ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

Income Tax Reference Application ("ITRA)" No. 616 / 2009

Date	Order with signature of Judge

FRESH CASE

1) For orders on CMA No. 684/2009.
2) For hearing of main case.

02.03.2023.

Mr. Faheem Ali Memon, Advocate for Applicant.
Mr. Qazi Umair Ali, Advocate for Respondent.

Through this Reference Application the Applicant department has impugned order dated 15.09.2009, passed in Income Tax Appeal No. 1142/KB/2007 (Tax Year 2005), 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 deleting the addition made u/s 21(k) without discussing the merits of addition merely for the reason that the Taxation Officer had not followed the computation of excess perquisites as provided u/s 21(k)"?
>
> 2. Whether under the facts and circumstances of the case clause (k) of section 21 places any specific bar against the addition to be made on collective basis for all employees"?"?

Learned Counsel for the Applicant has read out the relevant portion of the order in question and submits that insofar as Section 21(k) of the Income Tax Ordinance 2001 is concerned, it does not require that the exercise has to be carried out by the Taxation Officer in respect of each individual employee in computation of the excess perquisites, whereas, in this matter the Taxation Officer has proceeded on the basis of audited accounts of the Respondent; hence, the Tribunal has erred in law by deleting the addition made by the Taxation Officer.

On the other hand, Respondents Counsel submits that firstly, Section 21(k) of the Ordinance requires such computation in respect of each employee, whereas, this question was answered by this Court in ITRAs No.

306 & 307 of 2010 vide order dated 15.03.2011 which was assailed before the Hon'ble Supreme Court by the department and the order of this Court has been maintained by refusing Leave to Appeal.

We have heard the learned Counsel and perused the record. It would be advantageous to refer to the findings of the learned Appellate Tribunal for the present purposes which reads as under:-

> "14. As regards the addition of Rs. 10.84 378/- on account of notional interest on interest free loans to employees. We see a lot of force in the submission of the learned AR of the appellant specifically if any addition on this account was required the same should have been worked out exactly according to the provision of section 21(k) which requires that any expenditure is paid or payable by the employer on the provision of perquisites and allowance of an employee where the sum of the value of the perquisites computed u/s 13 and the amount of the allowances exceeds 50% of the employee's salary for the tax year. The provision of section 21(k) clearly provides that excess perquisites should be worked out in the case of each and every employee and excess perquisites so worked out in the cases of all employees could be added in the income of the employee of the taxpayer. Since the Taxation Officer has not followed the computation of excess perquisites as provided u/ 21(k), therefore, the addition made is not maintainable, hence is deleted."

It appears that identical question was dealt with by a learned Division Bench of this Court in ITRAs No. 306 & 307 of 2010 which was decided on 15.03.2011 and the said question before the Bench of this Court was as under:-

> "1. Whether under the facts and circumstances of the case, the learned Tribunal was justified in upholding the decision of the Commissioner (Appeals) deleting the addition made u/s 21(k) of the Income Tax Ordinance 2001?"

The learned Division Bench answered the question against the department and in favour of the Tax Payer which was then assailed by the department before the Hon'ble Supreme Court. The finding of the learned Division Bench reads as under:-

> "4. A perusal of the impugned order reveals that the Tribunal had not considered the implication of Section 21(k) of the Income Tax Ordinance 2001. A further perusal of the assessment order also reveals that the Taxation Officer while making the addition did not consider the implication of Section 21(k) but made the addition under section 39 by computing deemed interest on the interest free loans to the employees. Even otherwise section 21(k) has been deleted by Finance Ordinance 2006 and therefore, we are of the considered view that all the three questions, which have been proposed for the opinion of this Court, do not arise from the impugned order of the Tribunal and therefore, this Court in its advisory jurisdiction under Section 133 does

not have the jurisdiction to give its opinion on the questions which do not arise out of the order of the Tribunal. However, without prejudice to the above, a perusal of the order reveals that the markup on the basis of benchmark has been computed under the provisions of section 13(7) of the Ordinance and section 13(7) and 13(4) of the Ordinance relate only to the taxability of the employees and not to the taxability of the employer and therefore they have been wrongly applied by the Taxation Officer. We have also seen that the Taxation Officer has not discharged his onus in restricting the claim of interest paid on borrowed capital as the onus was on him to prove that the borrowed capital has been utilized for the purposes of advancing interest free loans and in absence of any such findings, the CIT(A) and the Tribunal were justified in deleting the addition made on account of deemed interest and to this extent their orders are unexceptionable and no interference is called for by this Court."

On perusal of the above findings of the learned Division Bench of this Court and upheld by the Hon'ble Supreme Court, it clearly reflects that the question already stands answered against the department and in favour of the Applicant; hence, no case for indulgence is made out. The proposed Question No. 1 is answered in the affirmative against the Applicant and in favour of the Respondent, whereas, Question No. 2 now remains academic and need not be answered.

Let copy of this order be sent to Appellate Tribunal Inland Revenue at Karachi, in terms of sub-section (5) of Section 133 of Income Tax Ordinance, 2001.

J U D G E

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Arshad/