IN THE HIGH COURT OF SINDH, KARACHI

Present
Mr. Justice Aqeel Ahmed Abbasi.
Mr. Justice Muhammad Junaid Ghaffar.

I.T.R.A. No.251 of 2011

Applicant	:	Commissioner Inland Revenue (Zone-IV), Large Taxpayers Unit, Karachi

Versus

Respondent	:	M/s. Medicaids Pakistan (Pvt) Ltd. Karachi
Date of hearing	:	13.05.2015
Date of Judgment	:	10.08.2015

Mr. Jawaid Farooqui, advocate for the applicant.
Mr. Arshad Siraj, advocate for the respondent.

J U D G M E N T

Aqeel Ahmed Abbasi, J. Being aggrieved and dissatisfied by the impugned order passed by the Appellate Tribunal Inland Revenue (Pakistan), Karachi in ITA No.497/KB/2011 (Tax Year 2009), whereby, the Appellate Tribunal Inland Revenue vide order dated 27.07.2011 has dismissed the appeal filed by the Commissioner Inland Revenue, Zone-IV, LTU, Karachi, the applicant department has filed instant reference application under Section 133 of the Income Tax Ordinance, 2001, by formulating following 02 questions, which according to learned counsel for the applicant, are questions of law arising from the impugned order passed by the Appellate Tribunal Inland Revenue in the instant case:-

> ***"1. Whether on the facts, in the circumstances of the case and on law the learned Tribunal was justified to hold that the toll manufacturing receipts are assessable under normal law without appreciating the fact that the toll manufacturing receipts are assessable under Final Tax Regime being contractual in nature @ 6% u/s 169 read with sub-section (1) and (6) of section 153 of the Income Tax Ordinance, 2001?***

2. Whether on the facts, in the circumstances of the case and on law the learned Tribunal was justified to decide the issue simply by stating that the issue has been decided by the superior courts without quoting any specific decision of any superior courts whereas in fact the issue was decided in favour of revenue by the learned Appellate Tribunal Inland Revenue in ITA No.1305/KB/2004 dated 26.12.2005 in taxpayers own case?"

2. Learned counsel for the applicant submits that the learned Appellate Tribunal Inland Revenue has erred in law and fact while dismissing the appeal filed by the Commissioner Inland Revenue, Karachi, and by further holding that matter regarding rendering or providing service clearly falls outside the purview of Final Tax Regime without appreciating the facts of the instant case, as according to learned counsel, the toll manufacturing receipts by the respondent in the instant case are assessable under Final Tax Regime for being contractual in nature and cannot be subjected to normal tax regime. Learned counsel for the applicant submits that in terms of Section 169 read with sub-section(1) and (6) of Section 153 of the Income Tax Ordinance, 2001, the toll manufacturing receipts, pursuant to a contract between the parties, are to be assessed under Final Tax Regime, whereas, per learned counsel, such aspect of the matter has not been properly examined by the Appellate Tribunal in the instant case. Per learned counsel, the Tribunal has not recorded any finding on facts of the case and has summarily rejected the appeal filed on behalf of the revenue through impugned order. It has been further contended by the learned counsel that rendering of service does not involve the process of manufacturing, whereas, in the instant case, the process of manufacturing is involved, the impugned orders passed by the Appellate Tribunal and the CIT (Appeals) are liable to be set-aside and the questions proposed may be answered in negative in favour of the applicant and against the respondent. In support of his contention, learned counsel for the applicant has placed reliance in the following case law:-

i) Federation of Pakistan through Secretary Ministry of Finance and others v. Haji Muhammad Sadiq and others PLD 2007 SC 133

ii) Federation of Pakistan and others v. Haji Muhammad Sadiq and others [(2007)95 TAX 153 (SC Pak)].

3. Conversely, learned counsel for the respondent has controverted the submissions made by the learned counsel for the applicant and submits that no

question of law arises from the impugned order passed by the learned Appellate Tribunal in the instant case as the decision of the Appellate Tribunal as well the order passed by the Commissioner (Appeals) are based on concurrent finding of facts. Per learned counsel, the respondent is a service provider, which is covered in terms of Section 153 (1)(b) of the Income Tax Ordinance, 2001. Learned counsel further submitted that above factual and legal position regarding treatment of toll manufacturing receipts pursuant to contract of service, has already been settled in the case of respondent by the Appellate Tribunal in I.T.A.No.741/KB/2005, whereby, tax deducted under Section 153 (1)(6) has been treated under normal law, whereas, its treatment as final discharge of tax liability has been declared to be illegal. Learned counsel has also referred to CBR Circular No.01 of 2005, wherein, according to learned counsel for the respondent, withholding tax claimed on all types of services were held to be adjustable. It is contended by the learned counsel for the respondent that admittedly, respondent is a service provider of toll manufacturing and does not carry on any business of manufacturing for itself, whereas, in terms of Section 153(1)(c) the execution of contract for rendering of or providing services has been excluded from the purview of Final Tax Regime. In support of his contention, learned counsel for the respondent has placed reliance in the case of ***Burmah Oil Company Limited vs. The Trustees for the Port of Chittagong PLD 1961 SC 452 and Golden Roadways Transport Bus Service vs. Executive Officer, Cantonment Board, Okara PTCL 1987 CL 5***.

4. We have heard the learned counsel for the parties, perused the record and the impugned order passed by the Appellate Tribunal Inland Revenue in the instant case. Brief facts of the case are that the respondent company filed its return of total income for the tax year 2009 under Normal law declaring total loss from business at (Rs.695729/-) alongwith statement of accounts and claimed an amount of Rs.1082577/- as refundable for the said year. The return filed was treated as an assessment order deemed to have been issued in terms of Section 120 of the Income Tax Ordinance, 2001. However, desk audit for the tax year 2009 was conducted and case of the respondent was selected for audit under

Section 177 of the Income Tax Ordinance, 2001, by the Commissioner Income Tax (Audit) LTU, Karachi. Notices were issued by the Taxation Officer to the respondent, which was responded from time to time, whereas, details and explanation were also furnished. The Taxation Officer, however, proceeded to amend the deemed assessment in the case of respondent and treated the toll manufacturing receipts of Rs.3502568/- as final discharge of tax liability under Section 169 read with Section 153 of the Income Tax Ordinance, 2001, and charged tax at the rate of 6% thereon. The respondents being aggrieved by such treatment of the toll manufacturing receipts under Final Tax Regime, filed an appeal before Commissioner (Appeals-I), Karachi, who vide order dated 13.12.2010 by placing reliance in the case of ITA No.751/KB/2005 set-aside the treatment of toll manufacturing receipts under Final Tax Regime and directed the Taxation Officer to modify the order accordingly. Commissioner Inland Revenue, LTU, Karachi, preferred an appeal against such order before the Appellate Tribunal Inland Revenue, who vide impugned order dated 27.07.2011, has dismissed the appeal filed by the revenue and confirmed the order of the Commissioner (Appeals) by observing that matter regarding rendering or providing service clearly falls outside the purview of Final Tax Regime and has been led at rest by the superior Courts as well as by this Tribunal. The record shows that admittedly the, amount i.e. Rs.3502568/- towards toll manufacturing receipts during year under reference, was received pursuant to a contract of service for manufacturing the medicine for 3rd party, whereas, no manufacturing of medicine has been done by the respondent during the year under reference for its own business or use. The Commissioner (Appeals) after having examined the aforesaid facts has categorically held that the toll manufacturing receipts for the year under consideration are covered under Section 153(1)(b) relating to rendering of or providing of services and also fall within the exclusion from Final Tax Regime under Section 153(1)(c) i.e. **execution of contract, other than a contract for the sale of goods or the rendering of or providing of services**. From perusal of the order passed by the Taxation Officer and the Commissioner (Appeals) in the instant case, it appears that such aspect of the matter has been ignored by the Taxation Officer, who has discarded the explanation offered by

the respondent in the above terms by simply holding that since the toll manufacturing receipts come under the ambit of execution of contract, therefore, same are subject to Final Tax Regime.

5. In view of hereinabove facts and circumstances of the case, we are of the opinion that the Taxation Officer was not justified to treat the toll manufacturing receipts of the respondent company for the tax year under reference, to be covered under Final Tax Regime, as the respondent admittedly, was not engaged in any manufacturing of medicines for its own use and has admittedly, rendered service of toll manufacturing to 3rd party under a contract of service.

6. The Commissioner (Appeals) after having examined the facts of the case and by placing reliance on an earlier decision of the Tribunal on the subject controversy has rightly set-aside such treatment of the Taxation Officer with the direction to modify the order accordingly. It will be advantageous to reproduce the finding of the Appellate Tribunal in the case of ITA No.741/KB/2005, as relied by the Commissioner (Appeals) in its order:-

> "*We have heard the rival arguments of both the learned Representative and have also perused the available record. We have gone through the words of statute, Section 153(1) (b), Section 153(6), 153(7) and Section 169 of the Income Tax Ordinance 2001 and also the First Schedule for rates of taxes to be levied, of the Income Tax Ordinance, 2001 we do not find any place whereby the tax deducted under Section 153(1) (b) have been treated a final discharge of tax liability. Where the Part III of First Schedule relevant Division III whereby the tax liability, whereby the tax deduction on payment of Goods and Services have defined in sub-lease (2) of the aforesaid Division which clearly stated that in the case of transport services 2% of the gross amount payable to be deducted as tax under Section 153(1)(b). The case law cited by learned AR are equally applicable in the appellant's case.*
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> *Keeping in view the facts and circumstances of this case, we are of the* ***opinion that the learned CIT (A) was justified to hold that Section 153(1)*** *(b) was applicable in this case. Hence, the order of the learned CIT (A) is confirmed and the departmental appeal is hereby dismissed."*

7. We are of the view that the Appellate Tribunal Inland Revenue, has rightly confirmed the order of the Commissioner (Appeals) in the instant case and dismissed the appeal filed on behalf of the Inland Revenue on the subject controversy. Moreover, the concurrent finding as recorded by two appellate forums below does not suffer from any factual or legal error, hence does not

require any interference by this Court. Accordingly, Question No.1 as proposed hereinabove is answered in affirmative against the applicant and in favour of the respondent, whereas, Question No.2 in view of hereinabove finding recorded by us does not require any response, as it does not relate to any question of law requiring opinion of this Court while exercising its reference jurisdiction under Section 133 of the Income Tax Ordinance, 2001.

Instant Reference Application is hereby dismissed in the above terms. The Registrar of this Court is directed to send a copy of this judgment under the seal of the Court to the Appellate Tribunal Inland Revenue, for information.

JUDGE

JUDGE