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IN THE HIGH COURT OF SINDH KARACHI

(ITR No. 219 2011)

Commissioner Inland revenue, Zone-IV, Large Taxpayers Unit, 32-A, PIC Tower, M.T. Khan Road, Karachi	APPELLANT
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VERSUS

M/s Kirther Pakistan B.V. C/o ford Rhodes Sidat Hyder & Co; 611, Progressive plaza, Beaumont Road, Karachi.	RESPONDENT.
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PRESENTED
27-08-2011
[Signature]
27/8/11
Dr. [Signature]
ITR & F

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REFERENCE APPLICATION UNDER SECTION 133
OF THE INCOME TAX ORDINANCE, 2001.



IN THE HIGH COURT OF SINDH, KARACHI.



ITRA No.219 of 2011

Present: Mr. Justice Syed Hasan Azhar Rizvi,
Mr. Justice Muhammad Junaid Ghaffar.

Commissioner Inland Revenue Applicant

V e r s u s

M/s. Kirther Pakistan B.V. Respondent

J U D G M E N T

Date of hearing: 18.03.2014.

Applicant: Through Mr. Javed Farooqui,
Advocate.

Respondent: M/s. Abdul Khaliq Khatri and
Fazel Rabbi, Advocates.

Muhammad Junaid Ghaffar, J: On 18.03.2014 we had answered the questions against the applicant through the following short order:-

“Through instant reference application, the appellant has proposed the following questions of law purported to be arising out of the order of the Tribunal dated 17.05.2011 passed in ITA No.830/KB-2010:-

1. “Whether on the facts and circumstances of the case the learned Appellate Tribunal Inland Revenue was justified in holding that after exclusion of royalty and adjustment of B.F. losses from the total income for the year, the balance taxable income for the year would become negative, hence no levy of WWF on negative income?”

2. Whether on the facts and circumstances of the case the learned Appellate Tribunal Inland Revenue was justified in holding that the WWF cannot be levied through an order passed under Section 221 of the Income Tax Ordinance, 2001?”



We have heard both the learned counsel. In so far as question No.2 is concerned we are of the view that the same needs to rephrase in the following manner:-

2. Whether on the facts and circumstances of the case the learned Appellate Tribunal Inland Revenue was justified in holding that the WWF cannot be levied through an order passed under Section 221 of the Income Tax Ordinance, 2001 without there being any mistake apparent on record?"

For reasons to be recorded later on, question No.1 is answered in the affirmative, against the appellant and in favour of the respondent. Similarly question No.2 as amended is also answered in the affirmative, against the appellant and in favour of the respondent".

2. Briefly, the facts are that the respondent company which is engaged in the exploration and production of petroleum product was issued a Show Cause Notice under Section 221 of the Income Tax Ordinance, 2001 ("Ordinance") on the grounds that computation of Income & the profit and loss account shows that the respondent had offered interest Income of Rs.28,897,541/- for the tax @ 50% chargeable to tax under Section 39 of the Ordinance, which is a mistake apparent from the record. It was also alleged that the respondent had adjusted Workers Welfare Funds ("WWF") against the royalty in calculating tax liability in terms of Rule 6(3), of Part 1 to the Vth Schedule of the Ordinance. The respondent had replied to the Show Cause Notice after which the Taxation Officer rectified the order under Section 221 of the Ordinance, against which an appeal was preferred and such appeal of the respondent was allowed by the Commissioner Appeals. The applicant being dis-satisfied preferred further appeal before the Appellate Tribunal Inland Revenue ("Tribunal") which was dismissed



and against which the present reference application has been preferred. In so far as the present controversy is concerned it is only in respect of the issue regarding charging WWF.

3. Mr. Jawed Farooqui, learned Counsel appearing on behalf of the applicant contended that since the treatment given to the royalty in the profit and loss account by the respondent was a mistake apparent on record, therefore, the respondent was liable to pay WWF. Learned Counsel further contended that the royalty was not an admissible expense and therefore could not be deducted as such, while computing the income.

4. Conversely, Mr. Abdul Khaliq Khatri, learned Counsel appearing on behalf of the respondent submitted that the action of the taxation officer initiated under Section 221 of the Ordinance was without jurisdiction, as without prejudice to the merits of the case, there was no mistake apparent on record which could allow the taxation officer to exercise jurisdiction in terms of Section 221 of the Ordinance. Learned Counsel further contended that in the case of the respondent there was no taxable income for the year under issue, as such WWF could not be levied. Learned Counsel further contended that the taxation officer failed to appreciate that the respondent in terms of Rule-4 of Part-1 of the Vth Schedule to the Ordinance read with provisions of the Petroleum Concession Agreement ("PCA") with the Government of Pakistan, was required to add royalty payment to the total income only for the purposes of calculating the amount payable to the Government, hence in terms of such treatment, the Workers Welfare Ordinance 1971 ("Ordinance 1971") nowhere requires that WWF is to be levied on total income as increased by the amount of the royalty. Learned



Counsel further submitted that since admittedly there were brought forwarded losses in the previous years, as such there was no income on which WWF could be levied. Learned Counsel for the respondent in support of his contention has relied upon the case of *CIT Vs. Shadman Cotton Mills Ltd*, reported in 2008 SCMR 204, *CIT Vs. National Food Laboratories*, (1992) 65 Tax 257 (SC Pak), *Sidhraamappa Andannadopa Manri Vs. CIT, Bombay*, (1952) 21 I.T.R. 333, *M. Rahman, Income Tax Officer and others Vs. Narayanganj Company (Pvt) Ltd.* (1971) 23 Tax 223 (SC Pak) and *The CIT Vs. Associate d Constructors (Pvt) Ltd*, unreported case in ITC No.362 of 1990, dated 19.03.2002".

5. We have heard both the learned Counsel and perused the record. By consent the matter is being decided at Katcha Peshi stage for final disposal.

6. It appears that in the instant matter the questions of law as referred for the opinion of this Court, requires adjudication on two issues i.e. one on the merits of the case, that as to whether, WWF could be rectified in the instant matter after exclusion of royalty and adjustment of brought forwarded losses form the total income for the year, and secondly on the issue, that as to whether the taxation officer had any authority or jurisdiction to levy WWF by passing an order under Section 221 of the Ordinance without their being any mistake apparent on record or not. We would like to address the second question first. In this regard it would be advantageous to reproduce the relevant provisions of Section 221 of the Ordinance which is in the following terms:-

221. Rectification of mistakes:-(1) *The Commissioner, the Commissioner (Appeals) or the Appellate Tribunal may, by an order in writing, amend any order passed by [him] to rectify any mistake apparent from the record on [his or its] own motion or any mistake brought to [his or its]*



notice by a taxpayer or, in the case of the Commissioner (Appeals) or the Appellate Tribunal, the Commissioner.

- [(1A)] -----
- (2) -----
- (3) -----
- (4) -----

7. As would be seen from the above provision that in this case the Commissioner may by an order in writing amend any order passed by him to rectify any mistake apparent from the record on his or its own motion or any mistake brought to his or its notice by a taxpayer. In the instant matter the return of income filed by the respondent is deemed to be an assessment order under Section 120 of the Ordinance and by virtue of this deeming provision the assessment order is an order passed by the Commissioner. In the instant matter the jurisdiction has been exercised by the Commissioner or the taxation officer in terms by Section 221 of the Ordinance for rectification of mistake on the basis of such powers conferred under Section 221 of the Ordinance; but it must be kept in mind that for such rectification, the condition precedent is, that there must be a mistake apparent from the record. Whereas, what the taxation officer has done in the instant matter is, perhaps an issue which required interpretation of the relevant law as well as PCA entered upon by the respondent with the Government of Pakistan. It neither pertains, either to a calculation mistake or of a wrong application of the tax rate, which perhaps could be termed as a mistake apparent from the record while arriving at the taxable income of the respondent, while filing the return/deemed assessment order. The jurisdiction which is allowed to be exercised in terms of Section 221 of the Ordinance is very limited, restricted and could not be stretched or extended by the taxation officer to adjudicate the same to the detriment of the party having substantial effect on the liability of the tax or otherwise. In our view, if this is permitted and





the taxation officer is allowed to rectify assessment orders under Section 221 of the Ordinance in such manner, then the provisions of Section 122 of the Ordinance would be redundant which caters to, and has an inbuilt mechanism for amendment of assessment orders under various different situations. After examining the entire record placed before us we are of the view that the issues so raised by the taxation officer, could not be said to be a mistake apparent on record, and therefore, in the given facts and circumstances of the instant case, the taxation officer had no jurisdiction in the matter to exercise the powers under Section 221 of the Ordinance for rectification of the deemed assessment order. For this reason we had answered the reframed question No.2 in the affirmative against the applicant and in favour of the respondent as aforesaid.

8. Now coming to the first question which is primarily on the merits of the case, although did not require an answer in view of the findings given by us in respect of question No.2, however, we have noticed that even on merits the contention of the taxation officer could not be sustained. It is an admitted fact that there were brought forward losses in the profit and loss account of the respondent, and while computing the income for the year in the question, the said brought forwarded losses were allowed to be adjusted against the total income of the said year. Similarly, the royalty in question was the liability to be paid to the Government of Pakistan by the respondent and as per the prevailing law as well as the PCA, royalty was required to be added to the total income of the respondent only for the purposes of calculating the amount of payment to the Government i.e. taxes and other payments. The WWF is to be calculated on the total income under Section 4 of the Ordinance 1971 as is assessable and does not provide that it would



be calculated on the total income as is increased by such royalty. In fact, in the instant matter the royalty is payable and not receivable therefore it could not be said to be a part of the total income and was only shown and added to the income consequently to Rule 4 of Part 1 of the V Schedule to the Income Tax Ordinance 1979 ("since repealed") in order to work out the amount payable to Government and has no nexus to the total income of the respondent which was required to be worked out for the purposes of calculating WWF. We have also noticed that in fact the taxation officer while dealing with this issue neither applied his mind nor passed any reasoned order which could be sustained under the law. The taxation officer in its order has dealt with the issue in the following manner:-

"The taxpayer reply was examined. This office does not agree with the view of excluding royalty form income for charging WWF as the income is arrived after addition of royalty to the profit. Keeping in view the above discussion, WWF is charged as under:



9. From the above it could be seen that the taxation officer has seriously erred in law while working out the payability of WWF, and therefore we are of the view that there could not be any exception to the findings given in favour of the respondent by the two forums below i.e. the Commissioner Appeals as well as the Tribunal. Consequently question No.1 was also answered in the affirmative against the applicant and in favour of the respondent by the short order as referred to above.

10. Consequently the instant reference application was dismissed by us by means of a short order dated 18.03.2014 and the above are the reasons for the same. The Registrar of this Court is directed to send a copy of this Order under the seal of this Court to the Tribunal for information.

Karachi:
Dated: _____

Mr. Muhammad Iqbal Chaudhary
JUDGE
Mr. Syed Hasan Azhar Rizvi
JUDGE
29.3.14

THE HIGH COURT OF SINDH, KARACHI
CERTIFIED TO BE TRUE COPY

(Signature)
(MUHAMMAD SARFARAZ)
I/C: ASSISTANT REGISTRAR (COPYING)

COPY APPLIED FOR ON 20-11-2021

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URGENT/NORMAL FEES: 08 Nil

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TOTAL: Nil

(Signature)
20/11/21

COMPARING BY/
OFFICE ASSOCIATE

(Signature)
(MUHAMMAD SARFARAZ)
ASSISTANT REGISTRAR (COPYING)

