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Our Ref. No. MIK/ITL/2012/50

Dated 02-02-12

Your Ref. No. _____

The Member (Legal)
 Federal Board of Revenue
 Islamabad.

Subject:- ITA No.193/1998 (CIT Faisalabad..vs... Kashmir Estate (Pvt) Ltd.)

The title reference came up for final hearing on 13.1.2012 when after hearing the parties, the Special Division Bench answered the first question in negative i.e. in favour of the Department and appeal was disposed of.

Circulars and directions on w.s.b.

Copy of order is enclosed.

The question involved is of great consideration and as such it is desirable to bring in your kind notice.

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 Chief (Legal)

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 Letter to all (Muhammad Ilyas Khan)
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IN THE LAHORE HIGH COURT AT LAHORE
JUDICIAL DEPARTMENTITA No. 193 of 1998 ~~of 20~~

JUDGMENT

Date of hearing 13.01.2012.Appellant by Mr. Muhammad Ilyas Khan, Advocate.Respondent by Ch. Anwar ul Haq, Advocate.

IJAZ UL AHSAN, J:- Following questions of law have been raised through this appeal.

I) *Whether under the facts and circumstances of the case, the learned Tribunal was justified to hold that the provisions of Section 66A are not attracted in agreed assessments.*

II) *Whether the principle of change of opinion applies to the proceedings initiated under section 66A in respect of assessment approved by the Inspecting Additional Commissioner of Income Tax/Wealth Tax.*

2. From a perusal of the questions, it appears that the first question needs determination first and if our answer is in the negative, we need not answer the second question.

3. We have heard the learned counsel for the parties. It appears that an agreed assessment of the respondent was reopened by the Inspecting Additional Commissioner on the ground that it was prejudicial to the interest of the Revenue. The said order was challenged by the assessee before the Income Tax Appellate Tribunal, which came to the conclusion that the powers under Section 66-A could not have been exercised by the

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Inspecting Additional Commissioner on account of the fact that it was an agreed assessment. The main argument advanced by the learned counsel for the appellant is that there is no concept of an agreed assessment under the Income Tax Ordinance, 1979. He further submits that even if there is an agreement between a departmental functionary and the assessee regarding an assessment, the Inspecting Additional Commissioner's powers to reopen and revise the same under section 66-A of the Income Tax Ordinance 1979 continue to be available. In suitable circumstances such power can be exercised. In support of his contentions, the learned counsel relies on Commissioner of Income Tax and Wealth Tax Sargodha Zone, Sargodha Vs. Messrs Irshad Anwar & Co. (2002 PTD 750), The Commissioner of Income Tax Gujranwala Zone, Gujranwala Vs. Muhammad Hanif Faisala Jareer (3002 PTD 1206) and Commissioner of Income Tax, Faisalabd Vs. Haji Muhammad Ashraf (2001 PTD 1492).

4. On the other hand the learned counsel for the respondent has defended the order dated 20.03.1998 passed by the learned Income Tax Appellate Tribunal. He submits that in the facts and circumstances of the case, where there was an agreed assessment in which the Inspecting Additional Commissioner was himself a party,

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he was precluded from reopening or revising the same in exercise of powers under Section 66-A of the Income Tax Ordinance. Relies on Messrs S. N. H. Industries (Pvt.) Ltd. Vs Income Tax Department and another (2004 PTD 330).

5. We have heard the learned counsel for the parties and gone through the record. A striking feature of the impugned order of the learned Income Tax Appellate Tribunal is that the Tribunal has not recorded any reasons for holding that the agreed assessment of the respondents cannot be re-opened. For ease of reference it would be useful to reproduce provisions of Section 66-A of the Income Tax Ordinance, 1979.

66A. Powers of Inspecting Additional Commissioner to revise Deputy Commissioner's order.--
- (1) *The Inspecting Additional Commissioner may call for and examine the record of any proceedings under this Ordinance, and if he considers that any order passed therein by the [Deputy Commissioner] is erroneous insofar as it is prejudicial to the interest of revenue, he may, after*

6. A perusal of the aforesaid section indicates that the power under Section 66-A is an independent power. It can, in suitable circumstances, be exercised in case the Inspecting Additional Commissioner comes to the conclusion that the order passed by the assessing officer is erroneous insofar as it is prejudicial to the interest of the revenue. The scope of Section 66-A has been

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examined by a Division Bench of the Sindh High Court in Messrs S. N.H. Industries (Pvt.) Ltd. Vs. Income Tax Department and another (2004 PTD 330) in the following terms.

"Section 66-A of the Income Tax Ordinance, 1979 had conferred powers on the Inspecting Assistant Commissioner/Additional Inspecting Assistant Commissioner to revise the order of Assessing Officer/Deputy Commissioner of Income Tax, after calling for and examining the record of any proceedings under the Ordinance, if he considered and was of the view that an order passed by the Assessing Officer/Deputy Commissioner of Income Tax was erroneous inasmuch as it was prejudicial to the interests of the Revenue. It further empowered the Assessing Officer/Deputy Commissioner of Income Tax to pass such order as the circumstances of the case would justify including an order enhancing or modifying the assessment, or canceling the assessment and directing a fresh assessment to be made subject to the condition that appropriate and effective opportunity of being heard was provided to the assessee/aggrieved party. From a bare perusal of section 66-A of the Ordinance it is to be noted that the Inspecting Assistant Commissioner, was required to minutely examine the record of any proceedings which included the assessment finalized by the Assessing Officer/Deputy Commissioner of Income Tax to conclude that the assessment was erroneous and prejudicial to the interests of the Revenue to attract the provisions of this section.

The prerequisite to the exercise of jurisdiction by the Commissioner suo motu under it, is that the order of the Income-tax Officer is erroneous insofar as it is prejudicial to the interests of the Revenue. The Commissioner has to be satisfied of twin conditions namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent i.e. if the order of the Income-tax Officer is erroneous but is

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not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue, recourse cannot be had to the said section.

There can be no doubt that the provisions cannot be invoked to correct, each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category falls orders passed without applying the principles of natural justice or without application of mind.

The phrase 'prejudicial to the interests of the Revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income-tax officer is unsustainable in law."

7. The powers available to the Inspecting Additional Commissioner to revise or reopen the assessment order are not absolute. These are required to be exercised in a manner which is in consonance with principles enumerated in the aforesaid judgment. While an agreed assessment may not be reopened as a matter of routine, it can be reopened where the Inspecting Additional Commissioner comes to the conclusion that the alleged agreement between the departmental functionary and the assessee was based upon misrepresentation, fraud or withholding of the requisite information, which if

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available would have led to a different conclusion by the assessing officer.

8. The order passed by the Income Tax Appellate Tribunal does not examine the vital question as to whether the exercise of powers by the Inspecting Additional Commissioner, was within the parameters prescribed by law and whether material was available on record to support the view that the agreed assessment order was prejudicial to the interests of the revenue. Without considering this aspect it is difficult to justify a conclusion that the Inspecting Additional Commissioner had no power to reopen an agreed assessment. Further, the impugned order does not record any reasons on the basis of which it has been concluded that the powers under Section 66A were not available to the Inspecting Additional Commissioner and that he was debarred from reopening the assessment.

9. In view of the foregoing we are inclined to answer the first question in the negative. Accordingly the matter is remanded to the Income Tax Appellate Tribunal to decide the matter afresh in accordance with law after hearing both sides. We also find that second question is of no relevance in the facts and circumstances of the present case.

10. This appeal is disposed of in the aforesaid terms.

(SYED MANSOOR ALI SHAH)

JUDGE

(IJAZ UL AHSAN)

JUDGE

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In Case No.

Examiner: J.C.I. (Copy Branch)
Lahore High Court, Lahore.

A.Rehman.