IN THE HIGH COURT OF SINDH AT KARACHI

Income Tax Reference Application ("ITRA") No.274 of 2024

Date	Order with signature of Judge

PRESENT:
Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Mohammad Abdur Rahman

FRESH CASE:
1. For order on CMA No.3946/2024.
2. For order on Office Objections No.1 & 27.
3. For order on CMA No.2080/2024.
4. For hearing of main case.

Dated; 3rd December 2024

Mr. Ghulam Murtaza Khuhro, Advocate for Applicant.

-*-*-*-*-*-

O R D E R

Through this Reference Application the Applicant has impugned order dated 04.03.2024 passed on a Rectification Application No.3789/KB/2023 in ITA No.910/KB/2022; proposing various questions of law.

2. Learned counsel for the Applicant has made best possible efforts to convince us as to the merits of the case, including the argument that notwithstanding the fact that the Applicant had claimed certain amnesty scheme in respect of undisclosed properties and non-payment of tax in terms of the Amnesty Scheme, would still not amount to a definite information for the Assessing Officer to invoke the provisions of Section 122(5A) of the Income Tax Ordinance, 2001. According to him, the amendment of the assessment order is therefore, without lawful authority and jurisdiction and liable to be set-aside on this ground alone.

3. However, before we could address merits of the case, we have noticed that this Reference Application is directed against dismissal of a Rectification Application and not against the main order of the Tribunal dated 6.11.2023, whereby the Appeal of the Applicant was dismissed, whereas such question that whether any Reference Application could be maintained against dismissal

of Rectification Application already stands decided by a Divisiona Bench of this Court[1] in the case reported as ***The Collector of Customs, Model Customs Collectorate, Port Muhammad Bin Qasim, Karachi v. Messrs Pacific Oil Mills (Pvt.) Limited and another [2023 PTD 1268]*** wherein it has been held that an order of rectification is not an order disposing of an appeal against which a Reference could be maintained. The relevant observations in the aforesaid case are as under: -

> *"7. From perusal of the aforesaid provision i.e. sub-section (2) of Section 194B, it appears that the Tribunal is empowered to act at any time within one year from the date of its order, with a view to rectifying any mistake apparent from the record, to amend any order passed by it under-sub-section (1) ibid and shall make such amendments if the mistake is brought to its notice by the Collector of Customs or the other party to the appeal. Similarly, sub-section (3) ibid provides that the Tribunal shall send a copy of every order passed by it under this section, disposing of an appeal, to the officer of Customs and in valuation cases also to the Director Valuation, and the other party to the appeal. On the other hand, Section 196 of the Act provides that within ninety days of the date on which the aggrieved person or an Officer of Customs, as the case may be, was served with order of the Tribunal under sub-section (3) of section 194B, the aggrieved person or any officer of Customs, authorized by the Collector, may prefer an application, in the prescribed form, stating any question of law arising out of such order.*
>
> *8. The moot question is that whether in the facts and circumstances this Reference Application is competent at all under Section 196 of the Act as apparently, the Applicant has not impugned the main order of the Tribunal whereby, the Appeal of the Respondent was allowed. The Applicant's Counsel has tried to overcome this objection raised by us by making a submission that the order in question is an order falling within the contemplation of sub-section (3) of Section 194B of the Act as the said provision covers all order(s) passed by the Tribunal including an order disposing of an Appeal, and since the impugned order is an order of the Tribunal, therefore, a Reference Application can be filed under Section 196 of the Act. However, with respect, we are unable to agree inasmuch as a Reference Application can only be filed against an order of the Tribunal issued under sub-section (3) of Section 194B ibid and in our considered view the order of rectification which has been impugned in this Reference Application is not an order of the Tribunal as provided in subsection (3) ibid as it is not an order disposing of an Appeal which is required to be served upon the parties to the Appeal; hence, no Reference Application can be entertained against such an order. The main order in Appeal is passed by the Tribunal under subsection (1) of section 194B of the Act, and such order of disposing of an Appeal is required to be dispatched to the parties before the Tribunal and only against such order a Reference Application can be entertained under Section 196 ibid. If the situation had been as contended by the Applicant's Counsel, then subsection (3) of Section 194B of the Act would have been differently worded and would not have used or restricted it to "**order passed by the Tribunal disposing of an Appeal**" as use of these words would then be redundant. If the legislature's intention would have been otherwise as contended by the Applicants Counsel, then it would have used the words "Tribunal shall send a copy of **every order** passed by it". This is not so, therefore, this contention appears to be misconceived and is hereby repelled. The argument of the Applicants Counsel to the extent that an order of Rectification is an order disposing of an Appeal is also not*

[1] authored by one of us, namely, *Muhammad Junaid Ghaffar, J ;*

tenable as Rectification by itself is a request to amend or correct a mistake apparent on record, and once the Tribunal holds that there is no such mistake, the said order would not be finally disposing of the Appeal before it. It will merely be a refusal to accede to any such request for rectification. It will never be an order of final disposal of the main Appeal, except when, the Rectification is entertained or allowed in any manner, including in part or full.

9. It would also be pertinent to observe that the period of limitation as provided under Section 196 of the Act against a final order of the Tribunal disposing of an Appeal is 90 days, whereas, a Rectification Application can be entertained by the Tribunal in terms of Section 194B(2) within one year from the date of such order. If the Applicant's contention is accepted, then apparently this Court would be extending the limitation period for filing of a Reference Application under Section 196 of the Act as in that case if the Department fails to file a Reference Application under section 196 of the Act against a final order disposing of an Appeal within limitation, it would prefer a Rectification Application as a matter of routine within one year time and would then file a Reference Application under Section 196 against a rectification order. This cannot be permitted so as to enlarge limitation which creates vested rights in favour of the opposing party. In fact, law of limitation provides settlement / end of disputes between the parties by operation of law. This is to create an atmosphere of certainty in the society. Indolent litigants do not get what they are even otherwise entitled for, if they have not acted diligently within the limitation period for taking recourse to a remedy as may be available to them[2]. Object of law of limitation was to prevent stale demands and so it ought to be construed strictly.

10. Having said that, we may also clarify that there could be a situation that Rectification Application filed by any of the parties is allowed; then the main order of the Tribunal stands modified / merged in the order of Rectification, then perhaps, the aggrieved party, if any, could approach the Court under Section 196 of the Act by way of a Reference Application and can take a plea that since it was not aggrieved initially by the main order of the Tribunal; however, after Rectification of the main order, now it is aggrieved; hence, the Reference Application is maintainable. Such a possibility cannot be ruled out; and in that case the theory of merger of an original order into an order of rectification would be applicable, and then such an order could be treated as an order falling within the ambit of Section 194B (3) of the Act, disposing of an Appeal. Admittedly, this is not the case before us as the Rectification Application of the Applicant stands dismissed.

11. It may also be noted that under the Income Tax Ordinance, 1979 (since repealed) a somewhat similar issue was raised before a learned Division Bench of this Court in the case of ***Commissioner of Income Tax Vs. Ateed Riaz*** ***(2002 PTD 570)****, followed recently by a Division Bench of this Court in Orient Electronics[3], whereby, a Reference Application was filed under Section 136 of the Income Tax Ordinance, 1979 against an order passed on a Rectification Application filed by the Department. Under the said Ordinance, Rectification was dealt with separately under Section 156 (currently under Section 221 Ordinance, 2001,) of the said Ordinance. An objection was raised as to competency of the Reference Application and in response, the Applicant's Counsel had relied upon various Judgments of this Court as well as Calcutta High Court; however, the learned Division Bench was pleased to repel the contention of the Applicant Department, by holding that if this is permitted, then it would enhance the limitation period for filing of a Reference Application, whereas, if no Reference is filed against the main order of the Tribunal, then no Reference is entertainable under Section 136(2) of the said Ordinance against the order of Rectification passed under Section 156 ibid. It was further held that if Tribunal rectifies its original order by allowing or entertaining an application under Section 156 ibid, then it shall be deemed to be an order under Section 135 of the Ordinance and Reference pertaining to any question of law arising out of an order under*

Section 156 shall lie in the same manner as out of an order under section 135 ibid. It was further observed that a party who has failed to approach the Court by way of a Reference Application against the original order, cannot be allowed to agitate the same questions of law by way of a Reference Application against an order of Rectification, if it had failed to file any Reference against the original order within the prescribed limitation. It would be advantageous to refer to the relevant findings of the learned Division Bench which reads as under: -

> *"In the last judgment, three earlier judgments have been considered. The ratio of all the above judgments is that an order under section 156 partakes the character of original order which is rectified under section 156 of the Income Tax Ordinance. Thus, if an order under section 62 of the Income Tax Ordinance is rectified under section 156, it assumes the character of order under section 62 of the Income Tax Ordinance, and an appeal from the order under section 156 shall lie in the same manner as from an order under section 62. Likewise, if the first or the second appellate orders under section 132 or 135 of the Income Tax Ordinance, are rectified under section 156, the rectified orders are to be read as orders under section 132 read with section 156 and order under section 135 read with section 156 of the Income Tax Ordinance, respectively.*
>
> *By the above judgments, it stands settled that an order under section 156 shall have the same character and be deemed to be under the same section of the Income Tax Ordinance, under which it was originally made and was rectified by recourse to section 156 of the Income Tax Ordinance. Thus, if the Income-tax Appellate Tribunal has rectified an order under section 156, it shall also be deemed to be an order under section 135 of the Income Tax Ordinance and reference pertaining to any questions of law arising out of order under section 156 of the Income Tax Ordinance, shall lie in-the same manner as out of an order under section 135 of the Income Tax Ordinance.*
>
> *However, the above proposition of law is of no help to the appellant in the present case. The reason being that admittedly the question of law proposed in the reference application arises out of the original order by the Tribunal is I.T.A. No.562/KB of 1993-94, dated 21-9-2000 and not from the order, dated 26-1-2001 in M.A. (Rect) No.239/KB of 2000-2001 made under section 156 of the Income Tax Ordinance. No reference application was filed against the order, dated 21-9-2001 passed under section 135 of the Income Tax Ordinance, and in the order, dated. 26-1-2001 disposing of the application under section 156 of the Income Tax Ordinance the learned Members of the Tribunal made no rectification in respect of issues under consideration and held that in the facts and circumstances of the case the provisions of section 156 of the Ordinance cannot be invoked. In these circumstances the learned Members of the Tribunal while rejecting the reference application under section 136 (1) of the Income Tax Ordinance, held that the question of law proposed in the reference application, does not arise out of the order rejecting the rectification application, against which the reference application was filed. Mr. Aqeel Ahmed Abbasi, is not able to point out any infirmity in the order, dated 27-4-2001, rejecting the Reference Application No.227/KB of 2000-2001, submitted under section 136(1) of the Income Tax Ordnance. We are, of the considered opinion, that merely because a reference application lies against an order under section 156 of the Income Tax Ordinance, nobody can be allowed to circumvent the law relating to the period of limitation provided in subsection (1) of section 136 and in subsection (2) of section 136 of the Income Tax Ordinance, 1979. The effect of treating the order under section 156 made by the Tribunal under section 135, is that, for the purpose of making reference to High Court, it shall be treated as aril order under section 135 of the Income Tax Ordinance. Nonetheless, a party cannot be*

allowed to seek a reference to the High Court in respect of question of law arising out of the original order under section 135 of the Income Tax Ordinance, if no such application was submitted within a period of ninety days of the date upon which he is served with the notice of an order under section 135 of the Income Tax Ordinance, as provided under section 136(1) of the Income Tax Ordinance, in the garb of an order under section 156 of the Income Tax Ordinance, 1979. We would like to clarify that orders under section 135 and section 156 made by the I.T.A.T. are subject to reference to the High Court, but the period of limitation for making reference from each order would be the same as provided in subsection (1) of section 136 of the Income Tax Ordinance. If any reference application is sought to be made in respect of an order under section 156 of the Income Tax Ordinance, then the reference shall lie, if the question of law arise out of the order under section' 156 only and not otherwise. If any question of law arises out of order under section 135 of the Income Tax Ordinance, then it cannot be referred to the High Court with reference to the order under section 156, if the period of limitation has expired. In the present case, we find, that the original order by the Tribunal under section 135 of the Income Tax Ordinance, was made on 21-9-2000 and no reference application was filed in respect of any question of law arising out of the said order. The applicant instead, chose to filed rectification application which was rejected on 26-1-2001. Thus the only question which could arise 'out of the order of Tribunal under section 156 was whether Income Tax Appellate Tribunal was justified in rejecting the rectification application. This question has not been proposed in the present reference application and instead the question has been proposed which arises out of the order of Tribunal, dated 21-9-2000, which has become barred by time."

12. We may also observe that as against the above judgment, the case of Pakistan Electric Fittings[4] of a Division Bench of this Court also holds field; and perhaps is somewhat contrary to what has been held in Ateed Riaz and the opinion rendered by us in this case. However, there are various reasons not to follow that case, if at all it is a binding precedent, otherwise. Firstly, that case arises in the context of Appellate jurisdiction of this Court in terms of the then section 136 of the 1979 Ordinance, as against the Reference (Advisory) jurisdiction now existing in the realm of Income Tax as well as Customs and other taxation laws. Despite there being similarity in both provisions; per settled law the Appellate jurisdiction is more expansive and vast as against the advisory jurisdiction. This is also reflected from the said judgment in Pakistan Electric Fittings, as the Court while hearing an Income Tax Appeal even went to the extent of holding that "we may also clarify that in case we had come to the conclusion the appeal under section 136 was not maintainable, it would have been a fit case to have converted this appeal into a Constitutional petition under Article 199 of the Constitution since it is settled law that where there is no remedy, the only remedy is a Constitutional petition under Article 199." This observation or finding, perhaps to our understanding, cannot be given in Reference or Advisory jurisdiction which is restricted to the extent of answering the questions of law arising out of the order of the Tribunal. Besides this, with utmost respect and humility at our command, we beg to differ to this very proposition as in our considered view, though the converse of it may be a possibility not to non-suit a litigant if the facts and circumstances of a particular case so demands, including the question of limitation. However, not all proceedings of Appeal or Reference arising out of a taxing law can be converted into Constitutional petitions. Right of appeal was a creature of the statute and it was not to be assumed that there was a right of appeal in every matter brought before a Court for its consideration. Right of appeal was expressly given by a statute or some authority equivalent to a statute such as a rule taking the force of a statute. Existence of right of appeal could not be assumed on any 'a priori' ground.[5] Similarly "The writ jurisdiction of

> *the High Court cannot be expended as the solitary resolution or treatment for undoing the wrongdoings, anguishes and sufferings of a party, regardless of having an equally efficacious, alternate and adequate remedy provided under the law which cannot be bypassed to attract the writ jurisdiction."*[6] *Lastly, in Ateed Riaz, the learned Bench has also distinguished the judgment of Pakistan Electric Fittings, and we are fully in agreement with the observations in Ateed Riaz. Hence, if at all, said judgment has any relevance, it is not applicable to the present facts in hand."*

3. In view of the aforesaid reasons in *Pacific Oil Mills* (Supra), this Reference Application against dismissal of a Rectification Application, being not maintainable, is hereby ***dismissed*** in *limine* along with pending application(s).

JUDGE

JUDGE

Farhan/PS