

# **IN THE HIGH COURT OF SINDH AT KARACHI**

(Extraordinary Reference Jurisdiction)

**I.T.R.A. No.677 of 2010**

Date	Order with signature of Judge
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**Present:**

**Mr. Justice Aqeel Ahmed Abbasi  
Justice Mrs. Rashida Asad**

**Fresh Case**

*For hearing of Main Case.*

**12.02.2021:**

Mr. Imran Ali Mithani, advocate for the applicant.

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## **ORDER**

Learned counsel for the applicant has referred to re-formulated question filed through statement dated 19.12.2019 and submits that it is a question of law arising from the impugned order dated 22.04.2010 passed under Section 162 by the Appellate Tribunal Inland Revenue (Pakistan) Karachi in ITA No.119/KB/2010 [Tax Year 2009] and require an opinion of this Court. Proposed question read as follows:-

*“Whether in the facts and circumstances of the case, the learned ATIR was justified to hold that the recovery under Section 162 from recipients could be enforced where a payer has acted upon a Certificate of Exemption issued by CIR under Section 159 (2) of the ITO 2001?”*

2. After having read out the proposed question and the impugned order passed by the Appellate Tribunal Inland Revenue, as well as the order of the Authorities below, learned counsel for the applicant submits that the Appellate Tribunal was not justified to allow the appeal filed by the respondent and to delete the demand created pursuant to order passed under Section 162 of the Income

Tax Ordinance, 2001, as according to learned counsel, the respondent failed to withhold tax under Section 161 of the Income Tax Ordinance, 2001, in view of exemption certificate, which according to learned counsel, was issued due to inadvertence by the concerned Commissioner. It has been prayed that impugned order may be set-aside and the question proposed through instant reference application may be answered in negative in favour of the applicant.

3. We have heard the learned counsel for the applicant, perused the record and the impugned order passed by the Appellate Tribunal Inland Revenue, with his assistance and have also examined the relevant provisions of law. It will be advantageous to reproduce the relevant para 11 & 12 of the impugned order passed by the Appellate Tribunal, which reads as follows:-

*11. Having gone through the above provisions of section 161 and 162 of the Income Tax Ordinance, 2001 we are of the view that various provisions of the Income Tax Ordinance, 2001 have laid down well defined 'mechanism' as regards advance tax collection by way of placing responsibilities on prescribed persons to withhold tax at source, taxability of income by way of requirement to file return of income. Law has also laid down/provided basis for withholding agents not to withhold tax at source in the circumstances under which non-deduction of tax can take place i.e. on the basis of issuance of exemption certificate. All prescribed persons are liable to withhold tax at source while making payments to recipients unless tax exemption certificate is issued by the Commissioner in which case the law provides u/s 159(2) that such payers will not withhold tax and it is well within the boundaries of stipulated law. Having considered the law, in this case it is undisputed fact that the tax exemption certificate was issued by the CIR enforcement division u/s 151(b), 153 and 155. It is therefore clear to us that at the relevant times when the payments were made by the respective payers to the Trust, they were not in failure to withhold tax at source due*

*to the reason that exemption certificate was available and by placing reliance thereon the payers did not withhold tax. Therefore as far as such payments are concerned no failure exist for non-deduction of tax.*

*12. We also find weight in the arguments of the learned AR that the remedy available with the department was to seek return of income and proceed to tax Trust's income if facts warranted. We were however informed by the AR during the course of hearing that necessary cognizance has already been taken by the department. We are further of the view that it is no fault of the payers to the effect whether the Commissioner issued the exemption certificate on proper basis or not. We therefore are inclined to accept the contention of learned AR and do not endorse the order passed u/s 162 of the Income Tax Ordinance, 2001 upto 18.06.2009.*

4. From perusal of the order passed by the Appellate Tribunal, it has been observed that demand created under Section 162 for non-deduction/withholding of tax under Section 161 of the Income Tax Ordinance, 2001, has been set-aside for the reason that respective payers were not under legal obligation to withhold the amount of tax in view of exemption certificate issued in favour of respondent (KPT) by the concerned Commissioner under Section 159 of the Income Tax Ordinance, 2001. It appears that at later stage while invoking the provisions of Section 162 of the Income Tax Ordinance, 2001, the applicant department took an instance with regard to validity of the exemption certificate issued by the concerned Commissioner in the instant case. We are of the view that a taxpayer cannot be held responsible for any illegal act or omission of the tax authorities, whereas, it has come on record that at the relevant point of time when alleged default in the withholding tax was made, there was an exemption certificate issued by the competent authority in favour of respondent (KPT). While confronted with above factual and legal position as emerged in the instant case, learned counsel for the

applicant could not point out any error or illegality in the impugned order passed by the Appellate Tribunal.

5. In view of hereinabove fact and circumstances of the case and the finding as recorded by the Appellate Tribunal Inland Revenue, which prima facie, does not suffer from any factual error and legal infirmity, we do not find any substance in the instant reference application, which is accordingly dismissed in limine. Consequently, the proposed question is answered in "AFFIRMATIVE" against the applicant and in favour of the respondent.

***JUDGE***

***JUDGE***

Nadeem.