IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Shafi Siddiqui, **J**.
Agha Faisal, **J**.

ITRA 32 of 2020	:	The Commissioner Inland Revenue vs. Mahvash and Jahangir Siddiqui Foundation
For the Applicant	:	Mr. Ameer Bukhsh Metlo, Advocate
Date of hearing	:	25.08.2021
Date of announcement	:	25.08.2021

ORDER

Briefly stated, the respondent was selected for audit[1] on 25.02.2013, however, instead of proceeding with the audit to its conclusion[2] the applicant apparently passed an amendment of assessment order under section 122 of the Income Tax Ordinance 2001 ("Ordinance") *inter alia* without satisfying the requirements per section 177(6A)[3] of the Ordinance. The respondent preferred an appeal before the learned Appellate Tribunal Inland Revenue and vide order dated 30.10.2019 ('Impugned Order') the appeal was allowed. The pertinent observations / findings are reproduced herein below:

> 46. In this case, admittedly, no audit report was issued to the taxpayer containing audit observations as already discussed in the body of this order. We feel no hesitation in holding that the amended order itself states that "considering the time constrain for completion of audit proceedings for tax year 2011 being barred by limitation" the amended order under Section 122(1)/(5) was passed in haste without affording reasonable opportunity of being heard to the Appellant. This whole scenario was fabricated in a bid to save the case from becoming time-barred on June 30, 2017 and hence, the Appellant was detained by not providing proper opportunity. We also feel no hesitation to state that in this case the principle of "audi alteram partem- no body to be punished unheard" has not been taken in to consideration. The principle of "audi alteram partem" has been enshrined in various judgments of higher courts to be a principle of universal application regarding affording opportunity of hearing to the parties and it is now an established law that the person should be heard before taking any decision affecting him.
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> (Underline added for emphasis.)
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> "58. On the basis of above discussion, our findings are summarized as under:
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> (i) Audit conducted of the appellant under section 177 read with sub-section (6) is void ab-initio and not in accordance with law having no legal effect.
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> (ii) Amendment under section 122(1)/(5) of the Ordinance, without fulfilling legal requirement of section 177(6) of the ordinance is without jurisdiction or in excess of jurisdiction.

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[1] Per section 214C of the Ordinance.

[2] In terms of section 177 of the Ordinance; as required per section 214C(2) of the Ordinance.

[3] After issuing the audit report, the Commissioner may, if considered necessary, amend the assessment under sub-section (1) or sub-section (4) of section 122, as the case may be, after providing an opportunity of being heard to the taxpayer under sub-section (9) of section 122. (Underline added for emphasis.)

(iii) Amendment proceedings initiated and concluded without issuance of SCN under section 122(9) is ab initio void, illegal and lacs jurisdiction.

(iv) Provisions of section 122 of the Ordinance start with the language "subject to this section". Such language restricts all further proceedings for amendment of an assessment, which means it could only be amended if they were covered by the provisions of this section. Amendment of assessment for which this section has been prescribed cannot be made if the requirements and qualifications prescribed in this section were not completed before making such an amendment.

(v) That once audit proceedings were initiated under section 177 of the Ordinance and amendment was required to be made under section 122(5), assumption of jurisdiction under section 122(5) of the Ordinance was a condition precedent for amendment i.e. "Definite Information" which is missing in this case.

(vi) What to speak of "definite information" clauses (i), (ii) and (iii) of sub section 5 of section 122 of the Ordinance, further stipulate the three conditions for issuing of a notice i.e., any income chargeable to ax has escaped assessment; or total income has been under-assessed, or assessed at too low a rate, or has been the subject of excessive relief or refund; or any amount under a head of income has been misclassified. The OIR has failed to fulfill pre-requisite requirement under section 122(5) of the Ordinance and has not brought on record any instance of "definite information".

2. The applicant has proposed various questions of law which we, respectfully, consider extraneous and dissonant to the Impugned Order. The only question that arose from the Impugned Order was "*Whether in the present facts and circumstances the amendment under section 122 of the Ordinance, without fulfilling the prerequisites of section 177(6A) of the Ordinance, was justified*."

4. The verbiage of the aforementioned provisions makes it apparent that statutory scheme of audit cannot be short circuited by ignoring the mandate of the law. It is a statutory requirement that an audit report is required to be issued and thereafter the taxpayer is to be afforded an opportunity of a hearing. The learned tribunal, being the final arbiter of questions of fact in the statutory hierarchy[4], has detailed that the statutory requirements were not fulfilled and also highlights that the order under appeal itself stipulated that it has been passed primarily actuated by time constraints, in order to prevent the matter from becoming barred by limitation.[5] It is further held, based upon evaluation of the record, that entire endeavor of the department was feigned to prevent the matter from becoming time-barred.

We had confronted the learned counsel for the applicant as to whether the requirements *inter alia* of section 177(6A) of the Ordinance were satisfied, and he unequivocally answered in the negative.

5. There appears to be no reason for the applicant to have ignored the statutory requirements and proceeded against the respondent based on its own conjectures. Nothing has been placed before us to justify the reason for the law not having been followed in its letter. It is trite law that there is no intendment about tax and that nothing may be read in or assumed in respect thereof.[6] *Rowlatt J.* maintained in *Cape Brandy* that in a taxing act

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[4] Per *Munib Akhtar J* in *Collector of Customs vs. Mazhar ul Islam* reported as *2011 PTD 2577*.

[5] Paragraph 46 of the Impugned Order.

[6] *Cape Brandy Syndicate vs. Inland Revenue Commissioners reported as [1992] 1 KB 64 ("Cape Brandy"); Commissioner of Agricultural Income Tax vs. B.M.W Abdur Rehman reported as 1973 SCMR 445 ("BMW"); Government of Pakistan vs. Hashwani Hotels Limited reported as PLD 1990 SC 68; Government of West Pakistan vs. Jabees Limited*

one has to merely look at what is clearly said and that there can be no equity or presumption in such regard. It was held that only the verbiage of the act may be considered and nothing merited being read or implied therein.

Cornelius J. observed in *BMW*, while citing *Cape Brandy* with approval, that in a fiscal case, form is of primary importance, the principle being that if the person sought to be taxed comes within the letter of the law, he must be taxed, however great a hardship may thereby be involved but on the other hand if the Crown cannot bring the subject within the letter of the law he is free, however apparent it may be that his case is within what might be called the spirit of the Law. The same ratio has been approved by the august Supreme Court time and time again including by an honorable five member bench in *Zila Council Jehlum*.

6. The statutory pre requisites of the audit report and a reasonable opportunity of hearing are crystal clear and suffer from no ambiguity. Notwithstanding the foregoing, even if there was any doubt, the same had to be resolved in favour of the taxpayer.[7] A Division Bench of this Court observed as much in *Citibank*[8], and in *PTV* (per *Mian Saqib Nisar J.*), the august Supreme Court settled principles in such regard and enunciated *inter alia* that there is no intendment or equity about tax and the provisions of a taxing statute must be applied as they stand; the provision creating a tax liability must be interpreted strictly in favor of the taxpayer and against the revenue authorities; any doubts arising from the interpretation of a fiscal provision must be resolved in favor of the taxpayer; and if two reasonable interpretations are possible, the one favoring the taxpayer must be adopted.

7. In the present case the respondent had been selected for audit and the department had every right to conduct such an exercise, within the remit of the law. The record demonstrates that no audit report was issued to the tax payer containing audit observations and that no reasonable opportunity of a hearing was provided. *Admittedly*, this was done "*considering the time constrain (sic) for completion of audit proceedings for tax year 2011 being barred by limitation*"[9]. Such conduct has rightly been deprecated by the learned tribunal and we find ourselves in concurrence therewith.

8. We are constrained to observe that the conduct of the department, subjecting a tax payer to arbitrary adversarial orders, merely to circumvent the constraints of limitation cannot be appreciated. It is imperative that the department ensure that such practices are denounced and serious action is taken against officers found culpable in such regard.

We are also conscious of our present jurisdiction, being that of a reference, hence, it is considered prudent to eschew any exercise of writ and / or supervisory jurisdiction in the present case. However, it is expected that the department may take appropriate holistic action forthwith

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reported as PLD 1991 SC 870; A&B Food Industries Limited vs. CIT reported as 1992 SCMR 663; Mehran Associates Limited vs. CIT reported as 1993 SCMR 274; Star Textile Limited vs. Government of Sindh reported as 2002 SCMR 356; Zila Council Jehlum vs. PTC reported as PLD 2016 SC 398 ("Zila Council Jehlum"); CIR vs. IGI Insurance Company reported as 2018 PTD 114.

[7] *B.P.Biscuit Factory vs. WTO reported as 1996 SCMR 1470; Chairman FBR vs. Al-Technique Corporation repowered as PLD 2017 SC 99; PTV vs. CIR reported as 2017 SCMR 1136 ("PTV").*

[8] Per *Munib Akhtar J* in *Citibank NA vs. Commissioner Inland Revenue* reported as *2014 PTD 284*; cited with approval by the honorable Supreme Court in *PTV*.

[9] Paragraph 46 of the Impugned Order.

in such regard; so as to not necessitate the intervention of this Court pursuant hereto.

9. In view of the foregoing, we are of the considered view that question framed for determination supra be answered in negative, in favour of the respondent and against the applicant. Therefore, this reference application is hereby dismissed *in limine*.

10. A copy of this decision may be sent under the seal of this Court and the signature of the Registrar to the learned Appellate Tribunal Inland Revenue, as required per section 133(5) of the Income Tax Ordinance 2001.

JUDGE

JUDGE

Khuhro/PA