ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

Income Tax Reference Application 14 of 2021

DATE ORDER WITH SIGNATURE OF JUDGE

20.09.2021.

Mr. Ijaz Ahmed Zahid, Advocate for the Applicant.

The applicant has impugned the order dated 29.10.2020 rendered by the learned Appellate Tribunal Inland Revenue ("Impugned Order"), the operative constituent whereof is reproduced herein below:

> *"We have considered the arguments of both the sides and have also perused the available record. The learned CIR (A) while deciding the appeal has observed as under:-*
>
> > *"I have considered the issue now raised in the perspective of the earlier proceedings and the orders by my predecessors. The issue in appeal before me is the action of the Officer in rejecting the application for rectification when the action taken in the order sought to be rectified i.e. the appeal effect order dated June 21, 2011 after the addition of Rs.60,282,000 on account of trial production sales in my view clearly creates a contradictory position as:*
> >
> > *(i) In the order dated February 18, 2010 expenses were disallowed on the basis that the costs of trial production have been incorrectly charged in the profit and loss account and not capitalized against the related trial production revenue.*
> >
> > *(ii) This addition has been maintained in the appeal effect order and further the Officer considers the Trial production sales are wrongly capitalized and to be taxable'.*
> >
> > *In my view since the Officer himself considers the sales to be taxable then for obvious reason no separate addition of the Trial production expenses of Rs.71,152,000/- is warranted under the circumstances as it is resultant of an addition of Rs.131,434,000 being that in respect of expenses of Rs.71,152,000 and then addition of Rs.60,282,000. The A.R. has also agitated that the amount of the sales is Rs.46,391,000 and not Rs.60,282,000 as Rs.13,892,000 is the Closing stock of the trial production which have also been reported in the earlier orders as pointed out by the A.R.*
> >
> > *Within the limited scope of rectification under section 221 of the Ordinance it is in my view that the only matter to be considered is the action whereby in the first order dated February 18, 2010, the trial production expenses of Rs.71,152,000 were "disallowed" by stating that these have not been "capitalized", whereas in the appeal effect order sought to be rectified, the 'Trial production sales' have been considered to be taxable as 'revenue receipts'. Once receipts are taxable, the Officer is required to allow the related expenses and hence rectification on this error as well as error in amounts is apparent which squarely falls within the ambit of section 221 of the Ordinance. Therefore, OIR is directed to rectify the impugned order accordingly."*
> >
> > *The last ground on which rectification was sought pertains "profit on bank deposits" amounting to Rs.177,000 which has been taxed twice i.e. once as part of taxable income offered for tax in the return of income and secondly as part of aggregate other income of Rs.7,661,000 separately*

added back in the computation of taxable income and eventually in the order under section 221. Accordingly, the officer is directed to delete the said addition which tantamount to double taxation after necessary verification.

A bare reading of above observation of the learned CIR(A) transpires that the learned CIR(A) has directed to rectify the order on the agitated issues under section 221 of the Ordinance. The core issue is that whether the OIR was justified to reject the request of application filed by the taxpayer. On this score we have minutely examined the purview of section 221 of the Ordinance, and we do feel that this section deals with rectification of mistakes which are apparent from record. Adjudication, audit, assessment or reconsideration of the already held view does not fall in the scope of this section. Therefore, we endorse the view of the OIR and reject the stance taken by the learned CIR(A)…."

(Underline added for emphasis)

2. The underlying facts pertinent hereto are chronologized herein below:

(i) The applicant was served with a notice for amendment of assessment under section 122(9) of the Income Tax Ordinance 2001 ("ITO"), for the tax year 2005, dated 15.01.2010.

(ii) Post consideration of the submissions of the applicant, the show cause notice culminated in an order dated 18.02.2010.

(iii) Aggrieved by the aforesaid, the applicant preferred an appeal and vide order dated 06.05.2011 the Commissioner Inland Revenue remanded the case back to the Officer Inland Revenue for *de novo* determination.

(iv) In pursuance of the foregoing, and after a deliberation afresh, an order dated 21.06.2011 was rendered by the Officer Inland Revenue.

(v) Aggrieved once again, the applicant preferred an appeal there against on 17.08.2011, which was dismissed on account of being barred by time, vide order dated 24.10.2013.

(vi) The applicant preferred an appeal against the aforementioned order before the Appellate Tribunal Inland Revenue, however, the said appeal was withdrawn by the applicant, as manifest by the order dated 05.04.2016.

(vii) During pendency of the appeal before Commissioner Appeals, the applicant preferred a rectification application, in respect of the identical grievance, vide application dated 08.02.2012.

(viii) The competent authority was pleased to reject the aforementioned application vide order dated 06.05.2014 and the pertinent findings are reproduced herein below.

"*It is pertinent to mention here that besides filing of rectification application, the taxpayer had also preferred appeal before the Commissioner Inland Revenue (Appeals-III), Karachi, on the issue mentioned at serial # 1 above. The learned CIR (Appeals-III), vide his appellate order # 13/2013, dated 24.10.2013, has, however, found the appeal 'not maintainable' being barred by time. Moreover, the rectification on this issue needs reconsideration of facts hence this is not a mistake apparent from the record which can be rectified. In these circumstances, the rectification application is rejected accordingly on this issue….*

(Underline added for emphasis)

(ix) In appeal, the Commissioner Inland Revenue was pleased to set aside the aforementioned order and held as follows:

> *"I have considered the issue now raised in the perspective of the earlier proceedings and the orders by my predecessors. The issue in appeal before me is the action of the Officer in rejecting the application for rectification when the action taken in the order sought to be rectified i.e. the appeal effect order dated June 21, 2011 after the addition of Rs.60,282,000 on account of trial production sales in my view clearly creates a contradictory position as:*
>
> *(i) In the order dated February 18, 2010 expenses were disallowed on the basis that the costs of trial production have been incorrectly charged in the profit and loss account and not capitalized against the related trial production revenue.*
>
> *(ii) This addition has been maintained in the appeal effect order and further the Officer considers the Trial production sales are wrongly capitalized and to be taxable'.*
>
> *In my view since the Officer himself considers the sales to be taxable then for obvious reason no separate addition of the Trial production expenses of Rs.71,152,000/- is warranted under the circumstances as it is resultant of an addition of Rs.131,434,000 being that in respect of expenses of Rs.71,152,000 and then addition of Rs.60,282,000. The A.R. has also agitated that the amount of the sales is Rs.46,391,000 and not Rs.60,282,000 as Rs.13,892,000 is the Closing stock of the trial production which have also been reported in the earlier orders as pointed out by the A.R.*
>
> *Within the limited scope of rectification under section 221 of the Ordinance it is in my view that the only matter to be considered is the action whereby in the first order dated February 18, 2010, the trial production expenses of Rs.71,152,000 were "disallowed" by stating that these have not been "capitalized", whereas in the appeal effect order sought to be rectified, the 'Trial production sales' have been considered to be taxable as 'revenue receipts'. Once receipts are taxable, the Officer is required to allow the related expenses and hence rectification on this error as well as error in amounts is apparent which squarely falls within the ambit of section 221 of the Ordinance. Therefore, OIR is directed to rectify the impugned order accordingly."*

(x) The department preferred an appeal and the said appeal was allowed vide the Impugned Order, hence, this reference application.

3. It is *prima facie* apparent from the narrative supra that the applicant was aggrieved of the order dated 21.06.2011, whereby its assessment was amended[1]. The order was appealed belatedly before the Commissioner Appeals, therefore, the appeal was dismissed as being time barred. The appeal there against before the Tribunal was voluntarily withdrawn by the applicant.

The original amendment of assessment order, dated 18.02.2010, was also appealed and the record demonstrates that no rectification application was preferred at any time in such regard.

It is manifest from the record that a rectification application was preferred on 08.02.2012, almost six months post institution of the admittedly time barred appeal on 17.08.2011.

4. Learned counsel admitted that the order/s amending the assessment were duly appealable, hence, the institution of the above cited appeals. However, remained unable to address our query as to why recourse to section 221 ITO was adopted and that also only post institution of the time barred appeal.

---

[1] In proceedings pursuant to the remand vide order dated 06.05.2011.

5. 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.[2] 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.[3] It is considered appropriate to denote that *Siemens* and *ENI* are Division Bench judgments of this Court and the ratio whereof is binding upon us.

6. The facts and circumstances of *Siemens* are *pari materia* hereto, since the department's invocation of section 221 ITO to amend an assessment, disallowing an exemption, was deprecated by the Court. It would thus follow that applicant's application for rectification, albeit belated, in respect of an appealable assessment order, in respect whereof an appeal was in fact preferred, would also fall contrary to the law enunciated by this Court in Siemens.

7. Learned counsel was unable to demonstrate any *mistake* apparent from the surface of the order dated 21.06.2011, which had admittedly deliberated upon the evidence and record placed there before and concluded that the applicant was not entitled to the benefit claimed. While deciding the applicant's application, per section 221 ITO, the Officer Inland Revenue expressly stated that the issues sought to be agitated required reconsideration of the facts, hence, not amenable to rectification *simpliciter*. The learned Tribunal maintained that adjudication, audit, assessment or reconsideration of the already held view does not fall within the ambit of section 221 ITO, therefore, endorsed the aforementioned findings. It is pertinent to denote that applicant's counsel has remained unable to identify any infirmity with the interpretation and / or application of section 221 ITO undertaken by the learned Tribunal.

8. In summation, it is observed that the applicant was aggrieved by amendment of its assessment vide an order, demonstrating deliberation in detail and application of mind. While such an order was inherently appealable, no case has been made out before us to consider the said order amenable to rectification[4] and that too post institution of an admittedly time barred appeal. It would suffice to reiterate that the ratio of *ENI*, wherein it was maintained that section 221 ITO could not be invoked as an alternative or substitute for an appeal, is squarely applicable herein.

9. Various questions had been proposed on behalf of the applicant, *prima facie* being argumentative / raising factual controversies[5], however, the learned counsel sought time and filed new proposed questions of law via a statement today. We are, respectfully, constrained to observe that the reformulated questions are also extraneous and dissonant to the Impugned Order. The learned Tribunal had ring-fenced its determination to consider whether the issues agitated could be *rectified* on the touchstone of section 221 ITO and confined its pertinent findings in such regard. Therefore, the only question for determination before us, arising out of the Impugned Order, would be "*Whether in the facts and circumstances of the case the appealable order under consideration could be rectified per section 221 ITO*". Therefore, respectfully, we hereby reformulate[6] the question to be answered herein, in terms of the verbiage supra.

---

[2] Division Bench SHC judgment in *CIR vs. Siemens Pakistan* reported as *2017 PTD 903* ("*Siemens*").
[3] Division Bench SHC judgment in *CIR vs. ENI Pakistan* reported as *2013 PTD 508* ("*ENI*").
[4] Division Bench judgment in *CIR vs. Rashid And Saqib Trading Company* reported as *2020 PTD 782.*
[5] Per *Munib Akhtar J* in *Collector of Customs vs. Mazhar ul Islam* reported as *2011 PTD 2577* – Findings of fact cannot be challenged in reference jurisdiction.
[6] *A. P. Moller Maersk & Others vs. Commissioner Inland Revenue & Others* reported as *2020 PTD 1614*; *Commissioner (Legal) Inland Revenue vs. E.N.I. Pakistan (M) Limited,*

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

11. 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.

J U D G E

J U D G E

Amjad/PA

Karachi reported as *2011 PTD 476*; *Commissioner Inland Revenue, Zone-II, Karachi vs. Kassim Textile Mills (Private) Limited, Karachi* reported as *2013 PTD 1420*.