IN THE HIGH COURT OF SINDH AT KARACHI

ITRA No. 19 of 2011

Before : Mr. Justice Irfan Saadat Khan
Mr. Justice Fahim Ahmed Siddiqui

Commissioner (Legal) Inland Revenue,
Large Taxpayer Unit, Karachi. …. Applicant.

Versus

M/s. Avari Hotel Ltd. Karachi. …. Respondent.

Date of hearing as well as
of short order. : 13.02.2020

Date of reasons. : 17.02.2020

Applicant Commissioner (Legal) Inland Revenue, Large Taxpayer Unit, Karachi through Mr. Kafeel Ahmed Abbasi, advocate.

Respondent M/s. Avari Hotel Ltd. Karachi through Mr. Iqbal Salman Pasha, advocate.

J U D G M E N T

FAHIM AHMED SIDDIQUI, J:- The department has placed five questions of law for deliberation and opinion of this Court. However, the learned counsel appearing for the department has pressed questions Nos. 3 and 5 only, which are now renumbered as questions Nos. (a) and (b). The said questions are as under:

a) Whether under the facts and circumstances, the learned Tribunal was justified to delete the disallowance of depreciation relying upon the judgment of the Hon'ble Supreme Court reported as 66 Tax 126 (S.C. Pak), which was distinguishable as in that case prejudice was caused to the taxpayer due to the delay in assessment by the Department, whereas in the instant case no such prejudice was caused?

b) Whether under the facts and circumstances of the case, the learned Tribunal was justified to delete the addition made to the declared rental income, relying upon the history of the case, although it is a settled position of law that the principle of res judicata is not strictly applicable to Income Tax proceedings?

2. Mr. Kafeel Ahmed Abasi, learned counsel for the department/ applicant, submits that the findings of the learned Tribunal were not justified in respect of deleting the disallowance of depreciation. He contends that since sub-section 4 of Section 22 of the Income Tax Act, 2001 (hereinafter referred to as 'the Act 2001') was in the field in the year 2003; therefore, depreciation was calculated as per the provision of deleted sub-section. According to him, the case law relied upon by the learned Tribunal was distinguishable, as to the facts of the present case. He further submits that the treatment by the learned Tribunal in respect of deletion of the declared rental income was not proper for the reason that there was no delay in assessment by the department. According to him, the taxpayer himself had declared total advance rent for the years 2002 and 2003, wherein there was great difference, which could not be explained properly and this aspect was also overlooked by the learned Tribunal. He submits that the assessing authority was justified in relying upon the case history for making an addition to the declared rental income but the learned Tribunal has deleted the same for which no reason was given. In the end, he submits that the referred questions need to be replied in favour of the department.

3. On the other hand, Mr. Iqbal Salman Pasha, learned counsel appearing for the Respondent strongly supports the findings of the learned Tribunal and submits that the questions posed by the department are misconceived and do not portray the correct picture of the facts and circumstances of the case. He submits that the depreciation was properly

worked out by the taxpayer, and the same was properly explained in response to the show cause. According to him, the amended assessment order, as well as the order of the learned CIT(A) in respect of disallowing the depreciation and rent received, were not correct. According to him, after deletion of Section 22(4) of Act 2001, its benefit needs to be extended to the case of the respondent being the said deletion comes under the definition of beneficial enactment. He submits that the order of learned Tribunal is a speaking order, in which every aspect has been explained, hence the questions referred need to be replied in favour of the taxpayer. In support of his contentions, he relied upon the cases reported as **Commissioner Income Tax vs Shahnawaz Ltd and others (1993 SCMR 73) and Commissioner Income Tax, Karachi vs Messrs. B.R.R. Investment (Pvt.) Ltd. Karachi (2011 PTD 2148).**

4. We have heard the arguments and have gone through the available record and citations relied upon during the course of arguments.

5. So far as disallowing the depreciation is concerned, the same was done by the department on the basis of sub-section (4) of Section 22 of Act 2001, which was omitted by the Finance Act, 2004. According to omitted sub-section (4) of Section 22 of Act 2001, the depreciation was calculated as per the formula given within the said provision from the date of acquiring the depreciable asset during the tax year. Nevertheless, after the omission of the said provision of law, the depreciation was calculated for the whole year irrespective of the time of acquiring the depreciable asset during the tax year. The department insisted that since the omission took place in the subsequent year; therefore, its benefit was not available to the taxpayer. In this respect, the contention of Mr. Kafeel Ahmed Abasi is that in the case of Shahnawaz Ltd (supra), there was a delay in passing the assessment order and on this ground, the case of the respondent is distinguishable. Unfortunately, we are unable to concur with the

arguments of Mr. Abasi. It is well settled by now that whenever a beneficial tax law is passed or the tax statute is softened in favour of the taxpayer, it applies retrospectively. We are of the view that the ratio of the case of Shahnawaz Ltd (supra) is quite clear on this point that in tax matters, the remedial legislation is applicable retrospectively unless it is explicitly mentioned within the statute otherwise. The same principle is reiterated by a Division Bench of this Court in the case of B.R.R. Investment (supra) to which, my brother Mr. Justice Sadat Irfan Khan was a member and he penned down the judgment, wherein while exploring an amendment in the repealed Income Tax Ordinance, 1979, it is held as:

> *"This amendment has to be considered to be clarificatory in nature and was inserted with the prime objective to clear the confusion lurking in the minds about the status of Modaraba. In our considered view this amendment is definitely beneficial to tax payer. It is a trite proposition of law that beneficial provisions of law are always retrospective in nature until and unless they have been made prospective by their implication."*

6. In the present case, in response to a query, Mr. Abbasi admits that the omission was in the benefit of the taxpayer but the benefit was not available to the respondent, as his case was not pending at the time of amendment. According to him, the case of Shahnawaz Ltd (supra) pertained to pending cases and in the said case, the benefit was not extended to the past and closed transactions. We found ourselves not in agreement with such contention. The present case was still open when the amendment in the law was passed, as such the respondent has rightly taken its advantage considering that its benefits were extended to the taxpayers.

7. Now comes to the question of rental income, as mentioned by the respondent in the return for the tax years 2003 and 2003. The department considered that there was some flaw in the rental income of 2003, as such certain addition was made in the rental income on the basis of the history of the case. Mr. Abbasi's contention being that the Tribunal has neither

given reasons on this point nor the rental income was properly calculated. Mr.Abbasi points out that there was a deficit in the current rental income which was shown in the tax year 2002 as Rs.77,274,116/-, while it dropped in the tax year 2003 to Rs. 42,587626/-, as such the assessing authority has rightly made an addition in the rental income, but the learned Tribunal has deleted the addition made in the assessment without giving any justification. We found this aspect of the arguments of the counsel of the department contrary to the fact. We have observed that the Tribunal has properly addressed this issue in para 3.05 to para 3.08 for which proper justification is given. Since the Tribunal is the final authority on the point of facts; therefore, regarding this aspect, no further comments are needed except that the reasonings and the justifications are available in the learned Tribunal order.

8. Above are the reasons of our short order dated 13-02-2020, whereby the question No. 3 {now Question No. (a)} and question No.5 {now Question No. (b)} are answered in AFFIRMATIVE i.e. in favour of the taxpayer and against the Department. Office is directed to send a copy of this judgment under the seal of the Court to the Registrar, learned Income Tax Appellate Tribunal (Pakistan), Karachi, as required under the law.

JUDGE

JUDGE