IN THE HIGH COURT OF SINDH AT KARACHI

I.T.R.A. NO. 16 of 2011

Present:-
Mr. Justice Syed Hassan Azhar Rizvi.
Mr. Justice Muhammad Junaid Ghaffar.

Commissioner Inland Revenue, …………………..…………… Applicant

VERSUS

M/s All Pakistan Rajputana Federation ……………..………… Respondent

Date of hearing:	**5.12.2013**
Date of judgment:	**21.02.2014**
Applicant	**Through Mr. Kafeel Ahmed Abbasi Advocate.**
Respondent	**Through Mr. Iqbal Salman Pasha Advocate.**

J U D G M E N T

Muhammad Junaid Ghaffar, J. The instant Income Tax Reference Application ("ITRA") has been filed by the Commissioner Inland Revenue (RTO) Hyderabad against order dated 11.10.2010 passed by the Appellate Tribunal, Inland Revenue, Karachi camp at Hyderabad, ("Tribunal") passed in ITA No. 336/KB/2010 (Tax year 2008) and has proposed the following questions of law:-

i) Whether on facts and in the circumstances of the case, the Tribunal was justified in law, to hold the order passed u/s.122(5) as being void and illegal for reason of non-mentioning of either such section (1) or sub-section (4) of Section 122 ignoring the ratio settled by the Hon'ble Supreme Court of Pakistan in cases reported as *PTCL 2007 CL[260] (Collector Vs. Zamindars Paper & Board Mills Limited and 2007 PTD 967 (Commissioner Vs. Abdul Ghani)* wherein it has been held that the determining factor is the subject matter and substance of a document irrespective of section referred therein?

ii) Whether on facts and circumstances of the case, in view of clear expression "amendment assessment", order passed u/s. 122(5) was Ipso facto, in substance and effect, an order passed under sub section (1) of section 122 of ITO 2001 whereas, sub section (4) dealt with the matter of "further amendment?"

iii) Whether on facts and in the circumstances of the case, such omission of sub section (1) in the caption of the order passed u/s. 122(5), had legal protection under the provisions of section 126(2) of ITO 2001.

iv) Whether on facts in the circumstances of the case, the tribunal was legally justified in, not recording objective findings of fact and law on, as many as other fourteen substantive grounds raised in memo of appeal.

2. Briefly, the facts relevant for the disposal of the instant ITRA are that the respondent is a Trust running a charitable hospital in the name of Wali Bhai Rajputana Hospital duly approved under section 2(36) of the Income Tax Ordinance 2001 ("Ordinance 2001") as a "Non-Profit Organization". The case of the respondent for the tax year 2008 was selected for audit under section 177(4) of the Ordinance, 2001 by the Commissioner of Income Tax, Audit Division, RTO Hyderabad and the jurisdiction of the case was assigned to Deputy Commissioner, Inland Revenue Audit-I, Hyderabad. The Deputy Commissioner called for the books of accounts and other relevant documents for examination and thereafter issued a show cause notice on the issue of claiming income of Rs. 24,99,958/- as exempted from tax. Subsequently, the Deputy Commissioner Inland Revenue verified the record of the respondent and passed an order whereby he did not allow the exemption on income and also disallowed several expenses claimed under various heads and accounts. The respondent being aggrieved with the said Order preferred an appeal before Commissioner Inland Revenue (Appeals) who vide order dated 6.3.2010 allowed the same on merits as well as on legal grounds and held that since the deemed assessment order was not amended under section 122(1) of the

Ordinance, 2001 and was done under section 122(5) of the Ordinance, 2001 therefore was unlawful and illegal. The applicant thereafter preferred an appeal before the learned Tribunal which, though has dismissed the appeal, but such dismissal was not on merits, but only on a legal issue by holding that the Order passed by the Taxation Officer under section 122(5) Ordinance 2001, was void and illegal, hence not sustainable in the eyes of law. The applicant being aggrieved has preferred the instant ITRA and has proposed the aforementioned questions of law for the opinion of this Court.

3. Mr. Kafeel Ahmed Abbasi, learned Counsel appearing on behalf of the applicant contended that the Commissioner Appeals as well as the Tribunal have erred in law by holding that the Order passed by the Taxation Officer under section 122(5) of the Income Tax Ordinance 2001 was void and illegal merely for the fact that a wrong provision of law was mentioned in the caption of the order, whereas, it was in fact an order passed under section 122(1) read with 122(9) of the Ordinance, 2001 in matter and substance. Per learned Counsel, it was just a typographical error in the said order whereby section 122(5) of the Ordinance, 2001 was mentioned. Learned counsel contended that it was merely a mistake and not an irregularity which has prevailed upon both the authorities below to hold that the Order was passed without any lawful jurisdiction. Learned counsel further contended that from the perusal of the show cause notice issued in terms of section 122(9) of the Ordinance 2001, it is clear that the Order passed by the Taxation Officer was based on the audit of the assessee and therefore for all legal purposes it was an Order under section 122(1) read with section 122(5) of the Ordinance, 2001. It was further contended by the learned Counsel that in fact no order is passed in terms of

section 122(5) of the Ordinance 2001 as it is only an enabling section which provides for a situation in which the assessment order can be amended as well as further amended. Learned counsel next contended that even otherwise in terms of Section 126(2) of the Ordinance, 2001 all Orders of assessment are curable including Orders passed without jurisdiction. Learned counsel relied upon the case reported in ***2007 PTD 967 (Commissioner of Income Tax Vs. Abdul Ghani)***.

4. Mr. Iqbal Salman Pasha, Learned Counsel appearing on behalf of the respondent contended that the respondent is a "Non- Profit Organization" duly approved under the Companies Ordinance, 1984 and is also exempted from Income Tax liability under the Ordinance, 2001, under SRO 667(1)/2006 dated 27.6.2006. Learned counsel contended that the Order passed by the Taxation Officer itself reflects that such Order was passed under section 122(5) of the Ordinance, 2001 for the reason that it is admitted in the said order that the case was selected for audit under section 177(4) of the Ordinance, 2001 and therefore the Order passed was an Order under section 122(5) and not under section 122(1) of the Ordinance, 2001 as contended by the learned counsel for the applicant. Learned counsel next contended that since otherwise the respondent is exempt from the liability of tax under Part I of the 2nd Schedule read with clause 58(1) & (3) of the Ordinance, 2001 and therefore the case made out by the Taxation Officer does not merit any consideration. Learned counsel vehemently argued that since admittedly no Order could be passed by the Taxation Officer in terms of Section 122(5) of the Ordinance, 2001 and so also for which the said Taxation Officer had no jurisdiction, therefore the instant ITRA is liable to be dismissed in limine. Learned counsel contended that

an Order under section 122(5) of the Ordinance, 2001 can only be made, once the amendment of the original assessment order has been carried out in terms of section 122(1) of the Ordinance, 2001 which prima facie in this case has not been done, therefore, the Taxation Officer had no jurisdiction under section 122(5) of the Ordinance, 2001 to pass any such order. Lastly, learned counsel contended that this was not an order which could be cured under section 126(2) of the Ordinance, 2001 as the question of jurisdiction and the authority of the Taxation Officer who had passed the said order is involved in the matter.

5. We have heard both the learned counsel and perused the record and the case law relied upon by the parties.

6. It appears that the respondent had filed its return for the tax year 2008 and its case was selected for audit under section 177(4) of the Ordinance, 2001 and was assigned to the Deputy Commissioner Inland Revenue, RTO, Hyderabad, whereafter the respondent produced its books of account and other relevant documentary evidence for examination. Subsequently, the Deputy Commissioner issued a show cause notice regarding claim of exempt income of Rs. 24,99,958/- in the return filed by the respondent. The Deputy Commissioner rejected the claim of the respondent and passed the Order under section 122(5) of the Ordinance, 2001 against which an appeal before the Commissioner (Appeals) as well as the Tribunal also failed. The precise controversy before us is, that as to whether the order passed by the Taxation Officer which has purportedly been passed under section 122(5) of the Ordinance, 2001 as is reflected from the caption of the order, was in fact and could be treated as an order under section 122(1) of the Ordinance 2001 or not. We have noticed that though the Commissioner (Appeals) had passed its order on the above legal

ground as well as on merits of the case, however, the learned Tribunal while passing the impugned order has only answered and given its findings on this legal issue as formulated above. It would be advantageous to reproduce the relevant provisions of section 122 of the Ordinance, 2001:-

> " 122. ***Amendment of assessments--***(1) Subject to this section, the Commissioner may amend an assessment order treated as issued under section 120 or issued under section 121 [.or issued under section 122C] [***] by making such alterations or additions as the Commissioner considers necessary [***]
> (2)………………………………………
> (3)………………………………………
> (a)………………………………..
> (b)………………………………..
> (4) Where an assessment order (hereinafter referred to as the "original assessment") has been amended under sub-section (1)[.] (3) [or (5A)]. The Commissioner may further amend [.as many times as may be necessary.] the original assessment within the later of ---
> (a) five years [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 amend assessment order to the taxpayer;
> [(4A)………………………………………………………..
> [(5) An assessment order in respect of a tax year, or an assessment year, shall only be amended under sub-section (1) and an amended assessment for that year shall only be further amended under sub-section (4) where, on the basis of definite information acquired from an audit or otherwise, the Commissioner is satisfied that:-
> (i) any income chargeable to tax has escaped assessment; or
> (ii) total income has been under-assessed, or assessed at too low a rate, or has been the subject of excessive relief or refund; or
> (iii) any amount under a head of income has been mis-classified.]
>
> [(5AA)in respect of any subject matter which was not in dispute in an appeal the Commissioner shall have and shall be deemed always to have had the powers to amend or further amend an assessment order under sub-section (5A)]"

7. From the perusal of the above provisions, it could be seen that there are various situations and conditions whereby the deemed assessment order issued under section 120 or an order under section 121 or 122C of the Ordinance 2001 can be amended by making such alterations or additions as the Commissioner considers necessary. Subsection (1) provides for this situation, whereas subsection (2) further provides that no Order under subsection (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 tax payer. Subsection (4) further provides that when an original assessment order has been amended under subsection (1), (3) or (5A), the Commissioner may further amend the original assessment within the later of five years form the end of the financial year in which the Commissioner has issued or is treated as having issued the original assessment order to the tax payer, or one year from the end of the financial year in which the Commissioner has issued or is treated as having issued the amened assessment order to the tax payer. Subsection (5) further provides that an assessment order in respect of the tax year or an assessment year, shall only be amended under subsection (1) and an amended assessment for that year shall only be further amended under subsection (4) where, on the basis of definite information acquired from an audit or otherwise the Commissioner is satisfied that any income chargeable to tax has escaped assessment or has been under assessed or assessed at too low rate or has been subject of excessive relief or reliefs or refunds or any account under a head of income has been misclassified. The case of the respondent is, that since in the instant case the original deemed assessment order had not been amended for any of the reasons as contemplated under subsection (1) of section 122 of the Ordinance, 2001 therefore the Taxation Officer was not authorized to pass any order under subsection (5) of section 122 of the Ordinance, 2001 as no amended order was in field and therefore the order passed by the Taxation Officer was without any lawful authority and jurisdiction. This to our understanding is not the correct appreciation of facts by the learned Counsel as admittedly the Taxation officer has passed the impugned order after the audit of the respondent had been

conducted under section 177(4) of the Ordinance 2001, therefore such contention is misconceived and is hereby repelled.

8. We have perused the relevant provisions of the Ordinance, 2001 as well as the findings recorded by the Tribunal on the subject controversy. It appears that what prevailed upon the Tribunal in arriving to the conclusion that the assessment order passed by the Taxation Officer was void and illegal is, that while passing the said order, the Taxation Officer has mentioned the provisions of Section 122(5) of the Ordinance, 2001 in the caption of the order. However on a careful examination it transpires that though the Taxation Officer has mentioned the provisions of Section 122(5) of the Ordinance, 2001 but in fact to our understanding Section 122(5) of the Ordinance, 2001 is not a provision under which an order for amending the assessment is passed. It contemplates only the situation whereby the officer concerned can amend an order by making an assessment either under the provision of subsection (1) or subsection (4) of Section 122 of the Ordinance. In fact Section 122(5) of the Ordinance, 2001 does not vests any jurisdiction or authority to pass any amending order in respect of the assessment order already in field; rather it only narrates the various situations and the very provisions under subsection (1) and (4) of Section 122 of the Ordinance 2001, whereby any order could be amended. We have gone through the Order passed by the Taxation Officer and are of the view that at the most it is only an error or mistake of the officer concerned, whereby the provision of Section 122(5) of the Ordinance has been mentioned in the caption of the Order, as the narration of facts, the issue raised through the show cause notice and the discussion made therein clearly reflects that such Order could be termed as an Order under sub-section (1) read with subsection (5) of

section 122 of the Ordinance as the amending Order of the Taxation Officer was admittedly passed after selection of the respondents case for audit under section 177 (4) of the Ordinance, 2001 wehreafter the respondent was formally confronted through a show cause notice issued under section 122(9) of the Ordinance and after the reply and books of accounts furnished by the respondent, the amending Order was passed by the concerned Taxation Officer. It is a settled proposition that the Court has to see that as to whether substantial compliance has been made and if any wrong provision of law has been mentioned in the Order, then what prejudice, if any, is likely to be caused to the aggrieved party against whom such order has been passed. To us, in the instant matter, not only substantial compliance has been made, but there is neither any prejudice caused to the respondent, as before and even after the issuance of the show cause notice and till the passing of the impugned order, every act of the Taxation Officer was within the purview of the Ordinance 2001, and it is only after passing of the amending order, such objection with regard to mentioning and passing of the order under section 122(5) of the Ordinance 2001 has been raised. It is the subject matter and the narration of facts and discussion in an order or notice which is primarily material for arriving at the conclusion that as to whether the notice or the Order has been appropriately issued or passed under the relevant subsection or section of the Act. This view of ours is fortified by the judgment of Hon'ble Supreme Court passed in the case of ***Commissioner of Income Tax VS. Abdul Ghani*** reported in **2007 PTD 967.** It would be advantageous to reproduce the relevant findings in the above case wherein the Hon'ble Supreme Court while dealing with an identical situation, though under the Income Tax Ordinance 1979 has held as follows:-

> "From a bare perusal of the above paragraphs reproduced from the judgment of the Appellate Tribunal dated 12th January, 1999. It may be noted that the objection with regard to non-issuance of notice under section 65 of the Ordinance and the jurisdiction of the Assessing Officer to proceed with the assessment of income of the respondent from the previous assessment years has been overruled by the Tribunal. Such observation was made by the Tribunal after taking into consideration the facts of the case, the provisions of section 56 and 65 of the Ordinance and the view expressed by a Full Bench of the Appellate Tribunal in the case reported in (1998) 77 Tax 91. In this context it will be appropriate to refer to the judgment of this Court in the case of Pakistan Fisheries Ltd. Vs. United Bank Ltd. PLD 1993 SC 109, wherein this Court pronounced that as long as power to hear and decide a matter vests in a Court, mere reference to a wrong provision of law for invocation of that power would not be a bar to the exercise of that power. Applying this pronouncement to the present case, there can be no doubt with regard to the power of the Assessing Officer to re-open the assessment for the previous assessment year under section 65 of the Ordinance, if he is satisfied that there has been escapement of assessment. Thus the fact that the Assessing Officer instead of issuing a notice under section 65, issued a notice under section 56 of the Ordinance nor would render the assessments framed in pursuance of such notice as illegal and without jurisdiction. Viewed in the background of above legal and factual position, it is observed that the Tribunal had decided the above issue after application of mind, consciously and giving plausible and satisfactory reasons for the same. It, therefore, cannot be said to be a mistaken or inadvertent finding or an error floating on the face of the judgment so as to the rectifiable under section 156 of the Ordinance. Rectification under section 156 of the Ordinance is permissible if the error is apparent, obvious and floating on the face of the judgment and can be rectified without long drawn arguments and proceedings for appreciating facts and interpretation or application of any provision of law." (Emphasis supplied)

10. In view of herein above, we are of the view that the order passed by the Taxation Officer in question was an order under section 122(1) read with section 122(5) of the Ordinance 2001 as all the conditions precedent for exercising such jurisdiction and passing of such order were fully satisfied, hence the order was neither void nor without jurisdiction and further the mentioning of the provisions of section 122(5) of the Ordinance in the caption and body of the order was merely a typographical error and by no stretch of imagination it could be termed to be such that it vitiates the entire order. Therefore, in view of the above discussion we are of the view that it would suffice if we only answer questions (i) and (ii), and this we would do after reframing the questions (i) and (ii) in the following manner.

i) Whether in the facts and circumstances of the case, the Tribunal was justified in law, to hold that the order passed by the Taxation Officer was void and illegal for the reason that the provision of section 122(5) of the Ordinance 2001 was mentioned in the caption of the order instead of either sub section (1) or sub-section (4) of Section 122 of the Ordinance 2001?

ii) Whether in the facts and circumstances of the case and in view of the matter and substance discussed in the order passed under section 122(5) ibid was Ipso facto, in substance and effect, an order passed under sub section (1) of section 122 of ITO 2001 or not?"

11. Question (i) is answered in negative, in favour of the applicant and against the respondent, whereas question (ii) is answered in the affirmative, in favour of the applicant and against the respondent, whereas answers to questions No (iii) and (iv) are not necessary. The upshot of the above finding is that the matter is to be remanded to the Tribunal as it had only decided the legal issue which we have answered as above. Therefore, the appeal shall be deemed to be pending before the Tribunal which shall be decided by the Tribunal on all the issues as may be raised or are already raised before it including the issues on merits which have already been decided by the Commissioner (Appeals). The Registrar of this Court is directed to send a copy of this order under the seal of the Court to the Tribunal for information.

12. The instant reference application is allowed in the above terms.

Karachi:

Dated: __02.2014

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