IN THE HIGH COURT OF SINDH AT KARACHI

I.T.A No.343 of 2000

Present:
Mr. Justice Irfan Saadat Khan
Mr. Justice Zulfiqar Ahmad Khan

Date of hearing	:	10.02.2022.
Appellant	:	M/s. Al-Hashmi Brothers Oil Industries Ltd. through Ms. Lubna Pervez, Advocate.
Respondents	:	Deputy Commissioner of Income Tax and 2 others through Mr. Taseer Khan, Advocate.

J U D G M E N T

JUSTICE IRFAN SAADAT KHAN, J: The instant Income Tax Appeal (ITA) was admitted for regular hearing, vide order dated 02.6.2000, to consider the following questions of law:-

1) *Whether on the facts and in the circumstances of the case the learned Income Tax Appellate Tribunal was right to hold that exemption withdrawn by virtue of Finance Act, 1994, remained unaffected by subsequent amendment brought in by Finance Act, 1995 through insertion of sub section 10 of Section 50 of the I.T. Ordinance 1979?*

2) *Whether on the facts and in the circumstances of the case the learned Income Tax Appellate Tribunal could hold the assessee company was liable for deduction of tax in respect of the payment made to suppliers despite the fact that its capital was below 1.5 million?*

2. Briefly stated the facts of the case are that the Assessee is a Limited Company engaged in the business of manufacturing of

Vanaspati Ghee and Cooking Oils under the name and style of “Hilal Banaspati” and “Pakwan Oil”. The return of income for the assessment year 1995-96 was filed by the appellant by declaring a loss of Rs.57,60,410/-. The Deputy Commissioner Income Tax **(DCIT)** then finalized the assessment on 30.6.1997 by computing the income of the appellant at Rs.16,66,112/-, under Section 62 of the Income Tax Ordinance 1979 **(repealed Ordinance)**. The DCIT then examined the record of the appellant and found out that the appellant has failed to deduct the tax under Section 50(4) of the repealed Ordinance on the local purchases made by it. Thereafter on 07.12.1998 a show cause notice was issued to the appellant for compliance on 12.12.1998. However, when compliance was not made on the relevant date the DCIT, while exercising powers under Sections 52 and 86 of the repealed Ordinance, imposed tax of Rs.2,084,260/- and penalty of Rs.1,042,130/- upon the appellant. Being aggrieved with the said order an appeal was preferred before the Commissioner of Income Tax (Appeals) **[CIT(A)]** who, vide order dated 10.5.1999, allowed the same and cancelled the order passed by the DCIT. Being aggrieved with the said order the department filed appeal before the Income Tax Appellate Tribunal **(the Tribunal)** bearing ITA No.355/KB of 1999-2000. The Tribunal was then pleased to cancel the order of the CIT(A) by maintaining the order of the DCIT. It is against this order of the Tribunal that the present ITA has been filed.

3. Ms. Lubna Pervez Advocate has appeared on behalf of the appellant and stated that the company is not legally obliged to deduct the tax under Section 50(4) of the repealed Ordinance since the paid-

up capital of the company was below Rs.1.5 million and as per SRO 368(1)/94 dated May 7th 1994 only the companies with paid-up capital exceeding Rs.1.5 million are required to deduct tax under the provision of Section 50(4) of the repealed Ordinance. According to her, the appellant was not liable to make deduction of tax on the purchases made by it. She also stated that the department was not justified in treating the appellant as an assessee in default and to proceed against them under Section 52 of the repealed Ordinance and also to impose penalty under section 86 of the repealed Ordinance for not deducting the tax. She invited our attention to subsection 10 of Section 50 of the repealed Ordinance, inserted vide Finance Act, 1995, and stated that this subsection could not be applied retrospectively as in her view the applicability of this subsection would be from the assessment year 1996-97 and not on the year under consideration i.e. Assessment year 1995-96. Hence according to her, the action of the department was illegal and uncalled for and therefore the answer to the questions may be given in affirmative i.e. in favour of the appellant and against the department.

4. Mr. Taseer Khan, Advocate has appeared on behalf of the department and stated that the appellant was legally obliged to make deduction of tax under Section 50(4) of the repealed Ordinance on the purchases made by them. According to him, admittedly tax was not deducted by the appellant thus they were rightly treated as an assessee in default and therefore the initiation of proceedings against the appellant under Section 52/86 of the repealed Ordinance were quite justified. He further stated that Section 50(10) of the repealed

Ordinance was inserted vide Finance Act, 1995, therefore the same would be applied from the assessment year 1995-96 i.e. for the year under consideration and hence the appellant cannot take refuge of the said Section, which fact, according to him, has elaborately been discussed in the order by the Tribunal. He further stated that since default in not making deduction of tax in respect of the purchases made by the appellant was duly established, therefore they were rightly treated as an assessee in default under Section 52 of the repealed Ordinance and imposition of penalty under Section 86 of the Ordinance upon them by the department was also in accordance with law. He lastly stated that in view of the above submissions the answer to the questions may be given in negative i.e. in favour of the department and against the appellant.

5. We have heard both the learned counsel at considerable length and have perused the record.

6. Before proceeding any further we would like to reproduce herein below the relevant provisions of law:-

> *"50(4) Notwithstanding anything contained in this ordinance:-*
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> *(a) Any person responsible for making any payment in full or in part (including a payment by way of an advance) to any person [85][being resident,] (hereinafter referred to respectively as "payer" and "recipient"), on account of the supply of goods or for service rendered to, or the execution of a contract with the Government, or a local authority, or [86][a company], [87][or a registered firm,] or any foreign consultant or consortium shall, [88][….], deduct advance tax, at the time of making such payment, at the rate specified in the First Schedule, and credit for the tax so deducted in any financial year shall, subject to the provisions of section 53, be given in computing the tax payable by the recipient for the assessment year commencing on the*

first day of July next following the said financial year, or in the case of an assessee to whom section 72 or section 81 applies, the assessment year, if any, in which the "said debt" as referred to therein, falls whichever is the later [89][:] [90][ ]

"[(10) Notwithstanding the omission of the first proviso to sub-section (2A), clause (c) of sub-section (4), and the provisos to sub-section (4A), sub-section (5), sub-section (5A), sub-section (6A), sub-section (7B), and substitution of the proviso to sub-section (4), under the Finance Act, 1994, (XII of 1994), and without prejudice to the provisions of section 6 or section 24 of the General Clauses Act, 1897 (X of 1897, all the notifications issued under the aforesaid provisions till the 30th day of June, 1994, shall be deemed to have been validly made and continue to remain in force until specifically repealed or amended;]"

"52. ***Liability of persons failing to deduct or pay tax****: Where any person fails to deduct or collect, or having deducted or collected as the case may be fails to pay the tax as required by or under section 50 he shall, without prejudice to any other liability which he may incur under this ordinance, be deemed to be an assessee in default in respect of such tax".*

7. Perusal of the record reveals that upon examination of the record the appellant was found to have failed to deduct the tax on its purchases, required to be made under the provision of 50(4) of the repealed Ordinance, and thereafter by treating the appellant as an assessee in default the provision of Section 52 was applied and penalty under Section 86 of the repealed Ordinance was also levied. Though the appellant has taken shelter of SRO 368(1)/94, dated 07.05.1994, that since their paid-up capital is less than Rs.1.5 million hence they are not liable for making deduction of the tax at source but we are afraid that the said contention of the learned counsel for the appellant is not correct if the same is viewed in view of the proviso substituted by the Finance Act 1995 read with CBR Circular No.3(7)SS(SHT)/98-99, dated 10.06.1999, clarifying the position of

the proviso added vide Finance Act 1994, which Circular Letter as per Section 8 of the repealed Ordinance was binding upon the tax officials, elucidating that the companies having the paid-up capital of less than Rs.1.5 million are not exempt from making the tax deduction on their purchases. Hence it is evident that the exemption provided vide SRO 368(1)/94, dated 07.05.1994, and the subsequent amendment in Section 50(10) of the repealed Ordinance would not be of any avail to the appellant after the deletion of proviso (c) from Section 50(4) of the repealed Ordinance vide Finance Act 1994 which has categorically defined the list of the payers who are required to deduct tax and the companies irrespective of their paid up capital were under legal obligation to deduct the tax at the time of purchases. It may also be noted that by virtue of withdrawal of the exemption with regard to the paid up capital of a company has rendered the companies to deduct the amount of taxes on their purchases and Section 50(10) of the repealed Ordinance, inserted vide Finance Act 1995, would in our view have no effect on such companies which were liable for making deduction of tax on the purchases made by them in accordance with law.

8. We, under the circumstances, are of the view that the appellant was under the legal obligation to make tax deduction on the purchases made by it and was rightly treated as an assessee in default under the given circumstances. We, therefore, uphold the order of the DCIT as well as that of the Tribunal and answer both the questions referred to us in “Affirmative” i.e. against the appellant /assessee and in favour of

the department. The instant ITA stands disposed of in the above terms.

Let a copy of this judgment be sent to the Registrar of the Tribunal for doing the needful in accordance with law.

JUDGE

JUDGE

Karachi:

Dated: .03.2022.