IN THE HIGH COURT OF SINDH, KARACHI
ITRA No.132 of 2011

Date	Order with signature of Judge

Present: **Ghulam Sarwar Korai & Munib Akhtar, JJ.**

For katcha peshi

Date of hearing: 24.04.2013

Mr. Amjad Javed Hashmi, Advocate for Applicant.
Mr. Abdul Rahim Lakhani, Advocate for Respondent.

JUDGMENT

Munib Akhtar, J.: This Reference Application has been filed by the Inland Revenue Department against the impugned order of the Appellate Tribunal dated 05.01.2011. The following question of law is said to arise out of the impugned order:

> "Whether in the facts and circumstances of the case, the learned Tribunal has allowed the tax incentives under section 113(2)(c) of the Income Tax Ordinance, 2001 in express violence to the mandatory pre-requisites?"

We would, with respect, slightly reformulate the question in the following terms:

> "Whether in the facts and circumstances of the case, the learned Tribunal has correctly concluded that the benefit under section 113(2)(c) of the Income Tax Ordinance, 2001 is available to the respondent taxpayer?"

The question arises in the following circumstances.

2. The respondent taxpayer is a resident company engaged in the business of the manufacture and sale of yarn/cloth. For each of the tax years 2007 and 2008 it declared a loss, but had to pay minimum tax under section 113(1) of the Income Tax Ordinance, 2001. In the tax year 2009, which is the year relevant for present purposes, it sought to claim the benefit of subsection (2)(c) of section 113 on the basis of the losses declared in the earlier two years, and filed its income tax return accordingly. It will be convenient to immediately set out section 113, as presently relevant:

> "113. Minimum tax on the income of certain persons.- (1) This section shall apply to a resident company ... where, for any reason whatsoever allowed under this Ordinance, including any other law for the time being in force—

(a) loss for the year; ...

no tax is payable or paid by the person for a tax year or the tax payable or paid by the person for a tax year is less than one-half per cent of the amount representing the person's turnover from all sources for that year:

Provided that this sub-section shall not apply in the case of a company, which has declared gross loss before set off of depreciation and other inadmissible expenses under the Ordinance. If the loss is arrived at by setting off the aforesaid or changing accounting pattern, the Commissioner may ignore such claim and proceed to compute the tax as per historical accounting pattern and provision of this Ordinance and all other provisions of the Ordinance shall apply accordingly. ...

(2) Where this section applies: ...

(c) where tax paid under sub-section (1) exceeds the actual tax payable under Part I, Division II of the First Schedule, the excess amount of tax paid shall be carried forward for adjustment against tax liability under the aforesaid Part of the subsequent tax year:

Provided that the amount under this clause shall be carried forward and adjusted against tax liability for three tax years immediately succeeding the tax year for which the amount was paid. ...."

3. The Taxation Officer took the view that the respondent was not entitled to the benefit of subsection (2)(c). He therefore sought to amend the (deemed) assessment order and after hearing the respondent amended the assessment by means of an order the material part of which is as follows:

"The provision of clause (c) of sub-section (2) of section 113 clearly stipulates that where tax paid under sub-section (1) exceeds the actual tax payable under Part-I, Division-II of the First Schedule, the excess amount of tax paid shall be carried forward for adjustment against tax liability under Part I, Division II of the First Schedule of the subsequent tax year.

In the taxpayer's case due to assessed losses in tax year 2007 & 2008, no actual tax was payable under Part I, Division II of the First Schedule to the Income Tax Ordinance, 2001, and minimum tax u/s. 113 which was higher than liability covered under FTR was charged, hence question of any excess amount paid over and above the actual liability under Part-I, Division-II of the First Schedule in tax years 2007 & 2008 does not arise."

4. Being aggrieved by the foregoing, the respondent preferred an appeal to the CIT(A), which was allowed. The appellate authority stated in relevant part as follows:

"In my considered view the Taxation Officer has misconstrued provisions of Section 113(2)(c) of the Income Tax Ordinance, 2001. The law places no bar that there should be some normal tax liability for the year to claim for adjustment/credit of tax paid in excess of tax payable under normal law. The words used by the legislature in the provision are "where tax paid under sub-section (1) exceeds the actual

tax payable under Part-I Division-II of the First Schedule" meaning thereby that actual tax payable under Part-I Division-II of the First Schedule law could be zero or otherwise. The excess amount of minimum tax which was over and above the zero tax payable under Part-I Division-II of the First Schedule due to assessed losses for both impugned years is available for allowing adjustment against the tax liability under Part-I Division-II of the First Schedule of succeeding years. The Taxation Officer has misinterpreted the correct legal position in this case. In this context, the learned Tribunal in a case law reported as 2005 PTD 965 (Trib) has held that while interpreting any provision of statute, plain meanings of the expression and the words used in statute, shall be adhered to. The following famous words quoted and relied in so many judgments cannot be over emphasized.

> "There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look at the language used".

The provisions of section 113(2)(c) upto tax year 2008 are unambiguous in this matter. It is also observed that these provisions have given a vested right to appellant to carry forward and claim adjustment as mentioned therein. Hence the action of the Taxation Officer in this respect cannot be endorsed."

5. Being aggrieved by the aforesaid order, the Department preferred an appeal to the Appellate Tribunal. However, the Department's appeal was dismissed by means of the impugned order. The Tribunal stated in material part as follows (emphasis supplied):

> "12. The original section 113 (2)(c) was inserted through Finance Act, 2004 to allow adjustment of minimum tax paid in excess of tax payable as per Part-I, Division-II of the First Schedule to the Income Tax Ordinance 2001. This Division-II, Part-I of the First Schedule provides normal rates of tax leviable on the resident companies on the income not covered under FTR. The intention of the legislature for insertion of this sub-clause was to facilitate the loss sustaining companies to overcome their liquidity problems. This was clarified by the CBR (now FBR) by issuing Circular No.17 dated 17.07.2004 that profit yielding companies paying tax more than turnover tax do not get credit for their contribution towards the exchequer during the tax year where it sustained loss or lower income. In this background, amendment in section 113 was introduced to allow the facility of carry forward of minimum tax for next five years for adjustment against normal tax liabilities. Reference to Circular 10 of 1991 by the learned AR in this context for calculation of minimum tax is apt while considering the justifiable interpretation of section 113(2)(c) of the Ordinance. The ACIR failed to appreciate the intent and purpose of introduction of section 113 and the content of this circular issued in aid of interpretation of this section in the Ordinance and, therefore, tend to agree with the findings of the learned CIR(A-1) that the provision of section 113(2)(c) of the Income Tax Ordinance, 2001, *in our opinion placed no bar that there should be any normal tax liability for the year to claim adjustment/credit of tax paid in excess of tax payable under normal law. The words by the legislature in the provision are "where tax paid under sub section (1) exceed the actual tax payable under part 1 Division-II of the first schedule" meaning thereby that actual tax payable under part 1 Division-II of the first schedule could be zero or otherwise.* The excess amount of minimum tax which was over and above the zero tax payable under part-I division II of the first schedule

due to assessed losses for both the impugned tax years is available for allowing adjustment against the tax liability under Part-I, Division-II of the first schedule, for the succeeding tax year."

Being aggrieved by the above, the Department has filed the present Reference Application in terms of the question of law already noted.

6. Learned counsel for the Department contended that the Tribunal had seriously erred in law in concluding that the respondent was entitled to the benefit of subsection (2)(c). He submitted that there was no dispute that the respondent had declared losses in each of the tax years 2007 and 2008. Thus, no tax was payable or paid in those years. Subsection (2)(c) only applied when some tax had actually been paid but was less than that stipulated in subsection (1). If so, then (but only then) the taxpayer was entitled to the benefit of subsection 2(c), i.e., to carry forward the differential and adjust it against future tax liability, subject to the limitation imposed by the proviso. Learned counsel submitted that the Taxation Officer had reached the correct conclusion in law and the contrary interpretation by the Tribunal was erroneous.

7. Learned counsel for the taxpayer submitted that the impugned order ought to be affirmed. He submitted that any other interpretation, such as that of the Taxation Officer, would be both anomalous and unfair. It would be unfair because a company which declared minimal income and paid miniscule tax thereon would be entitled to adjust essentially the whole of the minimum tax under subsection (2)(c), whereas a company that declared a loss would be wholly deprived of the benefit of the same. It would be anomalous because while a company that declared a gross loss within the meaning of the proviso to subsection (1) would wholly escape any liability to pay minimum tax, a company such as the present respondent, which declared a net loss, would be so liable. Learned counsel submitted that the interpretation adopted by the CIT(A), and upheld by the Tribunal was to be preferred. Learned counsel also relied on Income Tax Circulars 10/1991 and 17/2004. He prayed that the Reference Application be dismissed.

8. We had allowed learned counsel to submit written synopses and case law that they wished to rely upon. Both learned counsel did so, and learned counsel for the respondent also cited certain case law that he wished to rely upon.

9. We have heard learned counsel as above, examined the record with their assistance and considered the case law relied upon. The first point to note is that subsection (1) of section 113 is a charging provision. It imposes the tax

by way of a minimum tax if the stipulated conditions are met. Subsection (2)(c) confers a benefit. If it applies, it allows for an adjustment to be made in subsequent tax years. The manner in which charging provisions are to be interpreted and applied is well settled by decisions of the superior Courts. The basic principle was stated in *Cape Brandy Syndicate v. Inland Revenue Commissioner* [1921] 1 KB 64, which has been reaffirmed many times, and is this: "In a Taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used" (see, among others, *Government of Pakistan and others v. Hashwani Hotels Ltd.* PLD 1990 SC 68 and *A&B Food Industries Ltd. v. Commissioner of Income Tax* 1992 SCMR 663). Indeed, this principle has been expressly noted in the order of the CIT(A) (see para 4 above). An allied principle, also well established, is that whenever two interpretations of a charging provision are reasonably possible, the one favoring the taxpayer is to be adopted. Thus, the Federal Court in *Commissioner of Agricultural Income Tax v. B.W.M. Abdur Rehman* a case decided in 1952 but reported at 1973 SCMR 445, stated as follows: "There is ample authority for the proposition that in a fiscal case, form is of primary importance, the principle being that if the person sought to be taxed comes within the letter of the law, he must be taxed, however great a hardship may thereby be involved but on the other hand if the Crown cannot bring the subject within the letter of the law he is free, however apparent it may be that his case is within what might be called the spirit of the Law" (at pg. 452).

10. The position with regard to any exemption from a tax is different, although the relevant principles are again well established. These principles may briefly be stated as follows. Firstly, the onus lies on the taxpayer to show that his case comes within the exemption. Secondly, in case two reasonable interpretations are possible, the one against the taxpayer will be adopted. But, thirdly, if the taxpayer's case comes fairly within the scope of the exemption, then he cannot be denied the benefit of it on the basis of any supposed intention to the contrary of the legislature or authority granting it. Subsection (2)(c) is of course not an exemption from the tax imposed under subsection (1). However, it confers a benefit and in a larger and broader sense, an exemption also confers a benefit. The interpretation of subsection (2)(c) can therefore be analogized to that of an exemption, at least for purposes of applying the aforesaid principles of interpretation.

11. When section 113 is viewed from the foregoing perspective, it will be seen that the charging provision (i.e., subsection (1)) applies in either of two distinct situations. The first is where no tax is payable or paid. The second is

where tax is payable or paid, but the amount is less than that stipulated. These are separate and distinct situations, which cannot and ought not to be conflated, mixed up or confused with one another. The provision conferring the benefit (i.e., subsection (2)(c)) applies to only one of these situations, namely where tax is payable. *Ipso facto*, it does not apply to the other situation, where tax is not payable. This is clear on the face of it. There is no ambiguity or confusion. In our view, the interpretation sought to be placed on subsection (2)(c) by the Tribunal is plainly erroneous. In particular, the finding that the "actual tax payable under Part-1 Division-II of the First Schedule could be zero or otherwise" cannot be accepted. Indeed, with respect, the formulation "zero or otherwise" conveys no meaning. The language of clause (c) is plain. It speaks of tax payable and/or paid. Nothing could be clearer than that. An amount that is zero cannot be regarded as payable or paid in any meaningful sense. Even less so is the case of something that is "otherwise", i.e., a loss. This can, in the present context, be regarded as a negative number, i.e., something less than zero. Can this be regarded as something that is payable or paid? The question answers itself.

12. The submission by learned counsel for the respondent that the interpretation placed by the Taxation Officer could lead to unfair results cannot, with respect, be accepted. We are in the realm of fiscal statutes. The principles are clear and well established. What could perhaps, and at most, be said (although we do not subscribe to this view) is that the Tribunal's interpretation is one reasonable view that can be taken of subsection (2)(c). But, the other view (which in our opinion follows ineluctably) is on this basis at the very least also a reasonable view. The principles are clear. When two reasonable views of an exemption provision (or one that can be analogized to an exemption) are possible, the one against the taxpayer is to be adopted. Even on this basis therefore, the interpretation placed on subsection (2)(c) by the Tribunal cannot be accepted. Learned counsel for the respondent vehemently contended that the interpretation placed on the provision by the Taxation Officer would lead to absurdity. In our view, with respect, that is not so. What the Taxation Officer has done follows from a direct application of settled principles of interpretation of fiscal statutes. Learned counsel also submitted that the proviso to subsection (1) excluded a case of gross loss from the ambit of the minimum tax, whereas a case of net loss (which was the respondent's situation) was not excluded. He contended that to conclude that subsection (2)(c) did not apply to a case of net loss would amount to discrimination. With respect, we are not persuaded that this is the case. On a simple and bare reading and application of subsection (1) the respondent's case comes within the scope of the minimum tax. On no reasonably possible reading does it come within the scope of subsection (2)(c). No question of

discrimination therefore arises. Even otherwise, it is well settled that in fiscal matters, the legislature is given relatively wider latitude in respect of determining the matters that fall (or should fall) within the scope of the charging provision on the one hand and those which, on the other hand, are to be outside the charge or to be exempted from the same.

13. We have also considered the Income Tax Circulars relied upon. In our view, they provide no assistance to the respondent's case. Circular 10/1991 was in relation to section 80-D of the repealed Income Tax Ordinance, 1979. That statute does not appear to have any provision similar to section 113(2)(c). Circular 17/2004 provided an explanation for the changes made to the Income Tax Ordinance by the Finance Act, 2004. Paragraph 18 of this Circular related to section 113(2)(c). It appears that clause (c) was added for the first time to section 113(2) (as it then stood) by means of the Finance Act, 2004, and paragraph 18 of the Circular gave an explanation as to why this had been done. A bare perusal indicates that the paragraph referred only to "profit-yielding companies". It has no relevance for present purposes.

14. We have also considered the case law cited by learned counsel for the respondent. Learned counsel relied on *Pearl Continental Hotel and another v. Government of NWFP and others* PLD 2010 SC 1004, *Anwar Ali and others v. Manzoor Hussain and another* 1996 SCMR 1770, *Searle (Pakistan) Ltd. v. Government of Pakistan and others* PLD 1993 Kar 799 (DB), *Pak-Kuwait Investment Co. (Pvt) Ltd. v. Active Apparels International and others* 2012 CLD 1036 (SHC; SB), *Chenone Stores Ltd. v. Federal Board of Revenue and others* PTCL 2013 CL 1 (LHC), *Lone Cold Storage v. Revenue Officer LESCO* 2010 PTD 2502 (LHC) and *Naseem Mahmood v. Principal, King Edward Medical College and others* PLD 1965 Lah 272. The first mentioned case restates and reaffirms the well established principles of interpretation of fiscal statutes. The second mentioned case does not, with respect, appear to contain any passage that relates to the extract noted in the written synopsis. The third mentioned case states a well established principle regarding the interpretation of charging provisions. The fourth mentioned case relates to a banking matter. The fifth and sixth mentioned cases are cited for principles that apply in their respective contexts but do not, with respect, assist the respondent's case since it is of a different nature. The last mentioned case is in respect of discrimination. As noted above, in our view, this point does not arise in the present context. The cited decisions do not, with respect, assist the submissions made by learned counsel.

15. In view of the foregoing we conclude that the interpretation placed by the Tribunal on section 113(2)(c) was erroneous and cannot be sustained. The

Taxation Officer had correctly interpreted and applied the law. Accordingly, the question referred to us is answered in favor of the Department and against the respondent taxpayer. The impugned order is set aside and this Reference Application is allowed. The Registrar is directed to send a copy of this decision under seal of the Court to the Tribunal.

Sd- Munib Akhtar
JUDGE
7/5/2013

Sd- Ghulam Sarwar Korai
JUDGE 7/5

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Assistant Registrar

HIGH COURT OF SINDH AT KARACHI

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Assistant Registrar