IN THE HIGH COURT OF SINDH AT KARACHI

(Extraordinary Reference Jurisdiction)

I.T.R.A. No. 274 of 2019

I.T.R.A. No. 275 of 2019

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Date	*Order with signature of Judge*

Present:

Mr. Justice Aqeel Ahmed Abbasi
Justice Mrs. Rashida Asad

Fresh Case

21.10.2020:

Mr. Shahid Ali Qureshi , advocate for applicant(s).

O R D E R

1. The above three Income Tax Reference Applications have been filed against a combined impugned order dated 29.03.2019 passed by the Appellate Tribunal Inland Revenue of Pakistan at Karachi in ITAs No. 383/KB/2015 [Tax Years 2010]; 384/KB/2015 [Tax Years 2011]: & 385/KB/2015 [Tax Years 2012], whereby, following two common questions have been proposed by the applicant(s), whereas, in I.T.R.A. No. 276/2019, another additional question has also been proposed, which according to learned counsel, are questions of law, arising from the impugned order passed by the Appellate Tribunal in the instant case. The proposed questions read as follows:-

> *"a) Whether on the facts and circumstances of the case, learned Appellate Tribunal Inland Revenue was justified to allow deduction on account of liquidated damages, when the claim of liquidated damages represents late delivery charges imposed on the respondent due to violation of agreement executed with its customers and, hence, inadmissible under section 21(g) of the Income Tax Ordinance, 2001?*

b) Whether on the facts and circumstances of the case, learned Appellate Tribunal Inland Revenue was justified to allow deduction of WPPF under section 60B of the Ordinance, when portion of respondent's income comes under the ambit of final tax regime and no deduction or allowance is allowable against FTR income under section 169(2) of the Income Tax Ordinance, 2001?

Additional Question in
I.T.R.A. No. 276/2019

c) Whether on the facts and circumstances of the case, learned Appellate Tribunal Inland Revenue was justified to disallow levy of minimum tax under section 113(I)(c) of the Ordinance, when exemption provided in Clause (131) of Part I of Second Schedule is not applicable to respondent's case since the receipts of the respondent are contractual in nature and no technical knowledge has been imparted outside Pakistan?"

2. After hearing the learned counsel for the applicant(s) at some length and from perusal of the questions proposed and the impugned combined order passed by the Appellate Tribunal in the instant case, it is apparent that proposed questions have been decided by the Appellate Tribunal, while placing reliance on the judgment of the Hon'ble Supreme Court as well as earlier decisions in ITAs No. 245/KB/2010; 246/KB/2010; & 249/KB/2008 on the subject controversy and the questions as proposed hereinabove, whereas, learned counsel for the applicant has not been able to either distinguish the facts of the instant case from the facts of the cases, upon which, reliance has been placed by the Appellate Tribunal, nor could point out any legal infirmity relating to legal issues involved in the instant case. It will be advantageous to reproduce the findings of the Appellate Tribunal in respect of the aforesaid proposed questions, as contained in Para: 12 – 15 of the impugned order, which read as follows:-

"12. So keeping in mind above mentioned perspectives of the parties firstly we will take up issue of disallowance of liquidated damages, in this context learned representative of the department drawn our attention towards judgments passed in ITA No. 291 & 292/KB/2019 dated 1-7-2010 in favour of the department whereas the tax payer agitated that in 2000 PTD 371 and 2006 PTD 2256 the said issue of late delivery charges in violation of contractual obligation is decided by the Hon'ble Superior Courts holding that the late declaring charges in violation of the contractual obligation does not fall within the ambit of Section 21(g) of the Income Tax Ordinance, 2001. Since the Hon'ble Superior Courts already decided the instant issue therefore we respectfully following the same and decided this issue in favour of taxpayer.

13. So far issue of WPPF is concerned, this issue also decided by the Tribunal in ITA No. 249/KB/2008, in the said Judgment, it is hold by the learned Bench that the Workers Profit Participation Fund is admissible being deductible allowance like WWF, WPPF and Zakat under Section 60B of the Income Tax Ordinance, 2001 against income worked out hence does not require proration alongwith other expenses under Section 67 read with Rule 13 of Income Tax Rules, 2002.

14. Since we are exercising co-ordinate jurisdiction therefore we follow the above decision and decide this issue in favour of the taxpayer.

15. So far next issue income from export services is concerned, in this context the taxpayer relied upon ITA No. 245/KB/2010 and ITA No. 246/KB/2010, in the said appeals learned Bench was pleased to hold as under:-

> *'14. We have heard the learned representative of both side and perused the case record as well as case laws cited at bar after perusal of the order of the learned CIR(A), we are inclined to agree with the*

order of the learned CIR(A) for the following reasons:-

1) *The company has been claimed the exemption under Clause 131 of Part-I in Second Schedule.*

2) *The respondent has history of acceptance of claim of exemption for the past including during the audit taxation year 2003 and for the assessment year 2001-2002 & 2003 completed under the repealed Income Tax Ordinance, 1979. Exemption for subsequent years has also been accepted.*

3) *The taxation officer has failed to appreciate the nature of receipts of respondent and claim of exemption under Clause (131) Part-I of Second Schedule without providing any material evidence to substantiate departure from history of acceptance of claim of exemption.*

4) *That it is held in so many cases that assessee's own history is best guideline for determining the assessment, taxpayers enjoys acceptance of exemption and such treatment has been accepted by the department.*

5) *That taxation officer has failed to prove that the claim of the company was not correct on account of technical services rendered to foreign entity.*

6) *If exemption not claimed under Clause (3) of Part-II of Second Schedule the same cannot be imposed on the respondent thus the application of last Clause (3) of Part-II of Second Schedule is devoid of merit and has legal support. It is prerogative of respondent to choose beneficiary exemption under the Second Schedule in view of case law relied upon by the respondent reported as 1964 PTD 554 wherein it has been held that exemption cannot be allowed if not claimed.*

7) *It is undeniable fact that Siemens AG Germany has entered into power generation contract for which technical staff was provided by the*

Siemens Pakistan. Perusal of the copies of contracts shows that the scope of workers was limited to provision of skilled manpower/supervisor/foreman etc. Thus income from such services by Siemens falls under exemption Clause 131.

15. In view of the above the order of the CIT(A) is maintained both the years under appeal and departmental appeals for these two years stand dismissed.'"

3. Learned counsel for the applicant(s) was confronted to assist the Court as to whether the order passed by the various forums upon which reliance has been placed in the impugned order have been assailed on higher forums or the same have been set-aside or modified, however, he could not provide any assistance in this regard, has not been able to assist this Court as to how a different opinion can be taken by this Court in respect of proposed questions. Accordingly, we are of the opinion that once the legal issues are already decided by the Superior Courts or Tribunal, and the parties have not assailed the same before Superior Court in due course, no Reference would be justified on the same questions already stand decided, unless an aggrieved party can demonstrate that the earlier decision of this Court or the Tribunal is either per-incuriam or based on incorrect finding of law, whereas, in the instant case, learned counsel for the applicant has not pointed out any such discrepancy in the finding of the Tribunal. We may observe that every question cannot be raised or referred for opinion to the Court as a matter of routine for its opinion unless there is some substantial legal question, which has not been decided by Superior Courts, has arisen from the order of the Tribunal and prima facie, does not decide the legal issue, while examining the facts, law and the case law, if any, on the subject. Reliance in this

regard can be placed in the case of *Messrs Japan Storage Battery Ltd. v. Commissioner of Income Tax Companies Zone-I, Karachi* [**2003 PTD 2849**].

4. In view of hereinabove factual and legal position, we do not find any substance in the instant Income Tax Reference Applications, which are hereby dismissed in limine alongwith listed applications.

JUDGE

JUDGE

A.S.