

ORDER SHEET

IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

ICA. No.76447 of 2019

The Commissioner Inland Revenue and others Versus M/s Regency Inn Hotel and another

| Sr. No. of order/ proceeding. | Date of order/ proceeding | Order with signature of Judge, and that of parties or counsel, where necessary. |
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21.5.2024. Mr. Shahzad Ahmed Cheema, Advocate for the appellants.
Muhammad Bilal Pervaiz, Advocate for respondent No.1.

This Intra Court Appeal is directed against Order dated 24.10.2019 of a learned Single Judge-in-Chambers whereby, the constitutional petition of respondent No.1 was allowed and the notice impugned therein was declared to be illegal.

2. The case of respondent taxpayer was selected for audit of its income tax affairs under section 177 of the Income Tax Ordinance, 2001 (the "Ordinance") for tax year 2017 which was conveyed through notice dated 28.8.2018 who challenged the selection by filing a constitutional petition on the ground that insertion of clause 105 of Part-IV to the Second Schedule of the Ordinance through Finance Act, 2018 disallowed selection for audit of a taxpayer under section 177 of the Ordinance who had already faced audit within three years i.e. tax year 2014. This stance of the respondent was accepted by the learned Single Judge-in-Chambers vide Order dated 24.10.2019.

3. Learned counsel for the appellant submits that the learned Single Judge-in-Chambers failed to consider that vide Order dated 24.6.2019 passed in

W.P.No.249168 of 2018 (reported as **2019 PTD 1862**) it was declared that clause 105 of Part-IV to the Second Schedule of the Ordinance had no retrospective effect and dismissed the constitutional petition and that the learned Single Judge-in-Chambers did not correctly construe the ratio decidendi in the said case. Learned counsel for the respondent on the other hand has defended the impugned Order and prayed for dismissal of appeal.

4. Respondent, a registered partnership concern engaged in the business of hotel and restaurant and registered with FBR under NTN.2670394-0, was selected for audit under section 214C of the Ordinance for conducting audit of income tax for the tax year 2014 qua which notice dated 26.10.2015 was issued under section 177 of the Ordinance, necessary record was collected and audit proceedings were completed and amended assessment order dated 29.6.2016 was issued. Later another notice dated 28.8.2018 was issued for tax year 2017 selecting the case for audit under section 177 of the Ordinance which was assailed in constitutional jurisdiction. The precise objection taken by the respondent was that by Finance Act, 2018 clause 105 was inserted in Part-IV to the Second Schedule of the Ordinance whereby the case of a person could not be selected for audit by invoking provisions of sections 177 and 214C where their income tax affairs had already been subjected to audit in any of the three preceding tax years.

5. The learned Single Judge-in-Chambers in deciding the plea inter alia relied upon Order dated 24.6.2019 passed in W.P.No.249168 of 2018 by

another learned Single Judge of this Court in which scope of clause 105 of Part-IV to the Second Schedule of the Ordinance as introduced through the Finance Act, 2018 was examined. Perusal of Order dated 24.6.2019 shows that the notice called into question in W.P.No.249168 of 2018 was dated 14.9.2017 whereas the Finance Act, 2018 by which clause 105 was inserted became effective from 01.7.2018 and such scrutiny was specifically made in the context as to whether proceedings initiated prior in time to effective date shall be covered being "beneficial legislation" which stance was debunked and it was held that notice having been issued on 14.9.2017 prior to insertion of the clause did not attract its fetter and the constitutional petition was accordingly dismissed. It was however observed in paragraph 19 of the said Order as under:

"...Clause 105 was inserted in the Ordinance through Finance Act, 2018 which was promulgated on 01.07.2018. It will take effect from that date. A bare reading of Clause 105 also supports the conclusion that it shall operate from the date of the promulgation of Finance Act, 2018. If the legislature had intended Clause 105 to take effect from a date prior to 01.07.2018, it would have said so explicitly. It is also evident that Clause 105 prescribes legal consequences only for the future. The true import of this provision is simply that selection of a person for audit after 01.07.2018 can be affected if he had been selected for audit in the preceding three years. The selection for audit in the preceding three years which attaches new consequences for future selection after 01.07.2018 does not make Clause 105 per se retrospective in its operation. Put another way, Clause 105 is not a case of prospective law impinging upon prior transactions or rights created under an old law rather it imposes new consequences for the future in respect of an event that

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had happened prior to its introduction in the Ordinance. Clause 105 thus changes present legal rights and obligations with reference to a past event i.e. selection of audit within the time period prescribed by it."

(emphasis supplied)

6. Above noted portion indicates that in the analysis recorded in Order dated 24.6.2019 while holding against such retrospectivity without moorings in effective date, integrity of clause 105 was untouched and in fact its scope was made plain to apply to instances where notice was issued or proceedings were triggered after clause 105 became effective on 01.7.2018. Learned counsel for the appellants has attempted to argue that as a matter of fact clause 105 shall cover three simple calendar years immediately preceding its coming into effect from 01.7.2018 and, as such, the case of the respondents selected in 2014 shall not preclude the department from issuing notice for second audit. This argument is completely untenable and could not be accepted without doing serious violence to "three tax years" in clause 105 which is reproduced as under:


"The provisions of section 177 and 214C shall not apply to a person whose income tax affairs have been audited in any of the preceding three tax years:


Provided that the Commissioner may select a person under section 177 for audit, with approval of the Board."

(emphasis supplied)

The term "tax year" is defined in subsection (68) of section 2 read with section 74 of the Ordinance that clearly denotes the import of the clause and in the case at hand the audit selection already having been

made in the tax year 2014 and by the impugned notice dated 28.8.2018 selection again was made for the tax year 2017 which was as such covered by clause 105. The learned Single Judge-in-Chambers correctly construed clause 105 of Part-IV to the Second Schedule of the Ordinance and annulled the impugned notice being in violation of the said provision. No misreading or non-reading or legal infirmity could be pointed out in the Order so made as to warrant interference. Intra Court Appeal is meritless. **Dismissed**. No Order as to costs showing restraint.


(SHAHID KARIM)
JUDGE


(RASAAL HASAN SYED)
JUDGE

Shahzad

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23/05/24
Examiner J.C.B (Copy Branch)
Lahore High Court, Lahore