# IN THE HIGH COURT OF SINDH AT KARACHI

**Present:**
**Mr. Justice Muhammad Shafi Siddiqui**
**Mr. Justice Mahmood A. Khan**

C.P. No.D-5113 of 2021

OBS Pakistan (Pvt.) Limited
Versus
Federation of Pakistan & others

Along with 72 other petitions
(As per Annexure 'A' to this judgment)

Date of Hearing: 21.10.2021 and 02.11.2021

Petitioners: Through Mr. Ovais Ali Shah, Mr. Ali Almani, Khawaja Aizaz Ahsan, Qazi Umair Ali, Mr. Sami-ur-Rehman Khan, Ms. Saman Rafat Imtiaz, Mr. Javaid Farooqi, Mr. Munir Iqbal, Mr. M. Amin Bandukda Advocates.

Respondents: Through Mr. Kafeel Ahmed Abbasi, Deputy Attorney General along with Mr. Hussain Bohra, Assistant Attorney General, Mr. Iqbal Hussain, Mr. Munawar Ali, Syed Zaim Hyder Musavi a/w Mr. Aizaz Ahmed, Mr. Tauqeer Ahmed and Syed Farhan Ali Shah Advocates.

## J U D G M E N T

**Muhammad Shafi Siddiqui, J**.- This bunch of petitions under Article 199 of Constitution of Islamic Republic of Pakistan, 1973 involve common question of law and hence are being dealt with and decided by this common judgment.

2. Mr. Ovais Ali Shah and Mr. Ali Almani as leading counsel argued on behalf of the petitioners whereas others have adopted the arguments. On behalf of respondents Mr. Kafeel Ahmed Abbasi, Deputy Attorney General argued on behalf of Federation and Mr. Iqbal Hussain and Syed Zaim Hyder Musavi argued for the department.

3. After hearing counsels, following questions emerged for consideration:

1. *Whether the impugned notices purportedly issued under section 221 of the Income Tax Ordinance, 2001 exceeds its statuary frame?*
2. *Whether the impugned Circular dated 25.05.2021 of FBR is ultra vires the Income Tax Ordinance, 2001, if not, its effect?*

4. Brief history leading to the present controversy is adjustment of WWF liability against outstanding tax refund.

5. Under Workers' Welfare Fund Ordinance, 1971 (Ordinance 1971) petitioners are required to contribute towards workers' welfare as worker's welfare fund under section 4(1) of Ordinance 1971 and the payment is made under Income Tax Ordinance, 2001 (Ordinance 2001) along with returns manifested under section 4(2) and 4(3) of Ordinance 1971.

6. Taxation officer entrusted with jurisdiction is then required to act under Section 4(4) of Ordinance 1971 for passing order to determine the payment due from such entities. Such orders are appealable under section 4(10) of Ordinance 1971. The mechanism available for recovery of dues under Ordinance 2001 is made applicable to recover any shortfall of WWF/subject dues under Ordinance 1971.

7. In the previous regime of 1979 Ordinance in order to facilitate the taxpayer/assessee, FBR had issued a Circular[1] on 17.02.2000 allowing taxpayer to adjust any WWF liability against outstanding tax refund/credit. The circular continued under 2001's Ordinance epoch allegedly in terms of saving provision of Section 239 of Ordinance 2001 till issuance of impugned Circular on 25.5.2021[2].

8. It is with this background that petitioners continued to avail such adjustment of WWF liabilities against tax refund. On 25.05.2021 FBR issued the impugned Circular stating that the WWF is not a tax and therefore under section 170(3) of Ordinance 2001 taxpayer's WWF

[1] No.4(33)-Rev.Bud./99
[2] C.No.1(10)ST-LP&E/2020/66012.R, Islamabad the 25th May, 2021

liability could not be adjusted against unpaid outstanding income tax refunds. Officers were thus directed that WWF may not be adjusted against tax liability.

9. It is argued by petitioners' counsel that Hon'ble Supreme Court of Pakistan in Worker's Welfare case[3] decided that payment to WWF is not a tax however it was for the purposes of Article 73 of the Constitution of Islamic Republic of Pakistan, 1973 and consequently held that Ordinance 1971 cannot be amended through Money Bill. However, it is emphasized that this does not mean that WWF cannot be deemed to be a tax for the limited purpose of collection and paying WWF. It means that amendment cannot be carried out through Money Bill.

10. It is thus concluded by the counsel that pursuant to impugned circular respondents issued impugned notices under Section 221(2) of Ordinance 2001 to rectify petitioners' deemed assessment orders wherein such adjustments were made.

11. Respondent's counsel has relied upon Worker's Welfare case and submitted that FBR has now followed the directions of Hon'ble Supreme Court and have issued notices to rectify such mistakes where adjustments were made, which became apparent in view of Hon'ble Supreme Court's observation.

12. We have hard all the counsels[4] and perused the record.

13. As noted above there are two primary questions to be addressed.

14. For ease of convenience Section 221 of Income Tax Ordinance, 2001 is reproduced as under:-

> ***221. Rectification of mistakes.*** *- (1) The Commissioner, the Commissioner (Appeals) or the Appellate Tribunal*

[3] PLD 2017 SC 28 (Workers Welfare Funds v. East Pakistan Chrome Tannery & others)
[4] Mr. Ovais Ali Shah, Mr. Ali Almani, Mr. Kafeel Ahmed Abbasi, Deputy Attorney General, Mr. Iqbal Hussain, Syed Zaim Hyder Musavi Advocates.

*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.*

*(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), sub-section (3) and sub-section (4) shall apply in like manner as these apply to an order under sub-section (1).*

*(2) No order under sub-section (1) which has the effect of increasing an assessment, reducing a refund or otherwise applying adversely to the taxpayer shall be made unless the taxpayer has been given a reasonable opportunity of being heard.*

*(3) Where a mistake apparent on the record is brought to the notice of the Commissioner or Commissioner (Appeals), as the case may be, and no order has been made under sub-section (1) before the expiration of the financial year next following the date on which the mistake was brought to their notice, the mistake shall be treated as rectified and all the provisions of this Ordinance shall have effect accordingly.*

*(4) No order under sub-section (1) may be made after five years from the date of the order sought to be rectified.*

15. The above provision of Ordinance 2001 only enabled the Commissioner to amend any order to rectify any mistake apparent from the record. In terms of Circular 4 of 17.02.2000 of FBR, all regional commissioners of Income Tax were directed that since recovery/collection of WWF is also the responsibility of the income tax department, the refund of income tax should be adjusted against demand of WWF. FBR consciously decided while issuing such circular and keeping in mind Chapter X of Ordinance 1979 which concerned with refund and credit.

16. The mechanics of such understanding continued until impugned Circular dated 25.05.2021 was issued. Earlier Circular No.4 was issued

under repealed Ordinance 1979 in terms of its Section 8 while there was no concept of deemed assessment. Thus, consciously and effectively it (Circular 4) was acted upon by adjusting refund claim against WWF by the department.

17. In some of the cases we have even noticed that the deemed assessment was also amended under section 122 of Income Tax Ordinance, 2001 by the officers having jurisdiction wherein WWF liability was reworked and demands were created against some of the assesses, being petitioners here in petitions such as CP No.D-5153 to 5156 of 2021, realizing the outstanding income tax refund of the previous years of 2014 to 2016. The assessment officer has passed specific order under Ordinance 2001 adjusting WWF and income tax for the year 2016 to 2019 against unpaid income tax refund.

18. Be that as it may, even without taking into account some of the added factors as above, the applicability of Section 221 to the conclusiveness of adjusted WWF in terms of earlier Circular No.4, so long it is not subjected to Section 122 of 2001 Ordinance, is questioned by the department while issuing impugned notices. The *pari materia* to Section 221 of Ordinance 2001 in the repealed Ordinance 1979 is Section 156 whereas it is Section 35(2) under Income Tax Act 1922. In all these enactments the superior Courts have consistently held that the scope of provisions regarding rectification of a mistake is limited i.e. rectification is only possible in cases where there is a mistake apparent on the face of record such as clerical or calculation error, as these are the mistakes which do not require any devoted efforts to correct.

19. In cases were the contentious issues and interpretations are involved and/or require deliberation, the applicability of Section 221(1) of Ordinance 2001 would be inconsequential and immaterial.

20. In the case of Tri-Pack Films Limited v. CIT, an unreported judgment in ITRA No.14 of 2021, the Bench of this Court observed that:-

> *"Section 221 ITO delineates a mechanism for rectification of mistakes apparent from the record. It has been judicially determined that the mistake ought to be floating on the surface and that which did not require any drawn out process of reasoning and deliberation. It has also been maintained that the scope of section 221 ITO was limited in terms of its verbiage and the provision could not be invoked as an alternative or substitute for an appeal."*

21. In the case of Seimens Pakistan Engineering Co. Ltd.[5] a Division Bench of this Court has observed as under:-

> *"14. It would not be out of place to mention that section 35 of the Income Tax Ordinance, 1922 (repealed), section 156 of the Income Tax Ordinance, 1979 (repealed) and section 154 of Indian Income Tax Act, 1961 are para-materia to section 221 of the Ordinance, 2001. The powers of DCIR under section 221 of the Ordinance, as stated above, are quite limited to the extent of mistakes apparent from record since there are other provisions of law which deal with the authority of department officials with regard to reopening of assessment, revision etc. in cases where the department is of the view that certain income had escaped from the chargeability of tax, but for exercising powers under section 221 of the Ordinance there must be a mistake apparently floating on the surface which is so obvious to strike one's mind without entering into long drawn process of reasonings, detailed deliberation etc.*
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> *15. A perusal of the above decisions will leave no room for doubt that only those mistakes are rectifiable which are apparent from the record and floating on the surface and which do not require any long drawn process of reasonings, deliberation on a moot or debatable point. It is seen that the issue with regard to the taxability on the services rendered by the respondent outside Pakistan has been a contentious issue between the DCIR and the respondent hence, in our view, the same falls outside the scope of mistake apparent from the record. Moreover as seen from the above decisions it was already held in a number of decisions quoted supra that in cases where there could conceivably be two views/opinions the same falls outside the scope and ambit of rectification of mistake. In the instant case also the view of charging tax*

[5] 2017 PTD 903

> *on the impugned receipts as per the view of DCIR was liable to tax whereas as per the views of CIR(A) and ATIR the same is exempt under the relevant provisions of law, meaning thereby that there were two views/opinions and hence the issue was a moot point requiring detailed deliberation, lengthy arguments which could not be considered to be a mistake apparent from the record or a mistake floating on the surface."*

22. Third judgment in this regard is of CIT Company's II v. M/s National Foods[6] which interpreted the same provisions of Income Tax Act, 1922. The relevant part of which is as under:-

> *"Section 35 of the repealed Income-tax Act, 1922 confers a power to rectify any mistake in the order which is apparent from the record. Such power can be exercised suo motu or if it is brought to the notice by an assessee. Therefore, essential condition for exercise of such power is that the mistake should be apparent on the face of record; mistake which may be seen floating on the surface and does not require investigation or further evidence. The mistake should be so obvious that on mere reading the order it may immediately strike on the face of it. Where an officer exercising power under section 35 enters into the controversy, investigates into the matter, reassess the evidence or takes into consideration additional evidence and on that basis interprets the provision of law and forms an opinion different from the order, then it will not amount to "rectification" of the order. Any mistake which is not patent and obvious on the record, cannot be termed to be an order which can be corrected by exercising power under S. 35."*

23. Same principle was then reiterated by a Bench of this Court in the cases of CIR v. ENI Pakistan[7], CIT/WT v. Khalid Adrees Bhatti[8], CIT v. Shadman Cotton Mills[9], CIT v. Abdul Ghani[10], Crescent Jute Products Ltd. v. CIT[11], Islamuddin v. Income Tax Officer[12] and Pakistan River Streamers Ltd. v. CIT[13].

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[6] 1992 PTD 570
[7] 2013 PTD 508
[8] 2009 PTD 2139
[9] 2008 PTD 253
[10] PLD 2007 SC 308
[11] 2006 PTD 2001
[12] 2000 PTD 306
[13] 1971 PTD 204

24. In the present case there is no such mistake disclosed on the face of record rather in some of the cases even judicial orders were passed by the officers concerned for the reassessment/amendment of the deemed assessment whereas this exercise of adjustment was done in terms of Circular No.4 of the Board dated 17.02.2000, which has in fact bridged the cumbersome mechanism of refund in the earlier regime. This however continued under Ordinance 2001 despite section 170 of Income Tax Ordinance, 2001. It cannot under any stretch of imagination be treated as clerical or calculation error or error on the face of record for the reasons that numerous questions would have triggered for consideration while applying Section 221 of Ordinance 2001. While considering the subject issue as a mistake or error on surface, the officer concerned is supposed to answer:

(i) Whether impugned circular has retrospective effect?

(ii) Once the deemed assessment has been made and/or the order under section 170(3) of Ordinance 2001 has been passed, could the original assessment order be amended under section 221(1) of Ordinance 2001 ?

(iii) Whether notwithstanding the provisions of refund under 1979 and 2001 Income tax laws, FBR had permitted consciously the adjustments of refund against WWF claim?

(iv) Can WWF adjustment be reversed without making a refund allegedly due to the taxpayer as it is only against refund claim which came for consideration for the adjustment of WWF ? and perhaps many more questions.

25. Under section 4 of Ordinance 1971, WWF is assessed and paid or recovered under Ordinance 2001 and all provisions relating to the mode and manner of recovery of income tax under Ordinance 2001 apply for the recovery of WWF.

26. Section 2(63) of Income Tax Ordinance, 2001 defines “tax” as a tax imposed under Chapter II and includes penalty, fee or other charges or any sum or amount leviable or payable under the Ordinance 2001.

27. Answers to these questions require interpretation of law after deliberation and application of mind. This exercise cannot be carried out under section 221 of Ordinance 2001. It is an exercise far beyond the pale of simple rectification of mistake.

28. In our view these deemed assessments under section 120 of Ordinance 2001 or the amendments of the assessments for the purposes of subject raised in the impugned notices only (under section 221 of Ordinance 2001) is not open for rectification. Deemed assessment, other than clerical or calculation error on face of record, could be subjected to amendment under section 122 of Ordinance 2001 subject to limitation, if available.

29. The process of refund is governed by Section 170 of Ordinance 2001 which provides a complete mechanism. Section 170(2) provides that an application shall be made in a prescribed form, verified in the prescribed manner and made within three years of the later of:

(i) the date on which the Commissioner has issued the assessment order to the taxpayer for the tax year to which the refund application relates; or
(ii) the date on which the tax was paid.

30. Under subsection (3) of Section 170 where the Commissioner is satisfied that the tax has been overpaid, shall (a) apply the excess in reduction of any other tax due from the tax payer under the Ordinance; (b) apply the balance of the excess, if any, in reduction of any outstanding liability of the tax payer to pay other taxes; and (c) for the remainder, if any, to the tax payer. In terms of subsection 4 the Commissioner is required to decide the application for the refund within 60 days.

> (Underlining is for emphasize since the Hon'ble Supreme Court had not considered WWF as tax.)

31. Further, refund of any excess tax paid could not become due on mere filing of return disclosing such amount of refund or in the alternate on just initiating proceedings under Section 170 of Ordinance 2001.

32. This procedure of adjustment was only facilitated by the Board when Circular 4 was issued on 17.02.2000. Circular 4 only said that since collection of WWF is also responsibility of FBR, therefore, refund of income tax be adjusted against demand of WWF however FBR/ department consciously acted upon it to the benefit of assesse and now we are only inclined to consider the validity of impugned Circular of 25.05.2021 in these proceedings. After the judgment of WWF the bridge of Circular No.4 (as considered by the department) was curtailed in terms of impugned circular which is also issued by FBR purportedly under Section 214 of Ordinance 2001 and it reenergized the mechanism of claiming refund independently and the Commissioner, if satisfied that the tax has been overpaid, may apply the excess in reduction of any other tax due from taxpayer under Ordinance 2001 and/or may apply balance of excess in reduction of any outstanding liability of taxpayer to pay other taxes and/or refund the remainder to taxpayer. Now, since it relates to "tax" only and "under the Ordinance 2001", it has to be seen in the light of judgment of Hon'ble Supreme Court referred above.

33. By issuing the impugned circular, the statutory provision of Section 170 is made available to assessee for refund and we do not see any illegality as it has been done under the provisions of Income Tax Ordinance, 2001 i.e. Section 214 of Ordinance 2001.

34. Section 214 of the Income Tax Ordinance, 2001 provides that income tax authorities and other persons employed in execution of this Ordinance shall observe and follow the orders, instructions and directions issued by the Board. No doubt subsection (2) of Section 214 enables the Commissioner Appeals to have passed order in accordance with law without being interfered or influenced of any Board's circular or order but no one reached to such a situation until impugned circular was issued. As of now any application moved for the refund under

section 170 shall be dealt with in accordance with its requirement and an aggrieved person may approach the appellate authority for the redressal of his grievance arising out of such proceedings. We understand that Section 170 leaves no room for adjustment of WWF (which is not tax) which was bridged by earlier Circular but this is how the law stands today.

35. The impugned Circular has only restored the process of Section 170 of Ordinance 2001 for claiming refund only however actions which have already been taken thereunder are not open for a scrutiny at least under Section 221 of Ordinance 2001. For convenience however we may say that impugned Circular has prospective effect only. The adjustments made and allowed on the basis of Circular 4 cannot be subjected to provisions of Section 221 of Ordinance 2001. Applications made under section 170 of Ordinance 2001 for refund has the limitation of three years in terms of Section 170(2) i.e. deemed assessment or when tax was paid whereas deemed assessment itself could be subjected to amendment within five years of such deemed assessment hence the purpose which cannot be achieved under Section 170 is available under other provisions of Ordinance 2001.

36. We, therefore, conclude as under:-

A) Subject of impugned notices issued under section 221 of Income Tax Ordinance, 2001 claiming WWF prior to the effect of impugned Circular dated 25.05.2021 are illegal and unlawful <u>for the purposes of Section 221 of Ordinance 2001</u>;

B) Impugned Circular dated 25.05.2021 issued by Federal Board of Revenue under Income Tax Ordinance, 2001 is lawful, however, has its prospective effect;

37. All petitions, along with pending applications, stand disposed of in the above terms.

Dated: **Judge**

**Judge**