Judgment SHEET

IN THE HIGH COURT OF SINDH, KARACHI

C.P. No.D-2206 of 2006.

DATE ORDER WITH SIGNATURE OF JUDGE

Present: Mr. Justice Mohammad Ather Saeed,
Mr. Justice Syed Mahmood Alam Rizvi.

Date of hearing : 20th February 2009.

Petitioner : Zeal Pak Industries (Pvt) Ltd through Mr. Muhammad Ali Mazhar advocate.

Respondent : Regional Commissioner Income Tax & ors through Mr. Jawed Farooqui advocate.

Mohammad Ather Saeed J. This constitutional petition has been filed, impugning the show cause notice No.TO/Enf-I/COS-V/2006/SWHT, dated 18.08.2006, by which the petitioner was informed that there was a mistake apparent from the record in respect of the assessment order for the assessment year 2000-2001 as inadmissible expense was allowed and therefore, he was directed to show cause why the assessment may not be rectified under section 221 of the Income Tax Ordinance, 2001.

3. Immediately, on receipt of the above notice the petitioner filed this constitutional petition, seeking the following reliefs:-

i) That this Court may be pleased to quash the impugned show cause notice dated 18th August 2006 issued by the Respondent No.3 to the petitioner.

ii) Any other relief which this Court may deem fit and appropriate in the circumstances of the case.

3. Brief facts of the case are that the petitioner's assessment for the assessment year 2000-2001 was finalized on 29th June, 2002 under section 62 of the Repealed Ordinance and this notice has been issued under section 221 of the new ordinance i.e. Income Tax Ordinance, 2001.

4. We have heard Mr. Muhammad Ali Mazhar the learned counsel for the petitioner and Mr. Jawed Farooqui, learned counsel for the respondent.

5. The main argument of the learned counsel for petitioner, is that his assessment order was finalized under the provisions of the Repealed Ordinance on 29th June, 2002 and once the ordinance was repealed on 30th June, 2002 and the new Income Tax Ordinance, 2001 was promulgated on 1st July 2002 all the provisions of the ordinances were repealed and, therefore, the assessment order sought to be rectified had become a closed and past transaction and could not be reopened under the provisions of the new Income Tax Ordinance. The learned counsel then submitted that sub-section (1-A) of section 221, which provides the jurisdictions and powers to the commissioner to rectify the orders passed under

various provisions of the Repealed Ordinance was incorporated in the Income Tax Ordinance 2001 on 1st July, 2003 by Finance Act, 2003 and therefore, was prospective in nature and could only apply to the orders passed after its promulgation and not to orders, which were passed before its promulgation as it did not have a retrospective effect. On this point he relied on the judgment of this Court in the case of HONDA SHAHRAH-E-FAISAL ASSOCIATION OF PERSONS, VS. REGIONAL COMMISSIONER OF INCOME TAX KARACHI and others reported in 2005 PTD 1316. He submitted that in this judgment this Court while adjudicating on the applicability of subsection 5-A of section 122 incorporated in the ordinance vide Finance Act, 2003 held that the provisions of this subsection will not apply to any assessment order, which had been finalized before coming in force of this statute.

6. The learned counsel further submitted that this case is completely covered by the above judgment of this Court and prayed that this constitutional petition may be allowed by following the above judgment.

7. The learned counsel then argued that rectification, under the old Income Tax

Ordinance, was dealt by section 156. As per the provisions of that section, rectification can only be made within four year. The learned counsel further submitted that since his order was finalized on 29.06.2002 when section 156 was still in force, hence, he had acquired a vested right that his assessment cannot be rectified after the period of the limitation of four years provided under section 156 had elapsed. He pointed out that the show cause notice in his case was issued more than four years and one month after passing of the assessment order and if his contention is accepted that he had acquired a vested right then the show cause notice is barred by limitation, as five years period of limitation will not apply to orders passed before the coming in force of subsection 1-A.

8. In this connection the learned counsel relied on a judgment of the learned Lahore High Court, Lahore in the case of M/S. FAWAD TEXTILES MILLS LTD. VS. PAKISTAN reported in 2005 PTD 14.

9. On the point of vested rights the learned counsel also relied on a judgment of this Court in the case of Capt. S.M. ASLAM AND OTHER VS. KARACHI BUILDING CONTROL AUTHORITY reported in 2005 CLC 759.

10. The learned counsel then argued on the point of the effect of the repealed Ordinance, and in this connection he read out the provisions of section 6 of the General Clauses Act, 1897 and also the article 264 of the Constitutional of Islamic Republic of Pakistan and argued that under these statutes it is provided that the repeal shall not effect any right or privilege acquired under the old ordinance, therefore, the order sought to be rectified passed under the repealed ordinance cannot be rectified under the provisions of the new ordinance.

11. In this connection he relied on the Judgment of the Quetta High Court in the case of GHULAM HUSSAIN VS. GOVERNMENT OF BALOCHISTAN reported in 2006 PLC (C.S.) 38 and a judgment of learned Lahore High Court Lahore in the case of Lt. Gen. (Retd) JAMSHAD GULZAR VS. FEDERATION OF PAKISTAN reported in PLD 2006 Lahore 512.

12. The learned counsel then read out the saving clause to section 239 of the Income Tax Ordinance, 2001 and submitted that his case fell within subsection 4 of section 239 and therefore, rectification could only be made under section 156 of the Income Tax Ordinance and since period of four years as provided under section 156,

therefore, the show cause notice for rectification is barred by the period of limitation.

13. Mr. Jawed Farooqui learned counsel for the respondent submitted that the amendment made in section 221 of the Income Tax Ordinance by Finance ordinance, 2003 by incorporating subsection 1-A is procedural in nature and subsection 1-A is a procedural provision and not a sustentative provision and it is a settled law that procedural amendments apply to all the pending proceedings, which had not become past and closed transaction before the procedural amendment came in force.

14. In this connection the learned counsel relied on a judgment of the Hon'ble Supreme Court of Pakistan in the case of I.T.O. & OTHERS VS. SULAIMAN BHAI JIWA & others reported in 21 (1970 Taxation-72). He submitted that in this case the Hon'ble Apex Court has held that "when retrospective effect to a statute is not given by express words, one must, apart from the language employed, "look to the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state

of the law, and what it was that the Legislature contemplated".

15. The learned counsel further submitted that the judgment of this Court in the case of HONDA SHAHRAH-E-FAISAL and the judgment of the Lahore High Court Lahore in the case of M/S. FAWAD TEXTILES MILLS quoted supra, do not apply to the case of the petitioner and are distinguishable. He submitted that in the case of HONDA SHAHRAH-E-FAISAL ASSOCIATION quoted supra this Court had held that since there was no provision under the Income Tax Ordinance, 2001 empowering the Commissioner to amend his assessment order, which, in his opinion, is erroneous in so far as it is prejudicial to the interest of the revenue, before 30.06.2003 when the assessment orders in that case were passed, therefore, the petitioners in those cases had acquired a vested right that their cases could not be amended on the ground that they were erroneous in so far as they were prejudicial to the interest of the revenue. This Court, therefore held that the application of subsection 5-A of section 122 incorporated by the Finance Act, 2003 was prospective and could only be applied to the assessment orders, which were passed after coming in force of this statute. He pointed out that section 221 empowering the

Commissioner to amend the assessment orders, was already there when the new Income Tax Ordinance came into force and therefore, the addition of subsection 1-A, authorizing him to rectify the assessment orders passed under the Repealed Ordinance, was only procedural in nature and would apply to all the pending assessment in which the period of limitation prescribed under section 156 of the Income Tax Ordinance,1979, had not expired before coming in force of subsection 1-A and once it was not a past and closed transaction on 30th June, 2003 then the period of limitation will be extended to five years as provided under section 221. The learned counsel pointed out that in the case of FAWAD TEXTILES MILLS LTD quoted supra the Court had come to the conclusion that before coming in force of subsection I-A of section 221, the rectification of the order of the assessment had become time barred under section 156 of the Repealed Ordinance and had, therefore, become a past and closed transaction. He submitted that once subsection 1-A was incorporated, the period of limitation was extended, in case of all the assessments, which had not become time-barred till that date and section 221 had become applicable to all the assessments, which were passed under the Repealed Income Tax Ordinance.

He, therefore, prayed that petition may be dismissed.

16. We have examined the case in the light of the arguments of the learned counsel and have very carefully perused the records of the case and examined the law on the subject. We have also gone through the judgments relied on by the learned counsel.

17. Since the subject matter of the controversy before us is section 221 of the Income Tax Ordinance, 2001, it will be relevant to reproduce the same including subsection 1-A incorporated in this section vide Finance Act 2003:-

> 221. Rectification of mistakes.—(1) The Commissioner, the Commissioner (Appeals) or the Appellate Tribunal may, by an order in writing, amend any order passed by him to rectify any mistake apparent from the record on his or its own motion or any mistake brought to his or its notice by a taxpayer or, in the case of the Commissioner (Appeals) or the Appellate Tribunal, the Commissioner.
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> *(1A) The Commissioner may, by an order in writing amend any order passed under the repealed Ordinance by the Deputy Commissioner, or an Income Tax Panel, as defined in Section 2 of the repealed Ordinance to rectify any mistake apparent from the record on his own motion or any mistake brought to his notice by a taxpayer and the provisions of sub-section (2), subsection (3) and subsection (4) shall apply in like manner as these apply to an order under subsection (1).*

18. Before, we proceed further it will be helpful to trace the history of this section. Section 221 was a part of the Income Tax

Ordinance, 2001 when it was promulgated on 1st July, 2002 and subsection 1-A was initially introduced in the Ordinance vide SRO No. 633(1)/02 dated 14th September 2002 and was given effect from 1st day of July, 2002. The subsection, which was inserted in the Ordinance vide the above notification reproduced below:

> *(1A) The Commissioner may amend by an order in writing, any order passed under the repealed Ordinance by the DCIT, or an Income Tax Panel, as defined in section 2 of the repealed Ordinance.*

19. However, this notification was challenged and was declared to be of no legal effect by the learned Lahore High Court, Lahore and the Hon'ble Supreme Court and therefore, the same was rescinded vide SRO No.608/(1)/03 dated 24th June, 2003 w.e.f. 1st July, 2003 and vide Finance Act the present subsection 1-A was incorporated in section 221. From a companion of the rescinded subsection 1-A and the present subsection 1-A we find that although these subsections are worded differently but the basic purpose of both these subsections was/is the same i.e. empowering the Commissioner to amend any order passed under the repealed Ordinance to rectify the mistakes apparent from record.

20. We will therefore, first examine the question whether section 221 is a substantive provision or a procedural statute. Basically, the purpose of

this section is to rectify any error floating on the surface of the record both to the advantage and disadvantage of the taxpayer and this power to rectify is also to be exercised on an application moved by the taxpayer pointing out any error in the original order. It, therefore, cannot be considered to be a statute of substantive nature but has to be considered as a statute, which is procedural in nature. It is a settled law that the procedural amendments apply to all pending proceedings and to all cases which have not become past and closed transactions.

21. We would, however, also like to examine the prospective or the retrospective applicability of subsection 1-A by interpreting this subsection on the basis of another principle of interpretation i.e. that the Courts have to interpret statute by trying to arrive at the intention of the legislature for legislating such statute. For this purpose it will be relevant to examine this subsection in the light of the judgment of the Hon'ble Apex Court in the case of SULEMAN BHAI JIVA quoted Supra relied on by the learned counsel for the respondent, wherein the apex Court has held as under:-

> *When retrospective effect to a statute is not given by express words, one must, apart from the language employed, "look to the general scope and purview of the statute, and at the remedy*

> *sought to be applied, and consider what was the former state of the law, and what it was that the Legislature contemplated.*

22. When we examine the present statute in the light of the above extract of the judgment, the only conclusion which can be arrived at by a plain reading of the subsection is that the legislature intended to empower the Commissioner of Income Tax to amend any order passed under the repealed Ordinance by any authority including the Deputy Commissioner and to rectify any mistake apparent from the record either sue moto or on an application received from the taxpayer and since the majority of assessment orders, which can be subject matter of subsection 1-A are only assessment orders, which have been passed before 30th June, 2003, therefore, it is apparent that the legislature intended to empower the Commissioner to rectify the orders, which had not become time-barred before 30th June, 2003 under the provisions of section 156 of the repealed Ordinance before this date. We are, therefore, of the considered opinion that the provisions of subsection 1-A will apply retrospectively even to orders passed under the repealed ordinance before 30th June, 2003.

23. We will now examine the arguments of the learned counsel that his case is completely

covered by the Judgment of this Court in Honda Shahra-e-Faisal quoted Supra. On a perusal of this judgment we have seen that this Court had followed the judgment of learned Lahore High Court in the case of M/s. MUNNOO INDUSTRIES LIMITED VS. COMMISSIONER OF INCOME TAX, ZONE, LAHORE in 2001 PTD 1525 in which it had been held that section 66-A is a substantive law and not procedural in nature and therefore, it could not be given retrospective effect to amend assessment completed before 30.06.2003. It was also held that identical interpretation made by the CBR through its circular also appears to be more inconsonance with law.

24. Since we have already held that the section 221 and its subsections is procedural in nature and the judgment of this Court in the case of Honda Shahra-e-Faisal quoted Supra is in respect of substantive law, therefore, it is not applicable to this case.

25. We have also examined the judgment of the learned Lahore High Court in the case of FAWAD TEXTILES MILLS LTD quoted Supra and we agree with the learned counsel for the respondent that this is also not applicable as the learned Court has declared the notice under section 221 to be without jurisdiction after observing that the

period of limitation under section 156 of the repealed Ordinance had expired on 30.04.2003 i.e. before, coming in force of subsection 1-A and, therefore, the notice would not fall within the provisions of section 221. The learned Lahore High Court Lahore held as under:

> *"My answer to the proposition in hand is in the negative. The learned counsel for the petitioner is correct in pointing out that although the provisions relating to limitation are procedural in nature yet these cannot be invoked or made of where a longer limitation is brought on the statute by way of an amendment when the act sought to be touched had already attained finality on expiry of the limitation under the previous legislation. The reliance of the learned counsel in re: Commissioner of Income Tax V. Mrs. Manjula Sood (1997) 227 ITR 873 is relevant and pertinent. Their Lordships of the Punjab and Haryana High Court summarized the effect of changes in procedural law in the following words:---*
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> > *"The law prescribing the period of limitation is to be considered as procedural rather than substantive. This proposition of law would have only one exception, i.e. if under the existing law of limitation the right to initiate a proceeding has already become time-barred then a subsequent enlargement of time by an amendment of law cannot be availed finality, would vest a party with substantive right which has already accrued. This accrued right cannot be taken away by a subsequent amendment. Substantive laws determine the rights and liabilities of the parties concerned, whereas procedural laws govern the manner in which such rights or obligations are to be enforced or realized."*
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> *In the case in hand the order recorded under section 156 of the repealed Ordinance on 01.05.1999 attained finality after the expiry of the prescribed limitation of four years in that Ordinance on 30.04.2003. On the other hand, the power to rectify the orders recorded under the late Ordinance was vested in the Revenue by introducing said subsection (1A) in section 221 through Finance Act, 2003 dated 17.06.2003. Since by that time the period of four years prescribed under the late Income tax Ordinance,*

> *1979 had already expired, subsection (4) of section 221 of the new Income Tax ordinance, 2001 could not be invoked to extend the period to five years. On expiry of the prescribed period of four years under the late ordinance the petitioner acquired a vested right and the orders under section 156 recorded on 01.05.1999 rectifying the original assessment orders matured into a past and closed transaction."*

26. From a perusal of above extract it is clear that the Learned Lahore High Court has while holding that the provisions, relating to limitation are procedural in nature, have decided the case only on the basis of the facts of that particular case. It may be pointed out that the facts of the case in this petition are different in as much as the period of rectification prescribed under section 156 had not elapsed on 30th June, 2003 when subsection 1-A, was incorporated as a part of section 221 and therefore, all the provisions of section 221 including the period of limitation prescribed in subsection 4 of section 221 will apply in this case and therefore, in our opinion, the impugned notice is not barred by the period of limitation.

27. Regarding the applicability of section 6 of the General Clauses Act read with section 264 of Constitution of Islamic Republic of Pakistan, we are clear in our minds on the basis of examination of section 221 that no vested right or privilege can be acquired by the petitioner or

was available to the petitioner on the basis of assessment order passed under section 62 of the repealed Act till the time the period of limitation for rectifying such order had not elapsed and since section 221 has been held by us to be procedural in nature, therefore, in our opinion it applies to all the assessment orders passed under the repealed ordinance, which had not become time-barred under section 156 before 30.06.2003 and therefore, section 6 of the General Clauses Act and article 264 of the Constitutional of Islamic Republic of Pakistan do not apply to the rectification of the orders passed under the repealed act under section 221 of the Income Tax ordinance, 2001.

28. We would also hold that since the impugned show cause under section 221 has been issued under proper jurisdiction and authority vested in the commissioner by subsection 1-A of section 221, therefore, the petition is also premature as the petitioner has filed this constitutional petition without replying to the show cause notice and pursuing the remedied provided under the Income tax ordinance, 2001.

29. In view of the above observations, we dismiss this constitutional petition in limine alongwith all the pending applications.

30. We may, however, add that we have refrained from examining the impugned notice on the merits whether rectification proposed to be made is in accordance with law. We will, therefore, direct the respondent to allow the time to the petitioner to file a reply to the show cause notice and after examining their explanation on the merits of the case pass an order strictly in accordance with law.

J U D G E

J U D G E

Dated: .02.2009
SAJID

"My answer to the proposition in hand is in the negative. The learned counsel for the petitioner is correct in pointing out that although the provisions relating to limitation are procedural in nature yet these cannot be invoked or made of where a longer limitation is brought on the statute by way of an amendment when the act sought to be touched had already attained finality on expiry of the limitation under the previous legislation. The reliance of the learned counsel in re: Commissioner of Income Tax V. Mrs. Manjula Sood (1997) 227 ITR 873 is relevant and pertinent. Their Lordships of the Punjab and Haryana High Court summarized the effect of changes in procedural law in the following words:---

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In the case in hand the order recorded under section 156 of the repealed Ordinance on 01.05.1999 attained finality after the expiry of the prescribed limitation of four years in that Ordinance on 30.04.2003. On the other hand, the power to rectify the orders recorded under the late Ordinance was vested in the Revenue by introducing said subsection (1A) in section 221 through Finance Ct, 2003 dated 17.06.2003. Since by that time the period of four years prescribed under the late Income tax Ordinance, 1979 had already expired, subsection (4) of section 221 of the new Income Tax ordinance, 2001 could not be invoked to extend the period to five years. On expiry of the prescribed period of four years under the late ordinance the petitioner

acquired a vested right and the orders under section 156 recorded on 01.05.1999 rectifying the original assessment orders matured into a past and closed transaction."