IN THE HIGH COURT OF SINDH AT KARACHI

(Extraordinary Reference Jurisdiction)

I.T.R.A. No. 362 of 2017

Date	*Order with signature of Judge*

Present:

Mr. Justice Aqeel Ahmed Abbasi
Justice Mrs. Rashida Asad

Fresh Case

For hearing of Main Case.

04.11.2020:

Mr. Muhammad Aqeel Qureshi, advocate for the applicant.

O R D E R

1. Through instant Income Tax Reference Application, the applicant has proposed following question, which according to learned counsel for the applicant, is a question of law, arising from the impugned order dated 14.06.2017 passed by the Appellate Tribunal Inland Revenue (Pakistan) Karachi Bench at Karachi in ITA No.950/KB/2013 [Tax Year 2006], for opinion of this Court:-

> *"Whether under the facts and circumstances of the case the provision for "IBNR" being unascertainable and undetermined liability is an admissible deduction under Rule 5(a) of the Forth Schedule to the Income Tax Ordinance, 2001?"*

2. Learned counsel for the applicant, after having read out the proposed question and the relevant finding of the Appellate Tribunal Inland Revenue in respect of the subject controversy, submits that the Appellate Tribunal was not justified to delete the addition made on account of unascertainable and undetermined liability under Rule 5(a) of the Fourth Schedule to the Income Tax Ordinance, 2001, and has prayed that the impugned order may be

set-aside, and the proposed question may be answered in favour of the applicant and against the respondent.

3. We have heard the learned counsel for the applicant, perused the record and gone through with the impugned order passed by the Appellate Tribunal with his assistance. From perusal of the order passed by the Appellate Tribunal Inland Revenue in respect of the aforesaid controversy, which prima facie does not relate to any substantial question of law, and appears to have been based on peculiar facts of the instant case relating to the admissibility of unascertainable liability in terms of Rule 5(a) of the Fourth Schedule to the Income Tax Ordinance, 2001, the same has been decided, while placing reliance on the judgment dated 09.08.2016 passed by a Divisional Bench of this Court in the case of *New Hampshire Insurance Company, Pakistan Branch, Karachi v. Commissioner of Inland Revenue* in **ITRA No.12/2014**. It will be advantageous to reproduce the relevant finding of the High Court, relating to the subject controversy, which reads as follows:-

> *"13. We are in respectful agreement with the approach taken by the Privy Council in the appeal from Fiji and, in general, in the Australian cases. In our view, the acceptance by the New Zealand Inland Revenue Department that the term 'incurred" is applicable to IBNR claims in light of Privy Council decision in the appeal from New Zealand accords with this approach. In our view the term "incurred" as used in s. 20(1) should therefore be interpreted and applied similarly. We may note that there is nothing in the 2001 Ordinance, and in particular in s. 21, that expressly excludes the deduction of IBNR claims.*
>
> *14. we are, with respect, unable to agree with the submission by learned for the Department that paragraph 6 of Part B of Annexure II of the 2002 Rules is relevant only for reporting purpose and does not constitute part of the financial statements of insurer. Rule 16 clearly relates Annexure II to s. 46, and*

subsection (1)(b) of the latter relates clearly to financial statements. Furthermore, it is clear that paragraph 6 has to be read and applied as an integrated whole. The paragraph first makes clear that liability in respect of "all claims incurred to balance date" (emphasis supplied) is to be recognized and how such liability is to be measured is also indicated. The next clause then specifies the date on which is to be regarded as having been "incurred" Finally, the claims that must be shown as liabilities are categorized. It is to be noted that the last clause of the paragraph is not limited to IBNR claims. It relates also to "unpaid reported claims" and "expected claims settlement costs". These are outgoings which without doubt can be deducted for purposed of determining profits and gains from insurance business. On the submission made by learned counsel for the Department however, paragraph 6 would have to be artificially bifurcated into liabilities deductible and non-deductible which, with respect, is an untenable conclusion.

15. In our view, the fact that the Applicant's accounts are maintained on an accrual basis of accounting also does not stand in the way of IBNR claims being given due recognition. Learned counsel for the Applicant rightly placed reliance on subsection (3) of s. 34, which is also follows:

> "Subject to this Ordinance, an amount shall be payable by a person when all the events that determine liability have occurred and the amount of the liability can be determined with reasonable accuracy."

As the case law cited above makes clear, the fact that no notice has been received by the insurer in respect of an IBNR claim does not stand in the way of such a claim being a deductible for income tax purposes. Clause (2) of paragraph 6 of Part B of Annexure II of the 2002 Rules provides that (subject to the exception therein stated), a "claim shall be considered to be incurred at the time of the incident giving rise to the claim". On such date all the events that determine liability" for the purposes of s. 34(3) in the present context would have occurred. The contrary view suggested for the provision by learned counsel for the

Department, for purposes of the facts and circumstances of the present case, cannot with respect, be accepted.

16. In light of the foregoing discussion and analysis, we are of the view that Question No. 1, when understood and considered in the terms as set out in para 8 herein above, must be answered in favour of the Applicant and against the Respondent Department. The said Question is hereby so answered. In view of this answer and for reasons already stated it is not necessary to consider the remaining Question Nos. 2 to 4, and we do not therefore answer them.

17. The impugned order of the learned Appellate Tribunal stands modified accordingly in terms of the last preceding para. The Officer is directed to send a copy of this judgment under the seal of this Court to the Appellate Tribunal pursuant to s. 133(5).”

4. Learned counsel for the applicant was confronted to assist this Court as to whether the order passed by the Divisional Bench of this Court as referred to hereinabove, has been assailed by the Department before the Hon’ble Supreme Court, and/or the same has been set-aside or modified, in response to such query, learned counsel for the applicant could not provide any assistance and pleaded no instructions. Learned counsel was further confronted to assist as to whether, a decision of a High Court on a legal issue is binding upon the Appellate Tribunal Inland Revenue or not, in response to which, learned counsel for the applicant has candidly stated that the decision of this Court is binding upon all the subordinate Courts and the Tribunals.

5. In view of hereinabove facts and circumstances of the case, we are of the opinion that no substantial question of law arises from the impugned order passed by the Appellate Tribunal Inland Revenue in the instant case, more particularly, when the decision of the Appellate Tribunal Inland Revenue is based on the judgment of High Court, therefore, Appellate Tribunal Inland Revenue was

otherwise bound to follow such decision, unless said judgment is per-incuriam or distinguishable on facts or law. Learned counsel for the applicant has failed to point out any factual error or legal infirmity in the impugned order passed by the Appellate Tribunal in the instant case. Accordingly, instant Reference Application is hereby decided in view of earlier judgment of this Court as referred to hereinabove and the question proposed is answered in "Affirmative" against the applicant and in favour of the respondent.

6. Instant Income Tax Reference Application stands disposed of in the above terms.

JUDGE

JUDGE

A.S.