KTBA Karachi Tax Bar Association

01ST OF 2024 KTBA ONE PAGER CASE LAW UPDATE (June 07, 2024)

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Dear Members,

A brief update on a judgment by the Appellate Tribunal Inland Revenue on **"Exporters can Carry Forward Excess of Turnover Tax under NTR and Sale of Damaged Imported Raw Material or Finished Goods Is Not FTR"** is being shared with you for your knowledge. The order has been attached herewith the update.

This update is in line with the efforts undertaken by our **"CASE LAW UPDATE COMMITTEE"** to apprise our Bar members with important court decisions.

You are equally encouraged to share any important case law, which you feel that should be disseminated for the good of all members.

You may contact the Committee Convener Mr. Shams M. Ansari or at the Bar's numbers 021-99212222, 99211792 or email at info@karachitaxbar.com & ktba01@gmail.com

(Syed Zafar Ahmed)
President

(Asim Rizwani Sheikh)
Hon. General Secretary

01ST OF 2024 KTBA ONE PAGER
CASE LAW UPDATE
(June 07, 2024)

EXPORTERS CAN CARRY FORWARD EXCESS OF TURNOVER TAX UNDER NTR.

SALE OF DAMAGED IMPORTED RAW MATERIAL OR FINISHED GOODS IS NOT FTR.

Appellate Authority: Appellate Tribunal Inland Revenue
Appellant: Indus Dying & Mfg. Limited
Sections: 113 and 154 of the Income Tax Ordinance, 2001 (the Ordinance)

Detailed judgment was issued on March, 03 2021.

Background: Withholding by bank on export receipts under Section 154 constitutes final tax liability under FTR unless the exporter opts for NTR. In this case, the exporter opted for NTR under Section 154(5) of the Ordinance, while his tax liability under Section 113 on turnover, which is a minimum tax liability exceeded his normal tax liability. Accordingly, the exporter carried forward the excess withholding made under Section 154, which now becomes the advance tax. The Deputy Commissioner disallowed this treatment and so the Commissioner Appeal as well.

Second issue pertained to the sale of imported goods that had suffered damages. The taxpayer offered the same under NTR as sale of damaged raw materials. The Deputy Commissioner classified the same as a commercial import and subjected the same to Final Tax Regime (FTR) instead and so the commissioner appeal as well.

Decision of the Court:

First Ruling of the Court:

Once the appellant chose to opt out of the Final Tax Regime (FTR) under Section 154(5) of the Ordinance, the provisions of section 113 came into effect on export proceeds as these now become local turnover. This entails relinquishing the concessionary taxation under FTR and applying the provisions of Normal Tax Regime (NTR) instead. Notably, the exemptions provided under section 113 of the Ordinance do not exempt export income falling under the minimum tax regime. Therefore, the minimum tax under section 113 of the Ordinance is applicable to income falling under the Normal Tax Regime, even with the caveat of minimum tax.

Second Ruling of the Court:

Regarding the content of Circular No. 2 of 2015, it was ruled that it appeared that there are clear contradictions therein with the provisions outlined in Section 154(5) of the Ordinance, which specifically limits tax deductions on exports to minimum tax. The circular, therefore, expanded its interpretation beyond the intended scope by stating that tax deductions would be minimum tax solely on export income. This interpretation does not align with the legislative intent, as couched in the language of Section 154(5), which does not support such a selective application. If the legislative intent was ever to confine tax deductions to minimum tax on export income alone, the drafting of Section 154(4) of the Ordinance would resemble that of Section 148 and 153, where tax deductions on imports and services are contingent upon income from imports and services only. The absence of this specificity in the drafting of Section 154(5) indicates that the legislature's intent otherwise.

Third Ruling of the Court:

The imported goods sold by the appellant were damaged and hence the stock sold by the appellant were not in the condition as same while were imported, which is the only condition otherwise to be met to be classified as a commercial importer and falling under FTR, which is missing in the present case. Hence, the taxation of income arising from the sales of damaged imported goods would remain under Normal Tax Regime.

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APPELLATE TRIBUNAL INLAND REVENUE, (PAKISTAN) KARACHI

ITA No. ITA/755/KB-2020
(Tax Year 2015)
Under Section 122(1)/129

M/s. Indus Dyeing & Manufacturing Company Limited
5th Floor, Office No. 508, Beaumont Plaza, Beaumont Road,
Civil Lines Quarters, Karachi

...Appellant

Versus

The Deputy Commissioner Inland Revenue
Unit-1, Range-A, Zone- I,
Large Taxpayer Unit,
Karachi

...Respondent

Appellant by : Mr. Zafar Ahmed, ITP.
Respondent by : Mr. Waqas Maqsood, D.R.

ITA NO. ITA/745/KB-2020
(Tax Year 2015)
Under Section 122(1)/129

The Deputy Commissioner Inland Revenue
Unit-1, Range-A, Zone- I,
Large Taxpayer Unit,
Karachi

...Appellant

Versus

M/s. Indus Dyeing & Manufacturing Company Limited
5th Floor, Office No. 508, Beaumont Plaza, Beaumont Road,
Civil Lines Quarters, Karachi

...Respondent

Appellant by : Mr. Waqas Maqsood, DR.
Respondent by : Mr. Zafar Ahmed, ITP.

Date of hearing : 02-02-2021
Date of order : 15-03-2021

O R D E R

Mrs. Shaher Bano Walajahi (Accountant Member): These cross appeals were filed by the tax department as well as the taxpayer against the Order No.05/A-I dated 14.05.2020 passed by the learned Commissioner Inland Revenue-Appeals-I (CIR-A), Karachi. The above appeals are being taken up through this consolidated order.

2. Taking up Taxpayer appeal first we dispose off each of the grounds of appeal issue-wise for the sake of brevity. After examining the impugned orders, submission made by both sides and case laws cited, the appeals are decided in the following manners:

TAXPAYER/APPELLANT'S APPEAL:

3. The appellant/taxpayer has agitated the impugned order on the following grounds dividend into legal and factual grounds separately:

1. *The appellate order passed by the learned Commissioner Inland Revenue – Appeal-I (CIR-A) is bad in law and on facts of the case and may kindly be annulled as it suffers from following infirmities:*

LEGAL GROUNDS:

2. *That the learned CIR-A has erred by confirming the amended assessment on the ground that the law does not require the commissioner to frame a reasoned order under Section 177 of the Income Tax Ordinance, 2001 (the Ordinance), as pronounced under number of judgments of the superior courts.*

3. *That the learned CIR-A has erred by confirming the amended assessment order on the ground that the audit intimation notice fulfilled the criteria provided under the Ordinance.*

4. *That the learned CIR-A has erred that an audit intimation notice can form the basis for the audit proceeding as risky / grey areas for tax audit were never identified by the learned Commissioner Inland Revenue which is violation to the due process of law.*

5. *That the learned CIR-A failed to realize that the issue raised at the assessment level did not fit the criteria mentioned in the definition of "definite information" under the Ordinance.*

6. *That the learned CIR-A failed to realize that the mandatory requirement of Section 122(5) and Clauses (i), (ii) and (iii) of Section 122(5) were not fulfilled, nor ever been confronted as to under which clause of Section 122(5) the case of your appellant falls.*

DISALLOWANCE OF CLAIM OF CARRY FORWARD OF TAX CREDIT UNDER SECTION 113(2C) OF RS 97,792,196/- AFTER OPTED FOR NORMAL TAX REGIME (NTR)

7. *The learned CIR-A has erred by not granting your appellant the benefit of carryforward of tax credit under Section 113(2C) of Rs 97,792,196/- even though in para 6 of Order in appeal the learned CIR-A has given his opinion that after the option of NTR minimum tax under Section 113 of the Ordinance would apply on export sales.*

8. *That the learned CIR-A has failed to understand that exclusion available from the vires of Section 113 of the Ordinance is only for incomes falling under final tax regime and there is not a singular provision which excludes the vires of Section 113 of the Ordinance for income falling under Normal tax regime even with a caveat of minimum taxation.*

9. *That the learned CIR-A has failed to understand that the vires of the provision of Section 113 is applicable on turnover from all sources, which after the option of NTR would also include export sales.*

10. *That the learned CIR-A has erred in accepting that there lies no conflict in the provisions of Section 154(5) of the Ordinance and Circular No 2 of 2015. Whereas the circular has given an interpretation which is superfluous with the provisions of Section 154(5).*

11. *That the learned CIR-A has erred by not providing their findings on the below grounds:*

a) *The implication on relying on provisions of the circular in the context of increase in the rate of minimum tax under section 113 of the Ordinance in following tax years.*

b) *Once after the option for NTR has been filed and right for taxation under FTR has been relinquished, the payment under 154 will now stand pari pasu as an advance tax against the eventual tax liability of the company.*

c) *If taxpayer is not allowed to carry forward its minimum tax credit, the introduction of sub section 154(5) would become redundant.*

TAX ON COMMERCIAL IMPORT OF RAW MATERIAL UNDER FINAL TAX REGIME OF RS 4,276,760/-

12. *That the learned CIR-A has erred by confirming the amended assessment order and treating your appellant as a commercial importer on the income arising from import and its subsequent trading of raw cotton under Section 148(7) of the Ordinance, on the pretext that the raw cotton was sold without any value addition whereas, there is not a singular provision where such condition is mentioned in the Ordinance.*

13. *That the learned CIR-A has erred by confirming the amended assessment order whereas, your appellant did not fall in the category of a commercial importer as the raw cotton was not sold in defective condition and not in the same condition.*

14. *That the learned CIR-A has erred by confirming the amended assessment order without providing any detailed or satisfactory conclusion for his decision and simply labelled the same as "too simplistic" and "being illogical".*

15. *That the learned CIR-A failed to realize that it was compulsive on the part of your appellant to sell the faulty / redundant stock of imported raw cotton because it was not suitable for usage in production.*

16. *That your appellant craves permission to alter, amend, delete or add further grounds of appeal before or at the time of the hearing of the case.*

2. Brief facts of the case are that appellant is a public limited company listed on the Pakistan Stock Exchange and is engaged in the business of manufacturing and sale of yarn both locally and internationally. The case of the taxpayer was selected for audit u/s

177 of the Ordinance by the Commissioner Inland Revenue and taxpayer was also intimated regarding selection of its case for audit by the Commissioner Inland Revenue, Zone-I, LTU, Karachi through letter issued on Iris an online interface of the FBR under Barcode 100000031940050 dated 29.03.2018. Subsequently, the learned officer issued show cause notice under section 122(9) of the Ordinance. In response, the appellant replied. The proceedings were culminated by the DCIR under Section 122(5) of the Ordinance. The appellant filed appeal against the order with the Commissioner (Appeals) who through its order dated 14.05.2020 under section 129 of the Ordinance confirmed the order of the DCIR.

3. On the date of hearing, Mr. Zafar Ahmed, ITP attended the case proceedings on behalf of the appellant/taxpayer while Mr. Waqas Maqsood, DR attended on behalf of the Department.

4. The learned AR argued the appeal on the following arguments as under:

ARUGMENTS OF THE LEARNED A.R

GROUND NO. 2 TO 6; LEGAL GROUNDS

5. It is argued that the learned CIR-A has confirmed that the Commissioner Inland Revenue is not required to frame the reasoned order under section 177 of the Ordinance which is against the explicit provisions of the section 177 of the Ordinance and verdicts pronounced by Appellate Authorities/ Courts. The relevant para of section 177 of the Ordinance is reproduced below for ready reference:

> ***SECTION 177 - AUDIT.***— *(1) The Commissioner may call for any record or documents including books of accounts maintained under this Ordinance or any there law for the time being in force for conducting audit of the income tax affairs of the person and where such record or documents have been kept on electronic data, the person shall allow access to the Commissioner or the officer authorized by the Commissioner for use of machine and software on which such data is kept and the Commissioner or the officer may have access to the required information and data and duly attested hard copies of such information or data for the*

purpose of investigation and proceedings under this Ordinance in respect of such person or any other person:

Provided that—

(a) the Commissioner may, after recording reasons in writing call for record or documents including books of accounts of the taxpayer; and.....

6. *Furthermore, our point wise arguments in support of our contention are given in ensuing paragraphs:*

7. *The grounds mentioned in the intimation letter issued by the Commissioner cannot form the basis for income tax audit under Section 177 of the Ordinance because risk/grey areas have not been identified which is violation of the due process of law.*

8. *The Honorable Lahore High Court in WP No. 4691 of 2010, has instructed to disclose the reasons, in writing, by the Commissioner-IR for conducting the audit affairs of the taxpayer before initiating the audit proceedings and that too by providing an opportunity of being heard and thereafter, through a reasoned order may conduct the audit if so necessitated. Relevant text of the said instruction is being given hereunder;*

> ***In the case of Kohinoor sugar Mills Vs GOP reported as 2018 PTD 821***
> *I direct the concerned Commissioners, before proceeding further, to disclose and communicate reasons to the taxpayers in writing, provide them an opportunity of hearing, decide the objections through reasoned orders and thereafter proceed further (if necessary) justly, fairly and strictly in accordance with law. In cases where reasons have already communicated, the Petitioners may file their objections and defenses which shall be dealt with in accordance with the law and procedure enunciated above and such adjudication shall precede the audit (if any).*

9. *Above Order is based on a benchmark Judgment of the Supreme Court of Pakistan wherein it was well settled, that the Commissioner is not only required to disclose reasons for conducting the audit but also to provide a reasonable opportunity to the taxpayer to defend its position on the reasons raised there by. The extract of the reported case law 1994 Tax 317 and CP No. 1664-1665/2009 is reproducing as under;*

> ***In the case of CIT Vs Fatima Sharif Textile reported as 2009 PTD 37***
> *The law settled by the Hon'ble Supreme Court of Pakistan in CIT vs. Fatima Sharif Textile, Kasur (1994 Tax 317) and CP No. 1664-1665/2009 (Pakistan Mobile Communications Limited case)*

still holds the field. It is therefore held that the Commissioner is not only required to disclose reasons to the taxpayer in writing for calling for his record, documents, books etc but also grant him an opportunity to defend himself by affording him a hearing. It is only after the objections have been decided through a reasoned order that he may, if necessary, proceed with the audit. The learned counsel for the Respondents on instructions have categorically and emphatically stated that indeed this procedure would be followed by the Commissioners in letter and spirit, which is in line with the law laid down by the Hon'ble Supreme Court of Pakistan as noted above.

10. In view of the above clear directions of the Superior Court, the taxpayer has the right to justify its position as confronted by the Commissioner and it is only after this defence by the taxpayer, the Commissioner may conduct audit affairs by framing a reasoned order.

11. Moreover, we argue that roving inquiries and fishing expeditions have always been disapproved by superior courts as being in violation to the due process of law. Therefore, grounds mentioned in the intimation notice cannot form the basis for the audit.

12. In view of the above, it is argued that the commissioner did not follow the due process of law for tax audit as he proceeded without framing the reasoned order. It is a well settled principle of law that if the very foundation of an action is illegal and without jurisdiction the whole super structure built upon it cannot validly and legally stand. We would like to quote the following case laws on the above point:

1. ***In the SC case of Mansab Ali Vs. Amir reported as 1971 PLD SC 124,***
   "It is an elementary principle that if a mandatory condition for the exercise of jurisdiction by a Court, tribunal or authority is not fulfilled then the entire proceeding which follow becomes illegal and suffer from want of jurisdiction."

2. ***In the SC case of Almas Ahmed Vs. Govt of Punjab reported as 2006 SCMR 783,***
   "It is a basic principle that if a mandatory condition for the exercise of jurisdiction by a Court is not fulfilled then the entire proceeding which follow becomes illegal and suffer from want of jurisdiction."

3. ***In the SHC case of Muhammad Azim Vs. CIT reported as (1991) 63 TAX 143 and in the following cases, it was held;***
   "that since the initial action or assumption for invoking provisions of u/s. 177(1), 177(2) and 177 (10) of Income Tax Ordinance, 2001 by the Commissioner are incorrect, illegal and contrary to the law, the whole super structure built upon it is also illegal and void ab-initio"

4. ***In the SHC case of Schlumberger Seaco Inc Vs. CIT reported as (1992) 66 TAX 230,***
"And if, on the basis of the void order subsequent orders have been passed either by the same authority or by other authorities, the whole series of such orders, together with the super structure of rights and obligations built upon them, must, unless some statute or principle of law recognizing as legal the changed position of the parties is in operation, fall to the ground because such orders have as little legal foundation as the void order on which they are founded."

5. ***In the Tribunal case of Legler Nafees Denim Ltd Vs CIT reported as 2006 PTD 673, it was held;***
"Notice issued for assumption of jurisdiction was defective subsequent action could not be termed as legal"

6. ***In the Tribunal case of Atif Waheed Vs Sardar Taj reported as 2007 PTD 2601, it was held;***
"Notice under section 122 of Income Tax Ordinance, 2001 was without jurisdiction having not mentioned the provisions of exact law- subsequent proceedings being based on illegal notice would crumble to ground and cancelled."

13. Based on the above and considering the facts and circumstances of the case it is prayed that the impugned order of the learned CIR-A be declared void ab-initio and the same is to be annulled.

14. The CIR-A has confirmed the order of DCIR even though the DCIR was not in procession of definite information, hence the mandatory requirement of Section 122(5) of the Ordinance was not fulfilled. It is argued that the audit proceedings are a process to reach to a conclusion under Sections 122(1) and 122(5) and then an assessment within the said provision can be altered/modified. All the assessments have to be under Section 122 and before embarking upon such proceedings, the requirements of Section 122(5) are to be fulfilled in letter and spirit. The selection of the audit to itself does not mean an assessment or modification of assessment. Audit proceedings may be dropped if department could not find any justifiable material evidence based on "definite information".

15. The Hon'able Lahore High Court in its recent decision 2013 PTD 884 (H.C. Lahore) on the subject of "definite information" with reference to section 122(5) of the Ordinance has held as under: -

> *"The term "definite information" in section 122(5) of the Ordinance is not just any information but definite enough to satisfy the concerned officer that income chargeable to tax of an assessee has escaped assessment or total income of an assessee has been under- assessed, etc. `definite' means indisputable,*

known for certain, explicitly precise, clearly defined, leaving nothing to implication, established beyond doubt and cut and dried. Definite information is, therefore, that select information which falls within the restrictive meaning of the word "definite" explained above."

16. The word "acquired" used in section 122(5) of the Ordinance which literally means to "gain possession of, in the present context connotes that the information already exits and has to be picked up from the records or documents. This acquisition provides no margin for incomplete, imprecise and inexact information to be completed through further calculation or processing as that would not be acquiring information but analyzing it. Reading of Section 122(5) of the Ordinance, therefore, shows that information in a definite, final and conclusive form must already exist in some document or record at the time of acquisition. Any information which is incomplete or requires further processing falls outside the domain of definite information and can best pass for a departmental opinion, judgment, guesstimate, approximation or estimate.

17. Your appellant quotes the following case laws on the point of definite information for your perusal:

1. *In the SC case of CIT Vs. Eli Lilly Pakistan (Pvt) Ltd reported as 2009-PTD-1392*

2. *In the Tribunal case of Maroof Gilani Vs. Ishrat Hussain reported as 102-Tax-246*

3. *In the Tribunal case of Malik Tahir Masood Vs. Muhammad Akram reported as 102- Tax -193*

4. *In the Tribunal case of Javed Shehryar Vs. Iqbal Hashmi reported as 102- Tax-284*

18. Further, It is a trite law that the provisions of sub Section (5) of Section 122 of the Ordinance allows amendment of any assessment only when the department is in a possession of definite information and not otherwise, and in this context the learned DCIR was under legal obligation to specifically identify the nature of suppressed income and issue notice in terms of clauses (i), (ii) and (iii) of sub Section (5) of Section 122 of the Ordinance highlighting the fact under which category appellant's case falls. Furthermore, before making any additions to the assessed income under the grab of audit under Section 177 and amend assessment under Sections 122(1) & 122(5), the tax department is required to acquire legal jurisdiction under the provisions of Section 122(5). This can only be done to modify or alternation or amend the already assessed income only by establishing that appellant income is either under assessed or assessed at too low rate or subject to excessive relied or refund and to be based on

definite information. However, there is no specific finding in terms of "Definite Information". There was no grave error in deemed assessment. The learned DCIR has to qualify through audit that the deemed assessment is under assessed or as the case may be in terms of Section 122(5) [subject to definite information]. The requirement of Section 122(5) is to be strictly fulfilled in letter and spirit. The initiation of assessment proceeding through notices under Sections 177, 177(6) and 122(9) is legally not justified and order is passed in consequence thereof being unlawful are not sustainable and ab-initio void.

19. Based on the above and considering the facts and circumstances of the case it is prayed that the order be declared void ab-initio and the same is to be annulled.

ARGUMENTS OF LEARNED RESPONDENT:

20. The audit was selected and culminated after following all the preconditions given under the Ordinance.

FINDINGS / OPINION OF THE COURT

21. I have heard both sides, I am also of the view that the contention of the learned AR is devoid of any merits as the audit intimation notice issued by the respondent duly fulfilled the criteria given under section 177 of the Ordinance and the law does not require the commissioner to frame a reasoned order under section 177 of the Ordinance. Moreover, the issues taken up by the respondent fall within the ambit of definite information acquired from audit. The case law cited by the appellant are distinguish from the case in hand. Hence, the Commissioner(appeals) was right to dismiss the case of the appellant on this ground.

GROUND NO. 7 TO 11; DISALLOWANCE OF CLAIM OF CARRY FORWARD OF TAX CREDIT UNDER SECTION 113(2C) OF RS 97,792,196/- AFTER OPTED FOR NORMAL TAX REGIME (NTR)

22. It is argued before the Honorable ATIR that the learned CIR-A has given a mixed finding in his order. Even though he has accepted our plea that the vires of minimum tax under section 113 of the Ordinance would be applicable on your appellant, however he felt short of allowing your appellant the benefit of carry forward of this minimum tax payment in excess of Corporate Rate Liability for adjustment against future tax liability.

23. In this respect, it is argued that once after your appellant has opted out of final tax regime (FTR) under Section 154(5) of the Ordinance, rules of assessment for our income tax liability would, accordingly, be shifted from rules applicable to income under FTR to rules as would now be applicable to income under Normal Tax Regime (NTR) and that will remain discretely the same for taxation of both local as well as exports sales.

24. This implies that all the provisions related to NTR as provided for under the Ordinance will invariably be applied on your appellant instead of provisions related to FTR and that too without any exception or exemption. This is argued on the basis that there is not a singular provision given under the Ordinance which provides for any exception to the rule.

25. The exception the learned DCIR had carved out has no legal basis under the Ordinance, as there lies no conflict under the two provisions of minimum taxes. What needs to be understood here, which we would like to emphasize here remains the fact that once after the option for NTR has been filed and right for taxation under FTR has been relinquished, the payment under 154 will now stand pari pasu as an advance tax against the eventual tax liability of the company; no matter with a caveat of minimum taxation. It is now this new advance tax payment which is adjusted against the normal tax liability of the company. In the event, the normal tax would be more than tax deductions, which this advance tax could not cover, the resulting additional tax payment would be made.

26. On the similar lines if the normal tax happens to be lesser than this tax deduction, the said deduction would not be refundable to your appellant. The minimum tax under Section 113 would be calculated to be payable anyway and the excess of this minimum tax liability over the normal corporate tax liability will be carried forward as provided for. Hence, therefore, even though tax deducted is being treated as minimum tax under Section 154(5) of the Ordinance, however, after the option to come out of final tax regime the same deductions would now fall under NTR as mere advance tax and would also be liable for adjustment against the minimum tax under Section 113 of the Ordinance.

27. Given the above legal position, it would not be out of context to reproduce hereunder the relevant text of Section 113(2)(c) of the Ordinance for your ready reference and it is squarely argued that it will also be applicable to our case as one of the Rule of NTR, once after the income is being assessed under NTR which the learned CIR-A has failed to allow.

Section 113(2)(c); Minimum Tax;

(c) where tax paid under sub-section (1) exceeds the actual tax payable under Part I of Division I, or 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.....

28. A plain perusal of the above reveals that there lies no ambiguity in the claim of excess of minimum tax paid under Section 113 of the Ordinance. Hence, it is reiterated that after filing the option for NTR, the provisions of Section 113 becomes applicable as well with its chargeability and exemption clauses both which includes, last but not the least, the provision of carry forward of Minimum tax paid in excess of corporate tax under Section 113 (2)(c) of the Ordinance.

Export sales after opt out is not excluded from the vires of Minimum Tax u/s 113:

*29. The learned CIR-A has misinterpreted the provisions of Section 154(5) of the Ordinance read with Circular No. 02. Of 2015 and has not appreciate the legal position that Section 113(2) duly provides for the **EXCLUSION** of taxes paid under the Ordinance against which credit cannot be given. Relevant text of Section 113 of the Ordinance is being reproduced below for your ready reference:*

> ***113. Minimum tax on the income of certain persons***
> .....*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 the percentage as specified in column (3) of the Table in Division IX of Part-I of the First Schedule of the amount representing the person's turnover from all sources for that year:*
>
> ***"Explanation.*** -
> *For the purpose of this sub-section, the expression "tax payable or paid" does not include-*
> *tax already paid or payable in respect of deemed income which is assessed as final discharge of the tax liability under section 169 or under any other provision of this Ordinance; and*
>
> *(b) tax payable or paid under section 4B.*

30. It is patently clear that Exclusions from Section 113 of the Ordinance have been mentioned in the above explanation which excludes income falling under FTR. Provisions of Section 154(5) of the Ordinance is not in the Exclusion list.

Conflict between the provision of main law and circular:

31. The learned CIR-A has erred by stating that their lies no conflict in the provisions of Section 154(5) of the Ordinance and Circular No 2 of 2015 and the learned DCIR was correct to follow the provisions of Circular No. 02. of 2015 which states that tax deducted on exports proceeds will be treated as minimum tax on export income and income from other than export sales would be taxed as before. In this respect,

your appellant argues that Section 154(5) of the Ordinance only states that such tax would be minimum tax whereas the circular has added phrase "on export income" after the phrase minimum tax, hence the circular has stretch the wordings of Section 154(5) beyond its original wordings thereby restricting the scope of tax deduction on export proceeds to export income only. This interpretation of the circular is not only incorrect but is also against the provisions of main law. It is now a settled proposition of law that if there is a conflict in the main law and the subordinate law, the provisions of former shall prevail over the latter.

32. In support of our arguments, your appellant like to quote the following case laws:

In the case of An Industries (Pvt) Ltd Vs GOP reported as 2017 PTD 665: *August Supreme Court in Suo Motu Case No. 11 (PLD 2014 Supreme Court 389) and Suo motu case No. 13 of 2009 (PLD 2011 Supreme Court 619) held that rule making body cannot frame rules in-conflict with, or in derogation of the substantive provisions of the law or statute.*

In the case of Central Insurance Company Vs CBR reported as 1993 PTD 766: *At this juncture, it will be pertinent to refer to the following observations as to the status of the Central Board of Revenue's interpretation of law, made by Cornelious C.J. in the case of The Commissioner of Income Tax, East Pakistan, Dacca v. Noor Hussain (PLD 1964 SC 657):*
``In the view of my learned brother Fazle Akbar the benefit in law cannot commence from any earlier date than that of the instrument by which the firm is constituted. He has at the same time observed that ``the course pursued by the Board'' as appearing from Circular No.8,`` seems to be correct''. In my view, if there is a departure from the law involved in the provision for relaxation contained in the Circular, then that Circular is to the extent of the deviation, invalid and ineffective, and power thereunder is illegally exercised. The impression of such departure conveyed by the following passage in the Circular, viz.

On a strict interpretation of the law, a firm can be registered only from the date on which the partnership deed has been executed. Since this would create. hardship, the Board is disposed to agree to the benefit of registration being allowed for the full previous year, provided of course, the other conditions laid down for the registration of the firms under section 26-A are fulfilled.

The Board's view as to the interpretation of law do not have the force of law, and the expectation would be, particularly where a fiscal statute is involved which should be implemented with strict

impartiality, that references to inclination towards relaxation or otherwise would have been avoided''

2014 PTD 1187: *In light of provisions of section 206 of the Ordinance, 2001 FBR may issue circulars to provide guidance to the taxpayers and its functionaries. The circulars shall be binding on FBR functionaries but quite amazingly at the same time it shall not be binding on a taxpayer. Similarly any circular/clarification issued by the FBR is not binding on us being a judicial authority."*

FBR is not empowered by the statute to clarify, interpret and-- explain the legal provisions of Ordinance. That is why taxpayers have intentionally been excluded from the domain of circular/clarification venture of FBR. The powers vested u/s 206 of the Ordinance are of administrative nature having clear restriction to explain the legal issues.

A statute is required to be read as a whole and not in a piecemeal manner. Even otherwise FBR has no power to alter the tax liability of a person by issuing an SRO or circular or by making a `clarification' that is actually an "interpretation of law" in the garb of "clarification" which is also unwarranted under the law. The tax liability of a person can only be determined/altered/re-determined by competent legislature. The interpretation of law is the sole prerogative of the courts with the Hon'able Supreme Court having the final say in the matter.

Redundancy:

33. What may seem perplexing here that in the Tax Year 2015 tax withholding under Section 154 of the Ordinance was 1% and the rate of minimum tax under Section 113 of the Ordinance is also 1% due to which there is no impact in the overall tax liability of your appellant.

34. It is argued that the learned CIR-A has passed the order without given rebuttal on the issue raised by your appellant that for the sake of argument if contention of the learned DCIR is accepted than the taxability of your appellant on income from export proceed under Section 154 of the Ordinance after opted out from FTR would be considered at 1% as minimum tax in the said section even in Tax Year 2019 where the rate of Minimum tax under Section 113 of the Ordinance is 1.25% or in Tax Year 2020 where the rate is 1.50% which would lead to anomalous result.

35. It is also argued that the learned CIR-A has passed the order without given rebuttal on the issue raised by your appellant that once after the option for NTR has been filed and right for taxation under FTR has been relinquished, the payment under 154 will now stand pari pasu as an advance tax against the eventual tax liability of the company.

36. It is also argued that the learned CIR-A has passed the order without given rebuttal on the issue raised by your appellant that if taxpayers (for the sake of argument) is not allowed to carryforward its minimum tax credit, the introduction of sub section 154(5) would become redundant as there would remain no ostensible reason for your appellant to opt out of FTR, as even after the option of opt out your appellant is required to bifurcate its expenses and is unable to claim the excess of minimum tax paid under Section 113 of the Ordinance over the corporate tax to next years. We would like to quote the following case laws on the point of ***redundancy****:*

1. In a SC case of Muhammadi Steamship Company Vs Commissioner of Income Tax (Central) Karachi in Civil Appeal No K-69 of 1964, it was held;

"But it is a well-established rule of interpretation of statues that no words in a statute are to be treated as surplusage or redundant we cannot ignore these words."

2. In the SHC case of Commissioner Income Tax Vs Kamran Model Factory reported as (2002) 86 Tax 39, it was held;
"Every word used in a statute has to be given effect to and no word or provisions of a statute is to be treated as surplusage and redundant."

37. Hence, it is argued that unadjusted tax credit claimed by your appellant in the return of income amounting to Rs 97,792,196/- under Section 113(2)(c) of the Ordinance is to be allowed to your appellant.

ARGUMENTS OF LEARNED RESPONDENT:

38. The Circular clearly state that tax deducted on export sales as minimum tax on export income only and any other income would be taxed under normal tax regime separately. This minimum tax deducted on export sales cannot be equated as minimum tax under section 113 of the Ordinance and if the appellant wants to take benefit of section 113(2)(C) of the Ordinance, it would need to pay tax under Section 113 separately and the same cannot be adjusted from tax deducted under section 154 of the Ordinance.

FINDINGS / OPINION OF THE COURT

39. I have heard both the learned representatives at length and I am in view that the provision of section 113 are applicable on export proceed once the appellant has opted out from Final Tax Regime (FTR)

under section 154(5) of the Ordinance thereby right for taxation under FTR is relinquished and the provisions of NTR becomes applicable, therefore, minimum tax under section 113 of the Ordinance would also be levied on export sales.

40. Further, the exclusion list given under Section 113 of the Ordinance also does not exclude incomes falling under minimum tax regime from its ambit. Hence, minimum tax under section 113 of the Ordinance is also applicable on income falling under Normal Tax Regime even with a caveat of minimum tax.

41. As far as the content of circular No 02 of 2015 is concerned, I am afraid the same are clearly contradictory with the provisions of Section 154(5) of the Ordinance. Section 154(5) of the Ordinance restricts the tax deduction made on export as minimum tax whereas the circular has stretch the wordings beyond its mandate to state that tax deduction would be minimum tax on export income only. This clearly is not the intent of the law as the provisions of section 154(5) of the Ordinance has not been drafted in much a manner. Had it been the intent of the law to restrict the tax deduction as minimum tax on export income only the drafting of Section 154(5) of the Ordinance would have been similar to the drafting of Section 148 and 153 of the Ordinance. For better understanding the provisions of Section 154(5), 148 and 153(1)(b) are reproduce hereunder:

> ***Section 154(5):*** *The provisions of sub-section (4) shall not apply to a person who opts not to be subject to final taxation:*
>
> *Provided that this sub-section shall be applicable from tax year 2015 and the option shall be exercised every year at the time of filing of return under section 114:*
>
> *Provided further that the tax deducted under this sub-section shall be minimum tax.*
>
> ***Section 148:*** *The tax required to be collected under this section shall be a final tax except as provided under sub-section (8) on the income of the importer arising from the imports subject to*

sub-section (1) and this sub-section shall not apply in the case of import of .....

Section 153: *The tax deductible under clauses (a) and (c) of sub-section (1) and under sub-section (2) of this section, on the income of a resident person or, shall be final tax.*

Provided that,
(a) .....
(b) tax deductible shall be a minimum tax on transactions referred to in clause (b) of sub-section (1);

42. It is clear from the wording of the above provisions that the intent of the legislature under section 154(5) is quite clear and precise as had it been the intent of the legislature to make tax deduction on export as minimum tax on export income only, it would have made it intent quite clear while drafting section 154(5) of the ordinance like it has drafted under section 148 and 153(1)(b) of the Ordinance where tax deduction on import and services has been made dependent on import income and service income only which is clearly missing in drafting of section 154(5) of the Ordinance.

43. Moreover, even the commissioner (appeals) in Para 6 of his order has accepted that the provisions of section 113 would be applicable on export sales after the appellant has opt out from FTR however, in Para 6.3 of his order he denied the appellant to claim the benefit of carry forward to minimum tax paid in excess of corporate tax under section 113(2)(C) of the Ordinance on the pretext that the circular is not contradictory to the provisions of law. Hence, the commissioner (appeals) was in two (02) frames of mind and was unable to frame a judicious order after going through the facts of the case.

44. The commissioner (appeals) has also failed to give his opinion on the consequence in current tax year i.e. in tax year 2020 and onwards, if the view point of the respondent is agreed upon, when the rate of minimum tax on turnover under section 113 of the Ordinance is 1.5%. In my humble opinion, if the contention of the respondent is accepted, it would mean that the person opting out of FTR would only be liable to

pay tax at 1% on export sales instead of minimum tax at 1.5% which cannot be intent of law and would lead to erroneous result.

45. In view of the above discussion, the action of the learned officer and commissioner (appeals) is not in accordance with the law. The appeal of the appellant is upheld on this point.

GROUND NO. 12 TO 15; TAX ON COMMERCIAL IMPORT OF RAW MATERIAL UNDER FINAL TAX REGIME OF RS 4,276,760/-

46. It is argued that the learned CIR-A has confirmed your appellant as a commercial importer on the income arising from the import and subsequent sale of raw cotton under Section 148(7) of the Ordinance and has levied tax of Rs. 4,276,760/- under final tax regime. It is argued that your appellant frequently imports raw cotton for usage in its manufacturing facilities. Out of these cotton imports, a minor portion of the imported raw cotton turned out to be of sub-standard quality. Since your appellant manufactures high quality products, which is evident from the fact that most of the sales of your appellant are export sales hence, it was compulsive on the part of your appellant to sell the sub-standard stock of imported raw cotton because of the simple reason that such raw cotton was not suitable for usage in production of export quality products. Had your appellant not sold such sub-standard stock, it would have incurred a loss. Moreover, the quantities of raw cotton sold bears small fraction of our total import volume of raw cotton.

47. Moreover, one of the main conditions for being a commercial importer is to sell the goods imported in the same condition. Whereas, the CIR-A has erred in his order by stating that the condition of value addition is necessary to be opt out from the definition of commercial importer. It is argued that the condition of value addition is not mentioned in any provisions of the Ordinance as a prerequisite for falling out from the definition of commercial importer.

48. It is argued that since the raw cotton had become sub-standard for your appellant, it cannot be said that your appellant has sold the goods in the same condition as imported. If the condition of the imported goods had not been deteriorated it would have been used by your appellant in production instead of it being sold at a loss. Hence, your appellant cannot be treated as a commercial importer as it does not meet the condition to be classified as a commercial importer.

The CIR-A has not given any detailed finding of his own for labelling your appellant as a commercial importer, even though the raw cotton sold by your appellant was not in the same condition and has only

used the term too simplistic and being illogical as a basis to form his conclusion which cannot be termed as sufficient.

49. Your appellant being a prudent businessman has sold the sub-standard stock of imported raw cotton because it was not suitable for usage in production and has therefore, minimized its business loss. Hence, it is craved that your appellant should not be penalized for selling such imported goods without any value addition on the ground of commercial expediency and the taxation of income arising from the sale of such imported goods should remain under Normal Tax Regime.

50. Similar controversy arose in Tax Year 2012 as well, in which the department has accepted the plea of your appellant and taxed the income arising from sale of such sub-standard imported goods under normal tax regime at the corporate tax rate of 35%. Copy of the Assessment Order of tax year 2012 is enclosed. Hence, it is argued that since the department has already settled this issue by treating the income from sale of sub-standard cotton under Normal Tax Regime and that too with the very taxpayer, the same principles should be followed in this year as well.

51. It is submitted that the cotton sold by the appellant was in damaged condition and was accordingly sold out locally in wake of business prudence and to minimize its business loss.

52. Moreover, we would like to draw your attention towards the judgments of the Honorable High Courts of Pakistan, wherein the Honorable Court has allowed the appeal in the favor of the appellant of the point of commercial expediency. The Relevant para is reproduced below for your ready reference:

> ***In the case of CIT Vs Gelcaps (Pvt) Ltd reported as 2009 PTD 331:***
> *We are, therefore, of the considered view that the appellant rightly invested the balance money in fixed deposits and earned interest thereon so that its losses could be minimized. This is, in our judgment, best example of commercial expediency. We are, therefore, of the view that the interest income of the appellant earned under the facts and circumstances of these appeals was an income from business, and, as such, it was rightly set off against the interest payable before the balance was capitalized for the simple reason that it was an expenditure admissible under section 23(1)(vii) of the Income Tax Ordinance, 2001.*

53. In view of the above submissions, the action of the learned CIR-A for treating the income from the sale of such imported goods as FTR is liable to be quashed on the point of commercial expediency.

ARGUMENTS OF THE LEARNED RESPONDENT

54. The commissioner (appeals) was correct to treat the same under FTR as the imported raw cotton was sold without nay value addition.

FINDINGS / OPINION OF THE COURT

55. I have heard both sides and I am of the view that being prudent businessman, the appellant has sold the damaged stock of imported raw cotton because it was not suitable for usage in production of its high end products, which are exported by the appellant, and has minimized its business loss. The same is also visible form the audited accounts of the appellant as the same stock had been sold at a loss. Since the imported goods sold by the appellant was damaged and hence the stock sold by the appellant were not in the same condition as imported, which is the only condition to be met to be classified for being a commercial importer, subsequently falling under FTR, which is missing in the present case. Hence, the taxation of income arising from the sale of such imported goods would remain under Normal Tax Regime which has been accepted by the respondent in the case of the appellant himself in tax year 2012 as well. The commissioner (appeals) had rejected the plea of the appellant on the pretext that such goods were sold without value addition and hence, falls under FTR whereas in my humble opinion the condition of value addition has not been mentioned in the ordinance and the only condition mentioned to be satisfied is of same condition. The relevant section 153(5) of the Ordinance is reproduced below:

> ***Section 153(5):*** *Sub-section (1) shall not apply to —*
> *(a) a sale of goods where the sale is made by the importer of the goods and tax under section 148 in respect of such goods has been paid and the goods are sold in the same condition as they were when imported.*

56. In view of the above discussion, the appeal of the appellant on this point is also upheld.

DEPARTMENTAL 'S APPEAL:

57. The appellant/taxpayer has agitated the impugned order on the following grounds:

1. *That the order passed by the learned CIR (Appeal-I) dated 14.05.2020 is bad in law and on fact of the case.*
2. *That the learned CIR(A) has erred in holding that there is no need for apportionment of expenses between export and other incomes, whereas the tax deducted U/s 154 of the Income Tax Ordinance, 2001 is minimum tax liability on income attributable to exports provided under second provisio to section 154(5) of the Income Tax Ordinance, 2001.*
3. *That the attribution of expenses to various classes of income is required in order to bifurcate the streams of income correctly and determine minimum tax liability of the Taxpayer.*
4. *That the appellant craves for permission to add, alter amend or to bring fresh grounds of appeal, before, or at the time of hearing of appeal.*

ARGUMENTS OF TAXPAYER

58. As the income arising from export has fallen under normal tax regime after the option of opt out, there remains no reason to prorate expense. Proration of expenses is only applicable when there are two types of income; one falling under normal tax regime and other falling under final tax regime.

59. **Without prejudice to the above** ground, which shall remain the primary ground of appeal that there does not lie any reasoning for proration, even if the department were to prorate the expenses, the same should be made based on the criteria set out in Circular No 5 of 2000 and Circular No 20 of 1992 and the dictum decided by the judiciary where the FOB value of export sales i.e. amount of export sales after deducting freight charges should be used to prorate

expenses between local and export sales which has not been followed by the department in the instant case.

FINDINGS / OPINION OF THE COURT

60. Since the issue has already been decided in the Ground No. 7 to 11 in favour of the taxpayer appellant that after the option is exercised for the export income the same would fall under NTR. Hence, there is no need for apportionment of expenses, therefore, the appeal of the department is rejected. Moreover, it is worth mentioning that had it been necessary to prorate expenses even then the same has not been made within the four corners of law, as highlighted by the taxpayer, as the formula used by the department to prorate expenses is also not in consonance with law and on the dictum and guidelines provided by the superior judiciary.

61. Consequently, the cross appeals are decided in the manner indicated above.

----------Sd/----------
(SHAHER BANO WALAJAH)
ACCOUNTANT MEMBER

*Fayaz/APS**

Indus Dyeing & Manufacturing
Zafar Ahmed.
CTO.

m/s. Indus Dyeing & Manufacturing.
M/S. Erum / Fahad
16/03/2021 2pm.

16/03/2021