

IN THE HIGH COURT OF SINDH, KARACHI

I.T.R.A. No. 23 of 2018

PRESENT:

MR. JUSTICE AQEEL AHMED ABBASI &
MR. JUSTICE ZULFIQAR AHMED KHAN.

The Commissioner Inland Revenue, Zone-II, LTU, Karachi

Vs.

M/s. Central Depository Company Pakistan Ltd. Karachi

Applicant: through Mr. Muhammad Altaf Mun,
advocate

Date of Hearing: 26.09.2019.

Date of Order: 26.09.2019.

ORDER

Aqeel Ahmed Abbasi, J:- Through instant reference application, the applicant has proposed following questions, which according to learned counsel for the applicant, are questions of law, arising from the impugned order dated 25.09.2017, passed by the Appellate Tribunal Inland Revenue [Pakistan], Karachi in ITA No.883/KB of 2014 under Section 122(5A) [Tax Year 2008], for opinion of this Court:-

1. *“Whether in the facts and in the circumstances of the case, the learned Appellate Tribunal Inland Revenue was justified in holding that amendments made in section 122(4) through Finance Act, 2009, were not applicable to the facts of the present case?”*
2. *“Whether in the facts and circumstances of the case, the learned Appellate Tribunal Inland Revenue is justified in holding that the changes made in law of limitation being a procedural law, are not applicable to those assessments which were not become time barred at the time of change?”*

2. Learned counsel for the applicant, after having read out the above questions proposed through instant Reference Application, and the impugned order passed by the Appellate Tribunal Inland Revenue as well as the forums below, has contended that in view of the amendment brought through Finance Act, 2009, in sub-section (4) of Section 122, the period of limitation for making an amendment in assessment was extended from four

years to five years from the end of financial year in which the Commissioner Inland Revenue has issued Show Cause Notice or to issue the amendment order to the taxpayer, therefore, the order passed under Section 122-5A of the Income Tax Ordinance, 2001, for the Tax Year 2008, by the Additional Commissioner Inland Revenue, was within the period of limitation duly extended through Finance Act, 2009.

3. We have heard the learned counsel for the applicant, perused the impugned order passed by the Appellate Tribunal Inland Revenue, as well as orders passed by the Commissioner Inland Revenue (Appeals) and the Additional Commissioner Inland Revenue with his assistance. From perusal of the record, it transpired that the return for the tax year 2008 was filed by the respondent on 14.10.2008, declaring the profit for the year at Rs.456,044,488/-, which was treated as an order of assessment under Section 120 of the Income Tax Ordinance, 2001. The aforesaid order of assessment however, was re-opened by the Additional Commissioner Inland Revenue under Section 122-5A on the pretext that the deemed assessment under Section 120 of the Income Tax Ordinance, 2001, was erroneous and prejudicial to the interest of revenue, therefore, Notice under sub-section (9) of Section 122 was issued on 13.03.2014 and the order passed under Section 120 of the Income Tax Ordinance, 2001, was amended under sub-section (5A) of Section 122 on 06.05.2014. The Show Cause Notice issued to the applicant was duly responded by the applicant by raising objection with regard to limitation on the ground that the deemed assessment passed in the instant case of the applicant for Tax Year 2008, can be reopened from the end of financial year in which the deemed assessment was passed, however, as per un-amended provision of Section 122(4) of the Income Tax Ordinance, 2001, whereas, it was further contended that the amendment made through Finance Act, 2009, would apply prospectively and not retrospectively in the case of the applicant. It was further contended that since, a vested right has already accrued to the taxpayers at the time when return of the taxpayer for tax year 2008 was filed, and deemed assessment was made in terms of Section 120 of the Income Tax Ordinance, 2001. However, such contention of the learned

counsel for applicant was rejected, and assessment was amended under Section 122 (5A) of the Income Tax Ordinance, 2001, against which, an appeal was preferred before the Commissioner (Appeals-I) Inland Revenue, Karachi, who vide order dated 28.08.2014, dismissed the same by holding that amendment made through Finance Act, 2009, in sub-section (4) of Section 122, would apply retrospectively. The taxpayer being aggrieved by such order filed an appeal before the Appellate Tribunal Inland Revenue and the Appellate Tribunal, after examining the relevant provisions of law, and the effect of the amendment made in sub-section (4) of Section 122 through Finance Act, 2009, has passed the impugned order, allowing the appeal of the taxpayer. It will be advantageous to reproduce the relevant finding of the Appellate Tribunal as recorded in Paragraphs 8 to 11 of the impugned order, which reads as follows:-

“8. We have heard both the learned representatives and also gone through the orders of the officers below and the judgments relied upon by the appellant. Since the Ground No.2 taken up by the appellant/taxpayer goes to the roots of the matter, the same is taken up at first. Basically this ground relates to the amendments brought about in section 122 of the Ordinance, through the Finance Act, 2009. The limitation period for the purpose of amendment was prescribed under sub-sections(2), (4) and (5A) of the section, which read as under before and after the amendment:-

Before Amendment:

“122. Amendment of assessments:-

- (1)
- (2) *An assessment order shall only be amended under subsection (1) within five years after the Commissioner has issued or is treated as having issued the assessment order to the taxpayer.*
- (3)
- (4) *Where an assessment order (hereinafter referred to as the “original assessment”) has been amended under sub-section (1) or (3), the Commissioner may further amend, as many times as may be necessary, the original assessment within the later of –*
 - (a) *five years after the Commissioner has issued or is treated as having issued the original assessment order to the taxpayer; or*

(b) *one year after the Commissioner has issued or is treated as having issued the amended assessment order to the taxpayer.*

(4A)

(5)

(5A)

(5B) *Any amended assessment order under sub-section (5A) may be passed within the time-limit specified in sub-section (2) or sub-section (4), as the case may be."*

After Amendment:

"122. Amendment of assessments:-

(1)

(2) No order under sub-section (1) shall be amended by the Commissioner after the expiry of five years from the end of the financial year in which the Commissioner has issued or treated to have issued the assessment order to the taxpayer.]

(3)

(4) Where an assessment order (hereinafter referred to as the "original assessment") has been amended under sub-section (1) or (3), the Commissioner may further amend, as many times as may be necessary, the original assessment within the later of —

(a) five years ¹[from the end of the financial year in which the Commissioner has issued or is treated as having issued the original assessment order to the taxpayer; or

(b) one year from the end of the financial year in which] the Commissioner has issued or is treated as having issued the amended assessment order to the taxpayer.

(4A)

(5)

(5A)

(5B) *Any amended assessment order under sub-section (5A) may be passed within the time-limit specified in sub-section (2) or sub-section (4), as the case may be."*

9. It is important to note that these amendments were brought about after the return of income for the impugned tax year had already been filed and the deemed order under section 120 was already in the field.

10. The controversy at hand has already been set to rest by the Honourable Supreme Court of Pakistan in Civil Petition No.1306 of 2014 dated 03.09.2014 in the case of Commissioner of Income Tax, Rawalpindi Zone, RTO, Rawalpindi v. Major General (R) C.M. Anwar etc. The

relevant part of the order of the Honourable Supreme Court of Pakistan reads as under:-

“The learned High Court while answering these questions has considered the earlier provisions of section 122(2) of the Income Tax Ordinance, 2001 and taking into account the subsequent amendment brought in the above law by virtue of Finance Act, 2009 has come to the conclusion in paragraphs No.8 and 9 of the impugned judgment that on the basis of the law applicable when the tax return was filed by the respondent an order of amendment could only be passed within a period of five years and as per the facts of the case such period ended on 28.09.2009, whereas the show cause notice in the above context was issued on 13.05.2010. Thus it was categorically held that a vested right has been created in favour of the respondent assessee, which cannot be retrospectively taken away without there being an express intention of the legislature to do so. But the amended section 122(2) is neither manifest nor unequivocal for such express/clear intention. Learned counsel for the petitioner has not been able to dislodge the reasoning assigned by the learned High Court in the impugned judgment and we are not persuaded to interfere therewith on the basis of the facts before us. The conclusion drawn by the learned High Court that section 122(2) as amended by the Finance Act, 2009 shall have no retrospective effect and would not annul the past and closed transaction, when the assessment in favour of the respondent as per the deeming clause under section 120 had become conclusive and the period for the purpose of invoking earlier section 122(2) had expired on 28.09.2009 does not call for interference.”

11. Respectfully following the principle laid down by the Honourable Supreme Court of Pakistan, we vacate the order passed under section 122(5A) in the case, on the issue of limitation, and restore the deemed assessment under section 120 for the year.”

4. From perusal of the finding as recorded by the Appellate Tribunal Inland Revenue while placing reliance upon the judgment of the Hon'ble Supreme Court of Pakistan in Civil Petition No.1306 of 2014 dated

03.09.2014 in the case of Commissioner Income Tax, Rawalpindi Zone, RTO, Rawalpindi v. Maj. Gen. (R) C.M. Anwar, as referred to hereinabove, we are of the considered opinion that the questions proposed through instant reference application regarding effect of amendment introduced in sub-section (2) of Section 122 of the Finance Act, 2009, has already been decided by the Hon'ble Supreme Court of Pakistan, in the above referred judgment, according to which, sub-section (4) of Section 122 of the Income Tax Ordinance, 2001, would not apply retrospectively in respect of taxpayer, whose return was filed and deemed assessment was already made prior to amendment made in sub-section (2) of Section 122 through Finance Act, 2009, therefore, period of limitation (as it stood at the time of the filing of the Return) would be applicable. In the instant case, Return was filed on 14.10.2008 and deemed assessment was also made on the said date, hence a vested right accrued to the taxpayer with regard to period of limitation as provided under sub-section (4) of Section 122 of the Income Tax Ordinance, 2001, prior to amendment could not be taken away through subsequent amendment introduced through Finance Act, 2009, unless there is clear intention expressed regarding retrospective application of such amendment, which is missing in the amended sub-section (4) of Section 122 of the Income Tax Ordinance, 2001. While confronted with hereinabove factual and legal position, learned counsel for the applicant could not controvert the same nor could dispute that the legal issue involved in the instant case is identical from the issue which has already been decided by the Hon'ble Supreme Court in the above cited judgment in respect of similar amendment in sub-section (2) of Section 122 of the Income Tax Ordinance, 2001, through Finance Act, 2001.

5. It is pertinent to note that the effect of amendment introduced through Finance Act, 2009, in sub-section (2) of Section 122 of the Income Tax Ordinance, 2001, came for consideration before the Hon'ble Supreme Court of Pakistan in the case of **Commissioner of Income Tax v. Messrs Eli Lilly Pakistan (Pvt) Ltd. (2009 PTD 1392**, wherein, by placing reliance in the earlier judgment of the Hon'ble Supreme Court in the case of

Commissioner Inland Revenue (Zone-III), L.T.U. v. Oil and Gas Development Co. Ltd. (2016 PTD 2727) and in the case of **Commissioner of Income Tax v. Eastern Federal Insurance Company (PLD 1982 SC 247)**, while placing reliance in the aforesaid judgments as well as in the case of **Commissioner Inland Revenue v. Maj Gen. (R) Dr. C.M. Anwar and 2 others (2015 PTD 424) in Civil Petition No.1306 of 2014**, upon which, reliance has also been placed by the Appellate Tribunal in the instant case, has been pleased to declare that the amendment introduced through Finance Act, 2009 relating to limitation, will not apply retrospectively, whereas, it has been further held as under:-

“ *The introduction of time-limit within which an assessment can be amended in both the Ordinance (section 65 of the repealed Ordinance and section 122 of the Ordinance) is a statutory recognition of the protection against arbitrary power of reopening or amending an assessment after the expiry of the prescribed period. Therefore, it could not be said that in reopening the assessments already completed no right of the assessee/taxpayer was involved,*”

The Hon'ble Supreme Court in the aforesaid judgment has also examined the distinction between a charging section and a machinery or procedural provision in the context of section 122 of the Income Tax Ordinance, 2001, as well as the effect of the amendment in respect of limitation and has been further pleased to hold as under:-

“Having anxiously considered the matter, the view we are inclined to take is that the provision is impregnated with the potential of adding to the liability of the taxpayer, therefore, the same is not mere matter of procedure. It has already been that the taxpayer/assessee have a right that their assessments will not be reopened after the expiry of the statutory period of five years”.

We are of the opinion that the questions proposed through instant reference application relating to limitation through Finance Act, 2009 in Section 122 of the Income Tax Ordinance, 2001, already stand decided by the Hon'ble Supreme Court of Pakistan in the aforesaid judgment, therefore, the order passed by the Appellate Tribunal Inland Revenue does not suffer from any error or illegality, hence does not require any interference by this Court.

6. Accordingly, by respectfully following the ratio of the judgment of Hon'ble Supreme Court as referred to hereinabove, both the questions proposed through instant reference application are answered in "**AFFIRMATIVE**" against the applicant and in favour of the respondent.

JUDGE

JUDGE

Nadeem PA.