# TaxHelpline 2013/222

## APPELLATE TRIBUNAL

I.T.A. No. 1066/LB of 2013, decided on 15th August, 2013. Date of hearing: 20th June, 2013

Before Jawaid Masooa Tahir Bhatti, Chairperson and Sajjad Haider Khan, Accountant Member

Tahir Razzaque Khan, FCA for Applicant. Iftikhar Ahmed Baloch, DR for Respondent

**Raja ABDUL ISLAM**
**vs**
**COMMISSIONER INLAND REVENUE, REGIONAL TAX OFFICE, GUJRANWALA**

**ORDER**

Through this appeal the appellants has objected against the impugned order of the learned CIR(A) dated 29-11-2011 on the following grounds:--

"(2) That the learned CIR(A) was not justified in passing the order under section 129 of the Income Tax Ordinance, 2001 vide Order No.165 dated 29-11-2011 (received on 10-6-2011) by giving life to the non-existent order which stood quashed in terms of first proviso to section 122C(2) upon filing of Income Tax return under section 114 along with wealth statement under section 116 of the Income Tax Ordinance, 2001.

(3) That the CIR(A) has ignored the fact that order under section 122C(1) of the Income Tax Ordinance, 2001 was passed on 14-6-2011 and served on taxpayer on 16-7-2011. Subsequently taxpayer has submitted income tax return and wealth statement along with reconciliation statement under section 116 in terms of section 122C(2) which has resulted quashment of provisional assessment.

(4) That learned CIR(A) has been wrong in relying on the statement of the learned Officer Inland Revenue/DR who argued that no appeal lies to CIR(A) but he has failed to disclose the fact that order under section 122C(1) ceased to exist in view of first proviso to subsection (2) of section 122C of the Ordinance.

(5) That learned CIR(A) has passed the order under section 129 and has given life to the quashed order which is resulting prejudice to taxpayer by way of penalties under section 182 which is unprecedented and unlawful."

2. The learned first appellant authority has dismissed the appeal in limine and upheld the Order under section 122C(1) of the Income Tax Ordinance, 2001 bearing DCR No. 27 dated 14-6-2011 passed by Assistant Commissioner Inland Revenue, Enforcement Unit-3, Zone-II, Gujrat, Regional Tax Office, Sialkot. The appellant, in this case, is a French National holding residency in France since 1993, where he earns his livelihood and is engaged in business of running a Restaurant in Paris under the name and style of "Hamalaya". In Pakistan, the appellant is neither having any business nor have NTN.

3. The learned AR of the appellant argued that the learned CIR(A) was not justified in dismissing the appeal in limine without examining the record because no cause of action was pending at the time of hearing of appeal. He is of the view that after passing of provisional assessment order for the year under review i.e. Tax Year 2009 vide DCR No. 27 dated 14-6-2011 served on 16-7-2011, subsequent to receipt of Order, the appellant has filed Income Tax Return for the Tax Year 2009 and Wealth Statement along with reconciliation statement (as on 30-6-2009) which was duly acknowledged by the department vide letter reference No. A/Salam dated 12-8-2011.

The learned AR has produced and submitted the copy of above letter duly acknowledged by department before this Bench.

It is contended that after filing of tax return for the Tax Year 2009 within sixty days from the date of service of Order, the impugned Order bearing DCR No. 27 dated 16-6-2011 stood quashed and ceased to attain finality under the first proviso to subsection (2) of the section 122C of the Income Tax Ordinance, 2001.

He has argued that at the time of hearing during the proceedings of first appeal, it was brought to the knowledge of learned CIR(A) that the appellant want to withdraw the appeal because the appellant has filed the tax return along with wealth statement to the department and no cause of action is pending at this stage. The learned AR submitted that instead of passing an appropriate order after appreciation of this fact, the learned CIR(A) relied on the statement of Departmental Representative and dismissed the appeal in limine being incompetent and infructuous with the observation that no appeal lies against the order passed under section 122C of the

Ordinance, 2001.

The learned AR has drawn the attention of the bench to the fact that after the passing of Appellate Order of the learned CIR(A) vide Order No. 165 dated 29-11-2011 wherein the appeal was dismissed, the department has initiated recovery proceeding and passed penalty orders without realizing that no cause of action for penalty ever existed after filing of tax return on 16-8-2011. The learned AR has prayed that the impugned Appellate Order No. 165 dated 29-11-2011 passed by the learned CIR (Appeals) may please be annulled/set aside being devoid of any merits, illegal and an action in ignorance. He has submitted that in the presence of this appellate order, the department has been given an opportunity to create anomalous situation against the taxpayer. The assessment which has attained finality is given a new lease of life through this appellate order.

In support of his contention the learned AR has placed reliance on the case-laws reported as 2012 PTD (Trib.) 547 and 2012 PTD (Trib.) 839. He has also placed reliance on Circular No. 2 of 2010 and FBR's clarification letter dated 5-10-2010 with reference to interpretation of section 122C of the Income Tax Ordinance, 2001.

4. The learned DR on his turn, on the legal position did not controvert the above stated factual and legal position. He has conceded to the fact that after filing of tax returns under the first proviso under subsection (2) of section 122C, the Order for Provisional Assessment has ceased to exist and the return filed by Taxpayer is the Assessment in the field. He also conceded that after filing of tax return no cause of action remained pending against the appellant as per law. But he has supported the impugned orders of the officers below with the arguments that the appellant should have to bring these facts and the legal position before the ACIR and during the course of proceeding in first appeal before the learned CIR(A) which has failed to do and has not fulfilled his obligation therefore according to him the officers below have rightly passed the respective orders on the basis of available facts and records at the time of adjudication. He has therefore proposed that the matter may please be remanded back to the Taxation officer for appreciation of these facts.

5. We have heard the learned representatives of both the parties and gone through the available record as well as the case-law cited at bar. At the very outset we would like to clarify that a citizen can be made liable to pay tax only on the basis of unambiguous and explicit law. In fiscal statute there is no room for any presumption or intendment and no provision of law can, by any process of argumentation or interpretation, be loaded with meaning or intentions which plain language of the provision does not convey. In this case, we are of the considered view that the

department is trying to screw the taxpayer and extorting tax without observing the cardinal principal of tax laws discussed above. The department functionaries are also acting under sheer ignorance and not following procedure laid down in statute and circulars and clarifications issued by the FBR which are binding on all functionaries working under FBR under the law.

6. We are of the view that once it has come on record and has been established that the appellant is a French National Pakistani having sufficient sources of income through running Restaurant in France and having transferred foreign currency through proper Banking channels or otherwise by legal means, there was no justification to harass the appellant which is discouraging him to invest in Pakistan. He has no means/business in Pakistan and all sources of income are in France and has only made investment in Pakistan by purchasing landed property through foreign exchange brought from France. It is further observed that tax is not a forced liability but in fact it is a responsibility to owe to the state a proportionate share given by the taxpayer for utilizing and consuming the services provided by the state. Its determination must be made with a view to keep the above principle intact and to maintain confidence and to boost the encouragement in the tax paying society so that the tax should not be taken by the concerned public to be a harsh imposition but a duty. The Honourable Higher Courts and this Tribunal has held in many cases that it is high time to develop tax culture in the working classes which will help the enforcement of self assessment at large and the tendency of concealment of taxes shall be gradually discouraged and public would rather prefer to be the taxpayer instead of tax swallowers. Similar is the position regarding Foreign National making investment, they should also be encouraged rather forced to make investment in other countries.

7. Now coming to the facts of instant case in hand, first of all, let us examine the statutory provisions which deals with the provisional assessment as provided under section 122C of the Income Tax Ordinance, 2001 which read as follows at the time of provisional assessment.

"122C. Provisional Assessment.---(1) Where in response to a notice under subsection (3) or subsection (4) of section 114 a person fails to furnish return of income for any tax year, the Commissioner may, based on any available information or material and to the best of his judgment, make a provisional assessment of the taxable income or income of the person and issue a provisional assessment order specifying the taxable income or income assessed and the tax due thereon.

(2) Notwithstanding anything contained in this Ordinance, the provisional assessment order completed under subsection (1) shall be treated as the final assessment order

after the expiry of sixty days from the date of service of order of provisional assessment and the provisions of this Ordinance shall apply accordingly:

Provided that the provisions of subsection (2) shall not apply if return of income along with wealth statement, wealth reconciliation statement and other documents required under subsection (2A) of section 116 are filed by the person for the relevant tax year during the said period sixty days."

It would be equally advantageous to go through the Circular No. 2 of 2010 dated January 22, 2010, reported in Vol. 107 as PTCL 2010 St. 118, at page 120, where the Federal Board of Revenue has clarified the scheme of "provisional assessment" as under:--

"Newly added provisions of subsections (1) and (2) of section 122C are aimed are aimed at facilitation of a taxpayer where the fails to file return of income in response to requisition of the same by the Department. Under the new scheme of provisional assessment, in such cases of non-compliance, option shall be vested with the taxpayer even after finalization of (best judgment provisional assessment) to file a return within a period of sixty days of the service of demand notice resulting from provisional assessment. Such provisional assessment shall cease to have any legal effect if the taxpayer files return of income along with wealth statement, wealth reconciliation statement and other required documents, within a period of sixty days from the date of service of provisional assessment order. However, a return filed in response to provisional assessment shall be valid only if accompanied with wealth statement, wealth reconciliation statement and explanation regarding sources of assets in question. However, if the taxpayer fails to file return of income even after a period of sixty days of receipt of the demand notice resulting from a best judgment provisional assessment, such assessment shall attain finality on completion of a period of sixty days from the date of service of assessment order."

In order to provide guidance, the Federal Board of Revenue has issued clarification to field formations vide letter No. C 69(1) S-DOS/ 2009-138499-R dated October 5, 2010 reported in (2010) 102 TAX 149 (Part-I), which is reproduced as under:--

"No. C 69(1) S-DOS/2009-138499-R

Government of Pakistan

Revenue Division

Federal Board of Revenue

Islamabad, the 5th October, 2010

To,
All Chief Commissioner Inland Revenue RTOs,

All Chief Commissioner Inland Revenue LTUs,

Subject: SECTION 122C OF THE INCOME TAX ORDINANCE, 2001 CLARIFICATION REGARDING.

Subsection (1) of the section 122C of the Income Tax Ordinance, 2001 provided that where in response to a notice issued under subsection (3) or subsection (4) of section 1414, a person fails to furnish return of income for any tax year, the Commissioner may, based on any available information or material and to the best of his judgment, make a provisional assessment of taxable income or income of the said person and issue a provisional assessment order specifying the taxable income or income assessed and the tax due thereon.

2. The order so passed under subsection (1) of section 122 attains finality after the expiry of the sixty days from the date of service of order of provisional assessment and all the provisions of the Ordinance apply accordingly. However, the provisions of subsection (2) of section 122C are not applicable if return of income along with wealth statement, wealth reconciliation statement and other documents as required under subsection (2A) of section 116 are filed by the tax payer for the relevant tax year, before the expiration of sixty days.

3. The representations have been made regarding the treatment of the provisional demand, where the compliance of the notices under section 114(3) and (4) of the Ordinance has been made before the expiry of sixty days from the service of the provisional assessment order and requests have been made to lay down procedure regarding this provisional tax demand raised and communicated to the compliant taxpayer.

4. In the given circumstances, it has been decided that where the compliance by the taxpayer under subsection (1) of section 122C is made before the expiration of sixty days from the services of the provisional assessment order, the provisional demand shall be taken into minus account by the Enforcement and Collection Division and an order under the proviso to subsection (2) of section 122C shall be passed by the Commissioner and communicated to the taxpayer accordingly." (Underlining is for emphasis)

From the perusal of the available record of the instant case it reveals that the appellant had purchased two plots against a consideration of rupees six million at G.T Road, Sara-e-Alamgir in February, 2009 out of foreign currency proceeds earned from abroad. The department has collected the information from concerned Sub-Registrar of lands Sara-e-Alamgir, and issued a notice under sections 114 and 116 of the Income Tax Ordinance, 2001 which, according to the learned AR, were never received by the appellant or his representatives. The learned ACIR has passed ex parte Order under section 122C(1) of the Income Tax Ordinance, 2001 based on the available information/material to the best of his judgment as unexplained investment. But it is interesting to note that instead of invoking section 111 he preferred to get it assessed as "Income from Other Sources" under section 39 of the Income Tax Ordinance, 2001 without identifying the exact nature of income. There are 16 types of incomes postulated in section 39 and the assessing officer has not bothered to identify one out of all types of sources. This shows the level of care in framing the Provisional Assessment. The assessment under section 122C require the same amount of care as is required under subsections (5) and (5A) of section 122 of the Income Tax Ordinance, 2001 and such provisional assessment must indicate on what material or the basis the income is assessed and tax is determined. This is necessary because a provisional assessment order might attain finality under section 122C(2) of the Income Tax Ordinance, 2001 or may be subject to revision by the Honourable High Court under section 115 of Code of Civil Procedure, 1908 or may be matter in writ before Honorable High Court under Article 199 of the Constitution of Pakistan, therefore, the order should contain with sufficient precision, the material on which the assessment is based, so that the concerned authority can form an unbiased opinion of the fairness of assessment. This is also necessary on the following counts:--

(i) the provisional assessment has to attain the finality after the expiry of statutory period of sixty days, if the taxpayer failed to file tax return;

(ii) for the satisfaction of the judicial authorities that the provisional assessment has been made on the reasonable grounds and on substantial material and it is not arbitrary or based merely on guess work, conjuncture or speculation;

(iii) an order of provisional assessment not disclosing the basis or material is against the principles of natural justice; and

(iv) the provisional assessment is bad and liable to be set aside, if the assessment order suffer from this deficiency.

8. In this case the Assessment framed under section 122C(1) of the Income Tax

Ordinance, 2001 the ACIR has worked out the 'provisional income' to the tune of Rs.6 million as "Income from Other Sources, i.e., equal to amount of property purchased and expenses incurred". The Order for Provisional Assessment under section 122C(1) was served on the appellant on 16-7-2011 (this was not controverted by the departmental representative). The perusal of Provisional Assessment Order shows that the assessment lacks necessary precision and care as discussed above. Consequent to service of order an appeal was filed before the learned CIR(A), Sialkot on 26-7-2011. Concurrent to appellate proceedings before the learned CIR(A), the appellant has also filed the Income Tax Return for Tax Year 2009 and Wealth Statement along with reconciliation statement as on 30-6-2009 submitted with the covering letter dated 12-8-2011 through AR/Advocate of the appellant Sh. Muhammad Habibullah which was duly acknowledged by the department on 16-8-2011. Once the taxpayer filed the above documents as required under first proviso of subsection (2) of section 122C within the period of sixty days, the provisional assessment ceased to attain finality and Order of Provisional Assessment under section 122C(1) stood quashed by the operation of law. Thus, a vest right has accrued in favour of taxpayer.

9. At this stage the Enforcement and Collection Division of Enforcement Unit-3, Zone-II, Gujrat, RTO, Sialkot was under obligation to follow the instructions issued by the FBR to the Chief Commissioners referred above as contained in the letter dated 5-10-2010 reported as (2010) 102 TAX 149 (Part-I), which states that "….In the given circumstances, it has been decided that where the compliance by the taxpayer under subsection (1) of section 122C is made before the expiration of sixty days from the services of the provisional assessment order, the provisional demand shall be taken into minus account by the Enforcement and Collection Division and an order under the proviso to subsection (2) of section 122C shall be passed by the Commissioner and communicated to the taxpayer accordingly." The learned ACIR has not followed the above mandatory order, instructions or directions issued by the FBR which are binding on him under section 214 of the Income Tax Ordinance, 2001. This irregularity is very serious and amounts to negligent conduct in the performance of statutory duties as an assessing officer. We have restrained ourselves in passing any adverse structure against the ACIR concerned subject to the condition that the concerned officer shall follow the instructions issued by the FBR vide letter dated 5-10-2010 reported as (2010) 102 TAX 149 (Part-I) (sic) and to apply in the case of the appellant and pass such rectification and consequential orders as are necessary under the law for quashing of existing and consequential proceedings within 30 days from the receipt of this Order under intimation to this Bench or to give legal justification not to follow these directions of the FBR.

10. Now, we come to the Order of the learned CIR(A), Gujranwala who has heard the

case on 29-11-2011 and dismissed the appeal in limine without appreciating the underlying facts that there is no cause of action pending before him, the matter which was impugned before him had ceased to exist on 16-8-2011. The obvious reason for this negligence was either the learned first appellate authority has not examined the record or blindly believed on the departmental representative who had assisted him by giving misleading and incorrect information. After passing the impugned Appellate Order by first appellate authority, the department has started the recovery and penalty proceedings which are illegal and void ab-initio because no appellate authority can give lease of life to an order which has ceased to exist and quashed under the statutory provisions of law. Such vested right which has accrued to the taxpayer cannot be taken away by omission of following procedure laid down by the Board or by passing negligent Order-in-Appeal. In these circumstances we are left with no option but quash the proceedings and annul the impugned order passed by the learned CIR(A).

To sum up the proceedings, we annul the Order-in-Appeal No.165 of 2011 dated 29-11-2011 passed by the first appellate authority which is patently based on sheer ignorance of factual matrix and lack of assistance from department. We also set aside all the consequential penalty orders passed after 16-8-2011, the date when the Provisional Assessment had ceased to attain finality and a vested right in favour of Taxpayer has accrued. We also direct the ACIR to comply with the directions of FBR and pass such consequential orders as directed in para 7 above and to intimate the same to this Tribunal as well as to the appellant.

11. The appeal filed by the Taxpayer is disposed of with the directions/observation in the manner as discussed above.

Appeal accepted