ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

Income Tax Reference Application (ITRA) No.39 of 2010

Date	Order with signature of Judge(s)

1. For hearing of main case.

22.02.2023

Barrister Syed Ahsan Ali Shah, advocate for the Applicant.
Mr. Muhammad Faheem Bhayo, advocate for the respondent.

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Through this Reference Application the Applicant department has impugned order dated 28.10.2009, passed in Income Tax Appeal No.475/KB/2009 (Tax Year 2003), by then Income Tax Appellate Tribunal Karachi, proposing the following questions of law:

1. "Whether under the facts and circumstances of the case the learned ITAT was justified in vacating the order framed under section 221 of Income Tax Ordinance, 2001?

2. Whether under the facts and circumstances of the case the learned ITAT was justified in holding that the rectification was made on misinterpretation of legal provisions of the case?

3. Whether under the facts and circumstances of the case the learned ITAT was justified to allow credit u/s 107 AA of the Income Tax Ordinance, 1979 for the tax year 2003 despite clear stipulations to the contrary contained in section 239(15) read with section 74 of the Income Tax Ordinance, 2001?"

2. Learned counsel for the Applicant has read out the impugned order and submits that the Tribunal has erred in law by holding that the action taken by the taxation officer under Section 221 of the Income Tax Ordinance, 2001, was not justified as it is the case of the Applicant that the matter was fully covered under the said provision. As to merits of the case he submits that the Respondent was not entitled to claim tax credit in tax year 2003, as the same pertained to the earlier years; hence, the Tribunal has erred in allowing the appeal of respondent, and therefore, the proposed questions be answered in favour of the Applicant.

3. On the other hand, learned counsel for the Respondent supports the impugned order of the Appellate Tribunal and submits that no illegality has been committed by the respondent in availing the tax credit, as it was the lawful right of the Respondent; hence, the Reference Application is liable to be dismissed.

4. We have heard both the learned counsel and perused the record. It appears that the Respondent filed its tax return for tax-year 2003 claiming tax credit of Rs.415,159/- in terms of section 107AA of the Income Tax Ordinance, 1979 ("**Repealed Ordinance**"), and after necessary credit and adjustments was issued a deemed assessment order in terms of section 120 of the Income Tax Ordinance, 2001 ("**2001 Ordinance**"). Subsequently a notice under section 221 of the 2001 Ordinance was issued on the ground that tax credit was wrongly allowed for tax year 2003 as the whole of tax credit ought to have been absorbed in assessment year 2002-2003. Reply was filed and matter was contested on merits as well as on the ground that this was not a case wherein a notice could be issued for rectification under Section 221 of the 2001 Ordinance. The reply was not accepted; an order was passed under section 221 ibid against which 1st appeal before the Commissioner also failed. The Respondent being aggrieved; preferred Appeal before the Tribunal and vide impugned order the said Appeal stands allowed. It would be advantageous to refer to relevant findings of the Appellate Tribunal which reads as under.

> "7. After going through the arguments of both parties and facts of the case we are of the considered opinion that the appellant was justified in adjusting balance tax credit against the income of tax year 2003 which could not be absorbed against tax year 2002-2003. This is also intent of section 239(15) of the Income Tax Ordinance, 2001. The language of sub-section (15) of Section 239 stipulates that 'Section 107AA of the repealed Ordinance shall continue to apply until 30th day of June 2002'. Meaning thereby that the taxpayer has been allowed even to invest in purchase of plant and machinery on which credit u/s 107AA of the repealed Ordinance was allowable. Obviously the advantage or facility allowed upto 30.06.2002 cannot be withdrawn retrospectively with the change of law which obviously is not the intent of legislature."

6. We would first like to deal with Question No.3, regarding entitlement of the Respondent to claim tax credit as above, it has been held by the Appellate Tribunal that in view of Section 239(15) of the Income Tax Ordinance, 2001 and the language implied therein, the Respondent was fully justified in adjusting the available balance tax credit against income of tax year 2003 as a right had accrued to the respondent up to 30.06.2002. The learned Tribunal further held that the taxpayer has been allowed to invest in purchase of plant and machinery on which tax

credit under Section 107AA of the Repealed Ordinance, was permissible, whereas, the advantage of such facility allowed up to 30.06.2002, cannot be withdrawn retrospectively. It may be of relevance to observe that though 2001 Ordinance was promulgated earlier in time; however, it was made effective from 01.07.2002, and a basic difference in terms of assessment year and tax year was introduced under the taxation system of the County. Under the Repealed Ordinance, as assessment year was defined in Section 2(8)[1] ibid and *means the period of twelve months beginning on the first day of July next following the income year*. Simply put, assessment year 2002-2003 (relevant for this case) meant that it pertains to income for the period from 01.07.2001 to 30.06.2002. Whereas, under the 2001 Ordinance, instead of an assessment year, concept of tax-year was introduced and as per Section 74[2] of the 2001 Ordinance, *the tax year shall be a period of twelve months ending on the 30th day of June ('normal tax year') and shall, subject to sub-section (3), be denoted by the calendar year in which the said date falls.* For the present purposes the tax-year involved is 2003 and covers the period of income starting from 01.07.2002 to 30.06.2003. From the admitted facts on record it appears that otherwise the Respondent was entitled to claim tax credit in terms of Section 107AA of the Repealed Ordinance, and for assessment year 2002-2003 was even allowed the same, whereas, the issue before us is the treatment to balance of such tax credit from that assessment year. The forums below (taxation officer & Commissioner Appeals) held that since the provision of section 239(15) of the 2001 Ordinance, provided that section 107AA of the repealed Ordinance shall continue to apply until the 30th day of June, 2002, hence, the tax credit was inadmissible. However, we are not in agreement with such finding inasmuch as the forums below, including the learned Tribunal, have not dilated upon the provision of Section 107AA (3)[3] of the

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[1] (8) "assessment year" means the period of twelve months beginning on the first day of July next following the income year and includes any such period which is deemed, under any provision of this Ordinance, to be the assessment year in respect of any income or any income year;

[2] [**74**. **Tax year.—**(1) For the purpose of this Ordinance and subject to this section, the tax year shall be a period of twelve months ending on the 30th day of June (hereinafter referred to as 'normal tax year') and shall, subject to sub-section (3), be denoted by the calendar year in which the said date falls.

[3] (3) Where no tax is payable by the assessee in respect of the assessment year relevant to the income year in which such plant or machinery is installed, or where the tax payable is less than the amount of the credit, the amount of the credit, or so much of it, as is in excess thereof, as the case may be, shall be carried forward and deducted from the tax

Repealed Ordinance, which fully protected this tax credit. It further appears that this was question was though raised by the Respondents before the CIT(A); however, no finding was given. Section 107AA (3) provides that where no tax is payable by the assessee in respect of the assessment year relevant to the income year in which such plant or machinery is installed, or where the tax payable is less than the amount of the credit, the amount of the credit, or so much of it, as is in excess thereof, as the case may be, *shall be carried forward and deducted from the tax payable by the assessee in respect of the immediately following assessment year only*. Now in the instant matter, when return for income of tax-year 2003 (for the period starting from 01.07.2002 to 30.6.2003) was filed, the 2001 Ordinance had come into effect and the Respondent took adjustment of the available tax credit in computing its tax liability for tax-year 2003. We may reiterate that insofar as the availability of such tax credit amount is concerned, there appears to be no dispute. In our considered view, mere repeal of the 1979 Ordinance and applicability of the 2001 Ordinance, would not *ipso-facto* be a ground to deny the tax-credit, which otherwise was available to the Respondent, as a matter of right. If the 2001 Ordinance, had not been made effective from 01.07.2002, then such tax-credit available from assessment year 2002-2003 was very much validly and lawfully available for the assessment year 2003-2004, to be deducted from the payable tax being in the following assessment year. The argument that since section 239(15) of the 2001 Ordinance, provided that section 107AA of the repealed Ordinance shall continue to apply until the 30th day of June, 2002; hence, the tax-credit available from pervious assessment year cannot be adjusted on or after 30.6.2002 is misconceived and not in conformity with spirit of the said provision. Per settled law, tax credit is an entitlement linked with making of an investment, and a tax-payer becomes entitled to it as soon as an investment as provided in section 107AA of the Repealed Ordinance (or for that matter under Section 107 and 107A) is made, whereas, its adjustment and deduction in computation of the tax payable is a matter of assessment

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payable by the 25 assessee in respect of the immediately following assessment year only.

proceedings. Thus, it is obvious without any ambiguity that the right to claim tax credit comes into existence with the making of investment in the purchase of plant and machinery and the actual deduction from the tax payable is a matter of implementation only[4]. On that score as well, the Respondent was fully entitled to adjust the available tax-credit from the assessment year 2002-2003 (being available under the Repealed Ordinance) in its return for tax-year 2003 (filed and finalized under the 2001 Ordinance). In view of the above proposed question No.3 is answered against the Applicant and in favour of the Respondent. As a consequence, thereof, we need not answer Questions No.1 & 2. Accordingly, this Reference Application stands dismissed.

Office is instructed to send a copy of this order in terms of Section 133(5) of the Income Tax Ordinance, 2001, to the Tribunal.

JUDGE

JUDGE

Khuhro/PA

[4] Gulshan Spinning Mills Ltd v Government of Pakistan (2005 PTD 259)