APPELLATE TRIBUNAL INLAND REVENUE, MULTAN BENCH, MULTAN.

ITA No.527/LB/2021
(Tax Year 2017)

Mr. Abid Iqbal, Multan. **...Appellant**

Versus

The CIR, RTO, Multan. **...Respondent**

Appellant by: **Mr. Riaz Ahmad Raja, Advocate.**
Respondent by: **Ms. Sadia Nadeem, DR.**

Date of Hearing: **01.12.2021**
Date of Order: **06.01.2022**

ORDER

DR. MUHAMMAD NAEEM (Accountant Member): The taxpayer through instant appeal has assailed order dated 22.12.2020 passed by the learned CIR(Appeals), Multan.

2. The facts in brief leading to the instant appeal are that the taxpayer, an individual, filed return for the year under consideration, which was deemed to be an assessment order in terms of section 120 of the Income Tax Ordinance, 2001 (hereinafter called 'the Ordinance'). Subsequently, the case was selected by FBR through computer random ballot u/s 214C of the Ordinance for audit of its tax affairs u/s 177 of the Ordinance. Audit proceedings were initiated by way of issuance of statutory notices, against which, books of accounts alongwith relevant documents/details were furnished, which were examined and could not find favour of the taxation officer. Resultantly, the proceedings culminated in passing of amended assessment order u/s 122(1) read with section 122(5) of the Ordinance dated 31.08.2020, wherein income of taxpayer was assessed at Rs.12,660,415/-. Feeling aggrieved by the said treatment, the taxpayer preferred appeal before CIR (Appeals) Multan, which was rejected by way of confirmation of amended assessment order u/s 122(1) of the Ordinance. Still discontented, the taxpayer has come up in further appeal before this Tribunal.

3. At the very outset at the time of hearing, the learned counsel appearing on behalf of the taxpayer has opted to assail the amended assessment u/s 122(1)/122(5) of the Ordinance, on the legal plane of jurisdiction by arguing that audit report as required under section 177(6) of the Ordinance read with Rule 231F (4) & (5) of the Income Tax Rules 2002 was not confronted to the taxpayer, for amendment of the original assessment, which is a mandatory requirement and condition precedent for making the amendment, hence, the additions are not sustainable under the law. He has further added that higher appellate fora, in similar situation, have always deprecated such departmental practice being unlawful and void ab-initio. In this regard, he has placed reliance on the reported judgments cited as 2015 PTD (Trib.) 1242 & 2018 PTD 1444. On the other hand, the learned DR appearing on behalf of the department has fully supported the orders passed by both authorities simply by reiterating the basis evolved therein.

4. After going through facts of the case, applicable law and case law on the subject, we are convinced about the preliminary legal grounds of lack of Audit Report to assume jurisdiction for further proceedings culminating in passing of impugned order under section 122 as well as on facts. The comparative text of section 177(6) before and after substitution through Finance Act, 2019 is as under:

Before 01.07.2019	*After 01.07.2019*
After completion of audit, the Commissioner may, if considered necessary, after obtaining taxpayers ***explanation on all the issues raised in the audit,*** *amend the assessment under sub-section (1) or sub-section (4) of Section 122 as the case may be.*	*After completion of audit, the Commissioner* ***shall,*** *after obtaining taxpayers explanation on all the issues raised in the audit,* ***issue an audit report containing audit observations and findings.***

Whereas, through the same Finance Act, 2019 new sub-section (6A) was inserted in section 177 which reads as under:

> *"(6A) After issuing the audit report, the Commissioner may, if consider necessary, amend the assessment under*

> *case may be, after providing an opportunity of being heard to the taxpayer under sub-section (9) of section 122."*

As per established practice of the Department, even before substitution of sub-section (6) through Finance Act, 2019 and insertion of Rule 231F in the Income Tax Rules 2002 through SRO 131(I)/2016 dated 18.02.2016, they were issuing Audit Report. There was a TAB in the IRIS for issuance of audit report under section 177(6). Whereas from 18.02.2016 onwards it became statutory requirement as evident from the below sub-rule (4) and (5);

> *(4) On completion of examination of books of accounts, data or information under this rule the discrepancies, if found, shall be intimated to the taxpayer for obtaining taxpayers' explanation, in the form of audit report, seeking taxpayer's explanation on these points.*
>
> *(5) Explanations of the taxpayer, where found not acceptable, shall be intimated to the taxpayer, through a notice under section 122(9) of the Income Tax Ordinance, 2001 about the amendment in assessment alongwith the rationale or basis of such amendment and necessary amendment in assessment order shall be passed under section 122 of the said Ordinance after affording adequate opportunity of hearing to the taxpayer."*

5. We are of the opinion that the substituted sub-section (6) and newly inserted sub-section (6A) are also applicable in the instant case. Audit proceedings were pending when these amendments were made through Finance Act, 2019. The pendency of audit proceedings, as on 01.07.2019, is evident from the notices issued under section 177(1) after that date calling for record as enumerated in facts dated 12.07.2019 and 20.02.2020. Therefore, the issuance of Audit Report was mandatory due to multiple provisions. Reliance of the learned AR on decision of this Tribunal reported as 2015 PTD (Trib) 1242 is very apt which is with reference to sub-section (6) prior to its substitution in 2019 and prior to insertion of Rule 231F on

"The selection of audit and thereafter conducting of Audit proceeding is just process and audit authority before invoking provision of section 122 for amendment have to frame charge sheet/audit observation/audit qualification /audit report and the same ought to be communicated to the taxpayer for rebuttal and the explanation/ reply/ assertion/contention/objections of taxpayer must be obtained and considered before proceeding for invoking section 122. Then after acquiring jurisdiction, and fulfilling all the requirements of subsections (1) and (5) of section 122. Only thereafter assessment may be amended under section 122. The mere issuance of notice under section 122(9) read with under section 122(1) after selection and conducting audit of the taxpayer is not complete requirement of law. Department first has to reject the objection/rebuttal of taxpayer on audit report then require to acquire jurisdiction under section 122(1) and then 122(5). However, this having not been done so. We may conclude this issue that the CIR/OIR after selection and conducting audit ought in every case to be able to give the taxpayer all the objection/issues raised in audit against taxpayer such as to enable him to answer/explain them before invoking provisions of section 122 and after obtaining and considering explanation of taxpayer on audit objection even if the CIR/OIR may consider necessary. The CIR/DCIR/OIR, may amend the assessment under section 122(1), (4)/(5) after fulfilling all requirement of law subject to definite information and fulfillment of further condition of clauses (i), (ii) or (iii) of subsection (5) of Section 122. C.I.R., R.T.O. Hyderabad Vs Dr. Muhammad Azeem Almani 2015 PTD (Trib.) 1242"

6. A Division Bench of this Tribunal in ITA No.1540/KB/2019 dated 09.06.2021 also has examined and adjudicated the consequences of non-issuance of Audit Report. The relevant extracts from this judgment are as under:

QUOTE

1. *-------It can be seen from the combined reading of the above provisions of law that after selection of the case for*

per procedure given in section 177 of the Ordinance. Under sub-section (5) of section 177, the Commissioner shall conduct an audit of income tax affairs, call for record or documents including books of accounts maintained under the Ordinance for conducting an audit of income tax affairs of the taxpayer. After obtaining the record of a taxpayer under sub-section (5) of section 177, the Commissioner shall conduct an audit of the income tax affairs of the taxpayer. After completion of the audit, the Commissioner under subsection (6) of section 177 shall after obtaining taxpayer's explanation on all the issues raised in the audit, issue an audit report. After issuance of the audit report, the Commissioner may proceed if he considered necessary amend the assessment order under section 122 of the Ordinance. The language of sub-section (6) of section 177 is express, explicit and mandatory to the effect that the Commissioner proceed to amend the deemed assessment only after obtaining taxpayer's explanation on all the issues raised in Audit Report. Hence it is very clear that no proceedings for amendment of deemed assessment can be initiated without obtaining taxpayer's explanation on the Audit Observations. This view is fortified by the judgment reported as ***Nestle Pakistan Limited etc. Vs. The Federal Board of Revenue etc. (2017 PTD 686)*** *which says that –*

> *"Selection for audit cannot and should not allowed to be used for raising revenue simpliciter, without conducting any audit and preparation of Audit Report. It is reiterated that audit, necessarily, is administrative in nature, which starts by selection for audit and ends on issuance of "Audit Report" after seeking explanation from the taxpayer. Issuance of "Audit Report" is sine qua non for to maintain separation between administrative and judicial powers, as envisaged in Article 175 (3) of the Constitution of 1973."*

It is further held in the said judgment that:

> *"Audit being administrative proceedings, shall complete on issuance of Audit Report. If audit is not completed within the given the time frame, the selection shall be deemed to have been dropped. After issuance of Audit Report; adjudication proceedings shall be carried out by some other taxation officer to satisfy command of the Constitution under Article 10A."*

It has very clearly and authoritatively held in the judgment supra stepping towards amendment of already completed assessment order. The above judgment was subsequently upheld by the Hon'ble Division Bench of Lahore High Court in the ICA No.338 of 2017 through order dated 18.07,2017. Hon'ble High Court, while discussing the matter of audit report, has annunciated the legal procedure in the following words,

> *"However, in doing so it is vital that due process is followed and the basic requirements of the FTS are not ignored. In terms of Section 177 of the Ordinance read with Section 25 of the Act and Section 46 of the 2005 Act, the Commissioner can call for the record or documents for conducting the audit of the income tax affairs of person provided that he give reasons in writing and the reasons must be communicated to the Taxpayer. Under Section 177(6) of the Ordinance the Commissioner can seek an explanation from the Taxpayer on the issues raised during the audit and only if satisfied that the explanation is unsatisfactory, may proceed to amend the assessment under Section 122 of the Ordinance."*

The above judgments were subsequently upheld by the Hon'ble Supreme Court in the case titled as CIR Vs Allah Din Steel & Re-rolling Mills (2018 PTD 1444) wherein it is observed as follows:-

> *"16. A perusal of the statutory landscape makes it clear that the provisions of sections 177 and 214C of the Ordinance; section 25 of the Act, 1990 and section 46 of the Act, 2005 provide a mechanism and roadmap which is required to be followed by the Taxation Officer/Auditor. In terms of section 177 of the Ordinance, the Commissioner can call for the record or documents for conducting the audit of the tax affairs of a person, provided he furnishes reasons to do so. Such reasons must be communicated to the Taxpayer. He can also seek explanations from the Taxpayer on issues raised during the audit in terms of section 177 of the Ordinance. It is only if he is convinced that the explanation furnished by the Taxpayers is not satisfactory, he may proceed to amend the assessment under section 122 of the Ordinance, after giving the Taxpayer an opportunity to defend him. We are therefore of the view that the*

umbrella of constitutional guarantees furnish adequate and sufficient safeguards to the Taxpayer where there is a possibility of overstepping by the Tax authorities.",

It is quite obvious from the judgments referred above that the department is under legal and statutory obligation, prior to further proceed for amendment process contemplated under section 122 of the Ordinance to obtain explanation / clarifications on all the issues raised during audit from the taxpayer and issue an audit report which in the instant case was not done. After the judgment of the Hon'ble Supreme Court cited above, the provision of sub-section (6) was amended and new sub-section (6A) of section 177 inserted through Finance Act, 2019 which expressly mandates that after completion of the audit, the Commissioner shall after obtaining taxpayer's explanation on all the issues raised in the audit, issue an audit report. After issuance of the audit report, the Commissioner may proceed if he considers necessary to amend the assessment order under sections 122(1) read with 122(5) of the Ordinance.

7. Similarly the first proviso to sub-section (6A) of section 114 of the Ordinance gives safeguard, privilege and the waiver of penalty to the extent of 75% to the taxpayer if he deposits the amount of tax as pointed out by the Commissioner during the audit proceedings or before the issuance of notice under sub-section (9) of section 122 along with default surcharge and twenty-five per cent of the penalties leviable under the Ordinance along with the revised return. If such an opportunity during the audit proceedings or before issuance of notice under section 122(9) of the Ordinance is not given to the taxpayer, it would be seriously deprived of its statutory right enshrined in the said proviso which is not permissible under any canon of interpretation. It is a settled principle of interpretation of the statues that each and every word appearing in a section has to be given effect to and no word in law is redundant or surplus. So was held by the Apex Court in the cases of (i) in the matter of

1937 SC (Pak.) 219. (ii) Muhammadi Steamship Company Limited vs CIT. (Central) Karachi (PLD 1966 SC 828). (iii) M/S v.N Lakhani and Company Vs M.V. Lakatoi Express and 2 others (PLD 1994 SC 894) and (Iv) Director General Intelligence and Investigation FBR Vs Sher Andaz and 20 others (2010 SCMR 1946).

> *"9. For the foregoing reasons, both the orders passed by the lower authorities are annulled being void ab-initio and without jurisdiction. It is immutable principle of law that defective assumption/exercise of jurisdiction by the authorities is incurable. Reliance may be placed on Director General Intelligence and Investigation FBR VsSherAndaz and 20 Others (2010 SCMR 1746),* ***Director General Intelligence and Investigation and others Vs M/s AL-Faiz Industries (Pvt.) Limited and others PTCL 2008 CL 337(S.C) and Collector, Sahiwal and 2 others Vs Muhammad Akhtar(1971 SCMR 681****). In all these judgments it was held by the Hon'ble Supreme Court of Pakistan that:-*
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> > *i) Where essential feature of assumption or jurisdiction is contravened or forum exercises power not vested in it, or exceed authority beyond limit prescribed by law the judgment is rendered coram non judice and inoperative (2002 SCMR122)*
> >
> > *ii) If a mandatory condition for the exercise of jurisdiction before Court, Tribunal or Authority is not fulfilled, then the entire proceedings which follow become illegal and suffer from want of jurisdiction. Any order passed in continuation of these proceedings in appeal or revisions equally suffer from illegality and are without jurisdiction (2008 SCMR 240)"*

8. By respectfully following the aforesaid precedents of the

reiterate that issuance of Audit Report was mandatory and the impugned order under section 122 made without confronting the audit observations through Audit Report is without jurisdiction and hence of no legal consequences. It is a trite law that when a statute had prescribed a method of doing a thing in a particular manner, such provision of law is to be followed in letter and spirit and achieving or attaining an objective of performing or doing of a thing in a manner other than provided by law would not be permitted.

9. Under the facts and circumstances of the case and the legal position explained supra, the impugned order passed u/s 122(1) is cancelled and that passed by the learned CIR(Appeals) is vacated. We order accordingly.

-Sd-
(DR.MUHAMMAD NAEEM)
Accountant Member

-Sd-
(SAJJAD ASGHAR KHOKHAR)
Judicial Member

Copy of the bench order forwarded to
1. The Appellant Mr. Abid Iqbal, MN
2. The CIR.
By Order
ASSISTANT REGISTRAR
Appellate Tribunal Inland Revenue
Multan
14/01/22

Riazahmad
14/01/2022