177(10) of the Ordinance, 2001. The Learned counsel for the respondent taxpayer company in support of his contention made reliance on the judgments reported as **107 TAX 60 Commissioner Inland Revenue Legal VS Commissioner Inland Revenue (Appeals) etc** and **2012PTD184 (trib) C.I.R. Legal R.T.O., Rawalpindi VS Messrs Empire Hotel Murree**. He also placed on record a judgment of the Hon'able Supreme Court of Pakistan passed in Civil Petitions vide the order dated 19.05.2013.

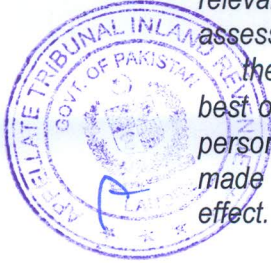
4. I have heard both the parties and gone through the case file and submissions made on behalf of appellant department and respondent taxpayer company carefully and heedfully. I also have gone through judgments relied upon by the respondent taxpayer company and arrived at the conclusion that the main issue to decide is;

*“Whether the amended assessment order can be passed under Section 121(1)(d) read with Section 177 (10), in a case where the return of total income has been filed and attained the status of deemed assessment order, prior to the amendment brought about in Section 121(1)(d) and 177 through Finance Act, 2010”?*

In order to resolve the present issue, I deemed it appropriate to reproduced here under the relevant provision of section 121 prior to amendment made through Finance Act, 2010:

**121. Best judgment assessment.**— (1) Where a person fails to-  
(a) furnish a return of income as required by a notice under sub- section (3) or sub- section (4) of section 114; or

- (aa) furnish a statement as required by a notice under sub-section (5) of section 115; or  
 or  
 (b) furnish a return as required under section 143 or section 144; or  
 (c) furnish the statement as required under section 116; or  
 (d) produce before the Commissioner, or a special audit panel appointed under sub-section (11) of section 177 or any person employed by a firm of chartered accountants 4 or a firm of cost and management accountants] under section 177, accounts, documents and records required to be maintained under section 174, or any other relevant document or evidence that may be required by him for the purpose of making assessment of income and determination of tax due thereon,  
 the Commissioner may, based on any available information or material and to the best of his judgment, make an assessment of the taxable income 5[or income] of the person and the tax due thereon 6[and the assessment, if any, treated to have been made on the basis of return or revised return filed by the taxpayer shall be of no legal effect.



(2) As soon as possible after making an assessment under this section, the Commissioner shall issue the assessment order to the taxpayer stating—

- (a) the taxable income;  
 (b) the amount of tax due;  
 (c) the amount of tax paid, if any; and  
 (d) the time, place and manner of appealing the assessment order.

(3) An assessment order under this section shall only be issued within five years after the end of the tax year or the income year to which it relates.

It is also appropriate to have the provisions of section 177(10) [inserted in The Ordinance 2001 through Finance Act 2010] which is relevant to resolve and settle the matter in hand which says;

**177. Audit.--** (1) The Commissioner may call for any record or documents including books of accounts maintained under this Ordinance-----  
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(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.

From the perusal and collective examination of above both the provisions it is noted that the Commissioner Inland Revenue can make a best Judgment assessment in a case where a person fails to furnish a return under section 114 of the Ordinance 2001 under clause (a) of subsection 1 of section 121 and this position existed till the omission of clause (a) of subsection 1 of section 121 from the statute book vide

Finance Act 2010. Hence it is safely concluded that if a person had submitted the return under section 114 of the Ordinance he would have not been called upon to proceed under section 121 of the Ordinance 2001. The legislature at the time of omitting clause (a) of the Subsection 1 of section 121 introduced a new provision in section 177 by inserting subsection 10 through Finance Act 2010 by virtue of which the Commissioner Inland Revenue has an authority and jurisdiction to make a best judgment assessment even in the case where a return has been submitted. It is therefore the above provisions clearly demonstrate that there is no provision available in the Ordinance 2001 prior to Finance Act 2010 which empowered the tax authorities to make best judgment assessment by invoking the provision of section 121 of the Ordinance 2001 in the case where the tax return had been filed.



5. The proceeding in the instant case has been initiated by the Assessing Officer for the tax year, 2009 i.e. prior to the Finance Act, 2010 and thus the department cannot take the benefit of Sub Section 10 of Section 177 of the Ordinance, 2001. It is an admitted position that after insertion of Sub section 10 to Section 177 of the Ordinance 2001, the things would have been changed but in the present case, i.e. for tax year, 2009, the benefit of sub section 10 of the section 177 of the Ordinance, 2001 cannot be extended to for making best judgment assessment under section 121(1)(d) of the Ordinance, 2001 in the cases where the deemed assessment order has already been made under section 120 of the Ordinance, 2001. I have also observed that provision of section 121(1)(d) can only be applied in the case where a person failed to file the tax return of total income or return filed by the taxpayer has been declared as "invalid" by the tax department. Whereas, in the instant case, the deemed assessment has also been completed by the competent authority in terms of section 120 of the Ordinance, 2001. This is what that has been declared by the Hon'able Lahore High Court in the case reported as **107-Tax 60 supra** in following words;

*"13. For the tax period under discussion i.e., 2004 to 2006 the legislative scheme does not provide for cancellation or*

annulment or amendment of the deemed assessment order passed under Section 120 by an assessment order under Section 121(1)(d). the amendments brought about in Sections 121 and 177(10) of the Ordinance, whereby Section 121 is passed, establish that the un-amended version of these sections did not identifying the lacuna in the law prior to the amendment. Reliance is placed on *Glaxo Laboratories Ltd. V. Inspecting Assistant Commissioner of Income Tax and other* (1992SCC910).



14. for the above reasons, we are of the view that prior to the amendment brought about in Section 121 and 177(10) through Finance Act, 2010, Section 121(1)(d) did not apply to cases where return of total income had been filed and did not envisage a second assessment order.

15. Therefore, the question of law raised in these references is decided in the "negative" and in favour of the assessee and the instant references are disposed of accordingly."

6. The tax authorities assailed this judgment of the Honorable Lahore High Court before the august Supreme Court of Pakistan by means of civil petitions and all the civil petitions were dismissed vide order dated 09-05-2013 complimenting the judgment of honorable High court the status of finality. The august Supreme Court of Pakistan dismissed the civil petitions with the following observation:

**"3. We have heard the learned counsel for the petitioner at length. According to her contention, the learned High Court has adverted to only one question which has been answered in negative although there were so many other questions, which arose. Suffice it to observe, in such a situation it was for the department to have move an application before the High Court. At present we are only required to examine the effect of the answer given by the High Court to the question noted herein above, therefore, we cannot take into consideration the argument that there were so many other questions. It is to be noted that the learned High Court examined the relevant provisions reference to which has been given in the concluding para. The question as framed was answered in accordance with the position of the law as it existed in 2004 and 2006. Subsequently certain amendments were made in view of the judgment of the Income Tax Tribunal. These amendments do not take effect retrospectively. The judgment of the learned High Court seems to be justified which needs no interference. For the foregoing reasons, these petitions are dismissed and leave refused."**

7. What has been discussed above and in the light of the judgments of the honorable Lahore High Court and the august Supreme Court of Pakistan, instant appeal filed by the tax department is meritless and I found no legal force in the arguments of the learned Departmental representative. Resultantly, the instant appeal is hereby dismissed.

8. This order consists of 7 (seven) pages and each page bears my signature.



Sd/-

**(MIAN ABDUL BASIT)**  
JUDICIAL MEMBER

(Empowered u/s 130 (8AA) of the Income Tax Ordinance, 2001 to exercise powers and functions of the Appellate Tribunal sitting singly).

Copy of the bench order forwarded to

1. The Appellant

2. THE CIR,

M/S Bhatti Paint House. B/Pur

By order

*Mhammad AS*  
Assistant Registrar

Appellate Tribunal Inland Revenue  
Lahore.