

IN THE HIGH COURT OF SINDH AT KARACHI

Income Tax Reference Application No.181 of 2023

Date	Order with Signature of Judge
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Hearing of case (Priority)

1. For order on office objections
2. For order on CMA No.238/2023
3. For hearing of main case

06.03.2026

Mr. Qaim Ali Memon, Advocate for the applicant

Mr. Taimoor Ahmed Qureshi, Advocate for the respondent

The pertinent observations of the learned Tribunal read as follows:

4. We have heard learned counsels for the rival parties and perused the case records. Our findings are as follows.
5. The learned AR contested the case on legal as well as factual grounds. At the outset, he contended that subject queries could not be raised by the department by launching amendment of assessment proceedings u/s 122(5A) of the Ordinance which can only be triggered when the deemed assessment order is erroneous and prejudicial to the interest of revenue. Whereas, no errors causing prejudice to the revenue were established through show cause notices by the ADCIR in the instant appeals. In support of his arguments he relied on various case laws of Honorable High Courts and of Appellate Tribunal on the scope of proceedings u/s 122(5A) of the Ordinance. On merits of the case, the learned AR contended that the appellant received gifts from her husband and daughter in the shape of cash through crossed cheques and shares of various companies. He contended that both donors are NTN holders, active taxpayers, filing their respective tax returns and hold the capacity as per their wealth statements to make such gifts. He contended that complete details such as gift deeds, copies of crossed cheques, bank statements of donors and appellant and Central Depository Centre (CDC) certificates verifying transfer of shares through mode of gifts were submitted and discussed with learned Commissioner IR (Appeals) but he failed to consider them. Therefore, according to the learned AR, the impugned additions made u/s 39(3) were illegal and unlawful and were liable to be deleted.
6. There is no cavil to the proposition that a deemed assessment order issued u/s 120(1)(b) of the Ordinance can only be amended u/s 122(5A) of the Ordinance if the Commissioner considers it to be erroneous in so far it is prejudicial to the interest of revenue. The fulfillment of these two preconditions are mandatory to lawfully invoke section 122(5A) of the Ordinance. Even if one of the two preconditions is missing 1.e, if assessment order is not erroneous but prejudicial to revenue or if it is erroneous but not prejudicial to revenue, recourse cannot be had to section 122(5A) of the Ordinance. The Honorable Lahore High Court in the case of Commissioner Inland Revenue, Multan Zone v. Muhammad Iqbal Rind & Sons D.G. Khan reported as [2022 PTD 1411] held that section 122(5A) of the Ordinance cannot be invoked to correct each and every type of mistake or error in deemed assessment order. The relevant paragraph of the aforesaid judgment is reproduced as follows:

"7. From perusal of the above provision, it is abundantly clear that an amendment of assessment under the said provision can be made only in cases where twin conditions namely, (i) the Assessment Order is erroneous, and (ii) it is prejudicial to the

interest of revenue, are satisfied. If one of these pre-requisites is absent i.e. if assessment order is not erroneous but prejudicial to revenue or if it is erroneous but not prejudicial to revenue, recourse cannot be had to section 122(5A) of the Ordinance. There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error in the assessment order. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being 'erroneous'. The phrase 'prejudicial to the interest of revenue' has to be read in an erroneous conjunction with assessment order. Every loss of revenue as a consequence of an assessment order cannot be treated as prejudicial to the interest of revenue. For examples, when an assessment order is based on one of the courses permissible in law and it has resulted in a loss of revenue or where two views are possible and the view taken in the assessment order is the one with which the commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of revenue unless the view taken in the assessment order is unsustainable in law."

7. A learned division bench of this Appellate Tribunal in the case of M/s Multinet Pakistan (Pvt.) Limited, Karachi v. The Commissioner Inland Revenue, Zone -III, LTU, Karachi reported as [2019 PTD (Trib.) 21621 held that before invoking the provision of section 122(5A) of the Ordinance, the Commissioner has to form an opinion that the deemed assessment order is erroneous in so far it is prejudicial to the Interest of revenue. The learned bench observed that the word 'considers' was of great significance. The learned bench further observed that the error(s) which form basis for the Commissioner's opinion to invoke section 122(5A) must be apparent from the deemed assessment order i.e. from the materials already available with the Commissioner. If records, documents, evidences and explanations are needed from the taxpayer to establish an error then it would mean that no sufficient or satisfactory material was available with the Commissioner to begin with so as to be able to form an opinion and to consider the deemed assessment as erroneous in so far it is prejudicial to the interest of revenue. The relevant paragraphs of the aforesaid judgment are reproduced as follows:

"18. The Addl. CIR has not been given free hand to invoke the provision of section 122(5A) of the Income Tax Ordinance, 2001, in each and every assessment/order. The very purport and tenor of the said section is to safeguard the interest of revenue and for that purpose the Commissioner is vested with the power to amend the order where same has acted with flagrant violation of law and fact occurred causing revenue loss. The provisions of section 122(5A) empower the Commissioner if he considers that the order passed is erroneous and prejudicial to the Interests of the Revenue. The power under section 122(5A) could be exercised only if the deemed order was erroneous and prejudicial to the interest of the Revenue. The amending power under this section is a quasi-judicial power hedged in with limitation and has to be exercised subject to the same and within its scope and ambit. As far as the word 'to consider' or in other words, to form an opinion that the particular arder is erroneous in so far as it is prejudicial to the interests of the Revenue, is a quasi-judicial act because it is an important decision and the same cannot be based upon the whims or caprice of the revising authority...

It is necessary for the Commissioner to state in what manner he considered that the deemed order under section 120 was erroneous and prejudicial to the interests of the revenue and what the basis or material was for such conclusion. This being so, the Commissioner must give his own reasons for being satisfied that the order under section 120 is erroneous and prejudicial to the interests of the revenue. This conclusion is further strengthened by the use of words "if he considers" used in section 122(5A) which postulates a scrutiny by the Commissioner of all the relevant facts for holding that order is erroneous and is also prejudicial to the interest of the revenue. If the amended order does not disclose such reasons, it suffers from an infirmity and is clearly vitiated. The very fact that the Addl. Commissioner is required to make an order after affording an opportunity of hearing to the taxpayer ingrains in the process the requirement of recording reasons for his conclusion, as is

necessary for a quasi-judicial order required to be made by a quasi-judicial authority...

The power of revision under section 122(5A) can be exercised by the Commissioner when the following factors co-exist: the Commissioner should consider that the said order is erroneous and prejudicial to the interest of the revenue. It is our view that the provisions of section 122(5A) can't be invoked when two views are possible. The error envisaged by section is not one which depends on possibility or guesswork, but it should be actually an error either of fact or of law which caused prejudice to the interest of revenue...

The consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interest of the Revenue, must be based on materials on the record of the case not to be based on fishing or roving enquiries. If there are no materials on record on the basis of which it can be said that Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction.

In other words, the plain language of section is more than abundantly clear that it is not every error or mistake that should induce the Commissioner to resort to exercise of the powers under section 122(5A)."

8. Section 122(5A) of the Ordinance has a very narrow locale to move. As already held by the learned ATIR in Multinet case supra that the Commissioner is not empowered to call records, documents, evidences and seek explanations from the taxpayer in amendment proceedings initiated u/s 122(5A) of the Ordinance as compared to audit proceedings initiated under section 177 and sections 122(1) & (5) and of the Ordinance. If the same is permissible, then sections 177 and 122(1) & (5) of the Ordinance would become redundant. It is settled law that no provisions or words in a statute are to be rendered redundant or surplus. Reliance is placed on the Honorable Supreme Court judgments reported as 2015 SCMR 1303, 2005 SCMR 1166 and PLD 1957 SC (Pak) 219. Furthermore, recently a learned division bench of this ATIR in ITA No's 323/IB/2022, 324/IB/2022, 349/IB/2022 and 350/IB/2022 [M/s National Highway Authority v. The CIR, CTO, Islamabad] while placing reliance on a few other reported judgments of the ATIR disapproved the calling of records and documents u/s 122(5A) and held the same to be an exercise akin to conducting of audit u/s 177. The relevant findings are reproduced as follows:

"13. In the sagacity of legal position discussed above it is held that the proceedings initiated by the tax department under subsection 5A of section 122 was flawed and was clearly outside the scope and mandate of said section. The tax department, in view of the discussion made hereinabove at para 11 and 12, was intending to conduct the audit of the tax affairs of the appellant, which could have not been done under section 122(5A) of the Ordinance, 2001. We are also of the view that if the tax department is allowed to examine the record and documents by invoking the provision of subsection 5A of section 122 of the Ordinance, 2001, then subsection 1 and 5 of section 122 and section 177 of the Ordinance, 2001 will become redundant. We therefore hold that the departmental proceedings in respect of tax years in question in these OF Papeals are not covered under section 122(5A) of the Ordinance, 2001 which are accordingly declared without any legal force, resultantly the orders of the authorities below for tax years 2012 and 2016 to 2020 are hereby annulled."

9. It is also settled law that the error and prejudice should be clearly manifest from the show cause notice and there is no room for any roving inquiry or fishing expedition. Reliance in this regard is placed on judgments in the cases of Commissioner Inland Revenue, Zone I, LTU v. MCB Bank Limited (2021 PTD 1367); Honda Atlas Cars (Pakistan) Limited v. Appellate Tribunal Customs, Excise and Sales Tax (2021 PTD 1806) and Caretex v. Collector of Sales Tax and Federal Excise (2013 PTD 1536).

10. From a cumulative reading of the case laws mentioned above, it can be concluded that a show cause notice must conspicuously reflect on first examination of the deemed assessment order that it is erroneous and prejudicial to the interest of revenue and must not require any document or record from the taxpayer to ascertain the veracity of results declared in the deemed assessment order. If probe, investigation or enquiries is made from the taxpayer then the deemed assessment order cannot be considered erroneous in so far it is prejudicial to the interest of revenue. Calling details from the taxpayer is outside the purview of amendment of assessment proceedings u/s 122(5A) of the Ordinance and would be tantamount to roving and fishing inquiry launched against the taxpayer to dig out/find errors. Perusal of amendment Orders in both appeals reveals that no error capable of causing prejudice to the revenue was identified by the Additional Commissioner in the deemed assessment order which was sine qua-non to initiate amended proceedings u/s 122(5A) of the Ordinance, rather, the Additional Commissioner insisted on providing records and details from the appellant which is outside the scope of instant proceedings, therefore, we hold that the Orders passed in both Tax Years were patently illegal and unlawful.

11. According to Muslim Personal Law a gift is valid when the donor has shown intention to make gift, acceptance by the donee and delivery of corpus irrespective of any written declaration between the donor and donee. The Ordinance, in particular section 39(3), speaks only about cash gifts which can only be considered genuine if made through cross cheque i.e. banking channel. However, such requirement is neither strict nor appreciated by the Appellate Tribunal and Higher Courts as mentioned in the case laws cited above. Furthermore, we are of the considered view that a gift by its very character could not be equated with income as it is not earned but rather received from a person out of natural love and affection. Any doubt regarding nature and source of receipt ought in the instant appeals the appellant received gift from husband and daughter in the shape of money and shares of different companies. The cash was received through crossed cheques which is duly reflecting in the bank statements of both the donor and donee. Whereas, shares were transferred from donor to donee through proper mechanism maintained by Central Depositor Centre (CDC). The AR of the appellant has also placed on record declarations of oral gift deeds which establishes the authenticity of aforementioned gift transactions. Furthermore, both donors are NTN holders, active taxpayers, filing their respective tax returns and hold the capacity as per their wealth statements to make such gifts. Therefore, we are of the considered view that learned AR has succeeded in establishing the genuineness of the gifts which are subject matter of both the appeals. Accordingly, the impugned additions made u/s 39(3) of the Ordinance in both Tax Years are found unwarranted even on facts and are not sustainable, hence deleted.

12. For the foregoing reasons and by respectfully following the binding case laws cited above, we hold that the orders passed by the authorities below in both Tax Years are illegal and contrary to facts, which are hereby annulled.

13. Both the appeals filed by the appellant are allowed in the manner indicated above.”

Learned counsel for the applicant was of the view that the impugned judgment was devoid of due discussion and deliberation, however, the same was countered by the respondent’s learned counsel and special emphasis was laid on paragraph-11 of the impugned judgment to demonstrate otherwise.

The other argument of the applicant’s learned counsel was that the documentation of the gift deed was neither produced before the Commissioner (Appeals) nor the appellate Tribunal, therefore, the evidence does not support the impugned judgment. Learned counsel for the respondent once again places reliance *inter alia* on paragraph-11 which demonstrates that the contentions of

the respondent were duly bulwarked by submission of bank statement of both donor and donee etc. He also demonstrates that the CDC record and gift deed etc. were also appreciated by the learned Tribunal.

Be that as it may, the Tribunal is the last fact finding forum in the statutory hierarchy and *de novo* appreciation of evidence could not be demonstrated to be undertaken in the present facts and circumstances in reference jurisdiction. Even otherwise learned counsel for the applicant remained unable to displace and distinguish the reasoning employed by the learned Tribunal and nor could it be demonstrated that the conclusion could not be rested thereupon. Therefore, we are of the considered view that no question of law arising herefrom has been articulated for adjudication before this Court, therefore, this reference application is dismissed.

A copy of this decision may be sent under the seal of this Court and the signature of the Registrar to the learned Appellate Tribunal, as required per section 133(8) of the Income Tax Ordinance, 2001.

JUDGE

JUDGE

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