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APPELLATE TRIBUNAL INLAND REVENUE
(DIVISION BENCH-I) KARACHI

Present: MR. FAKHAR-UL-ZAMAN AKHTAR, MEMBER.
MR. SHAHID MEHMOOD SHEIKH, MEMBER.

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ITA No. 1649/KB/2021
& MA (AG) No.3857/KB/2023
(Tax Years 2017)
Under Section 4B

M/s. Eastern Textiles (Pvt.) Ltd.

KarachiAppellant

Versus

The Commissioner Inland Revenue,

Audit III, CTO, Karachi.....Respondent

Appellant by : Mr. Muhammad Hasham Khan, Advocate.
Respondent by : Mr. Yasir Hussain, DR.

Date of hearing : 14.01.2025
Date of order : 04.03.2025

ORDER

FAKHAR-UL-ZAMAN AKHTAR, MEMBER : This appeal is filed by the taxpayer against the impugned order of learned CIR(A) dated 26.10.2021 whereby he confirmed the order of DCIR dated 26.01.2021. Following grounds are agitated upon by the taxpayer: -

- "1. The order passed by the Learned CIR(A) is bad in law and on facts as the order passed by Unit Officer is without jurisdiction as the Unit Officer was not delegated power of section 48 from the Zonal CIR
2. Without prejudice to above the Learned CIR(A) itself is not clear in his mind as on page 4/6 of the Appellate order the order in appeal was ANNULLED and on page 5/6 the order in appeal was confirmed
3. That the Learned CIR(A) on page 5/6 has himself accepted that the decision of the Hon ATIR reported as 121-TAX-172 (Trib) is binding on him and by following the decision the order was annulled as such there is no justification to confirm and disagreeing with the decision
4. That the Learned CIR (A) was not justified to hold that the Super tax u/s 48 will not be charged by amending the order u/s 122(5) or 122(5A) of Income Tax Ordinance."

The appellant also filed additional grounds as under: -

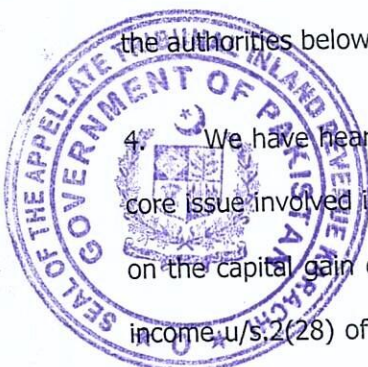
"4 (A). That the CIR (A) has erred in law by confirming the action of OIR whereby the capital gain earned by the appellant was treated as income for the purpose of section 4B of the Income Tax Ordinance, 2001 (the 'Ordinance') despite the fact that the capital gain of Rs. 736,961,474/- was not an amount CHARGEABLE under the Ordinance as enumerated u/s 2(29) of the Ordinance. (Reliance M/S SUNEHRI INDUSTRIES (PVT) LTD IN ITA. NO. 1305/KB/2023)

4 (B). That the CIR (A) has fell into an error by charging Super Tax u/s 4B of the Ordinance on the exempt Capital Gain earned by the appellant. The exempt gain cannot be taxed again. (Reliance M/S FAUJI FERTILIZER COMPANY LIMITED & OTHERS (2023) 128 TAX 141 (H.C. ISL))."

2. Brief facts of the case are that the appellant, a Private Limited Company and its principal business activity is manufacturing and exports of textile made up, filed its return of income for the tax year 2017, which was deemed to be an assessment order issued by the Commissioner under Section 120(1)(b) of the Income Tax Ordinance, 2001 (the "Ordinance"). Upon examination of the return, it was observed that the appellant had failed to discharge its tax liability under Section 4B of the Ordinance, leading to the issuance of a show-cause notice under the same provision. The appellant submitted its response; however, it was not accepted, and the proceedings culminated in charging of tax amounting to Rs. 22,599,490/-. Aggrieved by this order, the appellant filed an appeal before the Commissioner (Appeals), both on the point of jurisdiction and on facts but the appeal was dismissed. Still dissatisfied with the impugned order, the appellant has now preferred an appeal to this forum.

3. On the date of hearing Mr. M. Hasham. Khan (Advocate) attended the hearing on behalf of appellant and argued as per grounds of appeal whereas the department was represented by Mr. Yasir Hussain who supported the orders of the authorities below.

4. We have heard both parties and perused relevant record of the case. The core issue involved in this case is the DCIR charged the taxpayer with Super Tax on the capital gain on immovable property under section 37(1A) and Imputable income u/s.2(28) of the Income Tax Ordinance, 2001 the total income on which



in aggregate comes to Rs.753,316,339/- and the super tax was payable at Rs.22,599,490/-. This treatment was confirmed by the CIR(A).

5. To better analyze the issue, it is pertinent to reproduce the provisions of Section 4B of the Ordinance, which read as follows:

"4B. Super tax for rehabilitation of temporarily displaced persons- (1) a super tax shall be imposed for rehabilitation of temporarily displaced persons, for tax year 2015 at the rates specified in Division IIA of Part I of the First Schedule, on income of every persons specified in the said Division.

(2) For the purposes of this section, "income" shall be the sum of the following

- (i) profit on debt, dividend, capital gains, brokerage and commission.*
- (ii) taxable income other than brought forward depreciation and brought forward business losses under section (9) of this Ordinance, if not included in clause (i).*
- (iii) imputable income as defined in clause (28A) of section 2 excluding amounts specified in clause (i); and*
- (iv) income computed under Fourth, Seventh and Eight Schedule.*

(3) The Super tax payable under sub-section (1) shall be paid, collected and deposited on the and in the manner as specified in sub-section (1) of section 137 and all provisions of Chapter X of the Ordinance shall apply.

(4) Where the super tax is not paid by a person liable to pay it, the Commissioner shall by an order in writing, determine the super tax payable, and shall serve upon the person, a notice of demand specifying the super tax payable and within the time specified under section 137 of the Ordinance.

(5) Where the super tax is not paid by a person liable to pay it, the Commissioner shall recover the super tax payable under sub-section (1) and the provisions of Part IV< X, XI and XII or Chapter X and Part I of chapter XI of the Ordinance shall, so far as may be, apply to the collection off super tax as these apply to the collection of tax under this Ordinance.

The above provision initially applied to Tax Year 2015; however, vide Finance Act 2016, the wording in paragraph (1) was substituted to read "2015 and 2016", thereby extending its applicability to Tax Years 2015 and 2016. Subsequently, for Tax Year 2017, the reference was replaced with "2020" through the Finance Act 2019. Additionally, the words "and onwards" were introduced for Tax Year 2020 through the Finance Supplementary (Second Amendment) Act 2019. Accordingly, Tax Year 2017 and subsequent years became applicable only from the Finance Supplementary (Second Amendment) Act 2019, which took effect from 2020.

6. As regards the super tax on capital gain, we confronted the learned DR with the table contained in Division VIII of Part I of the First Schedule of the Ordinance, which explicitly states that Capital Gain after five years is subject to a

zero-tax rate. In light of this, we inquired how Super Tax could be charged. Before proceeding further, it is relevant to reproduce the provision of Section 37 of the Ordinance as follows:

"37. Capital gains.— (1) Subject to this Ordinance, a gain arising on the disposal of a capital asset by a person in a tax year, other than a gain that is exempt from tax under this Ordinance, shall be chargeable to tax in that year under the head "Capital Gains".

(1A) Notwithstanding anything contained in sub-sections (1) and (3) gain arising on the disposal of immovable property [] by a person in a tax year, shall be chargeable to tax in that year under the head Capital Gains at the rates specified in Division VIII of Part I of the First Schedule.]"

The Division VIII of Part I to the First Schedule of the Ordinance is reproduced hereunder:

"The rate of tax to be paid under sub section (1A) of section 37 shall be as follows:

S. No	Period	Rate of Tax
1.	Where holding period of immovable property is up to five years	10%
2.	<u>Where holding period of immovable property is more than five years</u>	<u>0%</u>

Provided that gain arising on the disposal of immovable property by a person in a tax year to a Rental REIT Scheme shall be taxed at the rate of five percent upto thirtieth day of June 2019 irrespective of the holding period."

The gain arising from the disposal of immovable property is governed by Section 37(1A) of the Ordinance and is chargeable to tax at the rates prescribed under Division VII of Part I of the First Schedule of the Ordinance. If the holding period exceeds five years, the applicable tax rate is 0%. Furthermore, the term "tax" is defined under Section 2(63) of the Ordinance, which reads as follows:

2(63) "tax" means any tax imposed under Chapter II, and includes any penalty, fee or other charges or any sum or amount leviable or payable under this Ordinance;

From the foregoing definition, it can be construed that the leviability of tax under Section 4B of the Ordinance constitutes a tax as defined under Section 2(63) of the Ordinance. It is a well-settled principle, consistently upheld by this court, that where tax exemptions, credits, or concessions are granted against normal tax, the same must also be extended to super tax. Tax cannot be

charged and levied unless it falls squarely within the purview of the charging provisions. Taxing law cannot be extended by implication beyond the clear import of the language used. {Commissioner Inland Revenue, Gujranwala Vs. S.K. Steel Casting Gujranwala} (PTCL 2019 CL. 401).

7. As per our understanding, Super Tax is chargeable on Capital Gains only when the holding period does not exceed five years. However, in cases where the holding period exceeds five years as the immovable property in question was purchased on 25.03.1992 and sold on 29.12.2016 as per documents presented before us, hence Super Tax is not applicable. This interpretation of law is consistent with the settled jurisprudence principle i.e., in a taxing statute that if a charging or taxing provision is open to more than one reasonable interpretation, the interpretation most favorable to the taxpayer must be adopted. This means that if an interpretation either excludes the taxpayer from liability or reduces the tax burden, such an interpretation should prevail.

8. This principle of law was recently illuminated by the Supreme Court of Pakistan in the case of M/s Kunjah Textile Mills Ltd. & Others (C.A. 256/2011).

The relevant excerpt from the judgment is reproduced below:

"10. But what of the definition of "licensee" which specifically refers to any person (such as the respondents) who generates electric power by means of a generator of more than 500 KW capacity? There can be no doubt that the respondents are within the definition of "licensee" in terms of the substitution made by the 2001 Ordinance (and are herein after referred to also as the "statutory licensee(s)"). However, that still does not bring them within the scope of the levy. It is a cardinal principle of taxing statutes that if more than one reasonable interpretation is possible of the charging, or taxing, provision, then the one more favorable to the putative taxpayer is to be adopted, i.e., the one that either takes him out of the charge altogether or (if such be the case) results in a reduced or lessened burden. We assume for the moment that on the change in the definition of "licensee" one possible, and reasonable, interpretation of s. 13 and one which brings the respondents within the taxing event is as put forward by the learned AAG. Even if such be the case (and with respect, we have serious doubts on this score as already set out above) in our view there is another, also reasonable, interpretation possible which does not. The second interpretation is that if the respondents are statutory licensees, all that means is that if any of them were to supply the energy produced by its generator of more than 500 KW capacity to another person, then in respect of that supply the levy would be attracted in terms of the first entry of the Fifth Schedule. It would not however mean that the self use of the energy in and of itself would come within the levy. Put differently, the words "self use" in the substituted definition would be only descriptive of who the statutory licensee is (i.e., one whose supply of energy to another person would

complete the taxing event in terms of the first column of the Fifth Schedule), and not amount to a levy of the duty on such self consumption. The levy would still require the statutory licensee to supply the energy to some other person, i.e., the consumer in terms of the Fifth Schedule. As is clear, this second interpretation is more favorable to the putative taxpayer (i.e., the respondents) and would therefore, on an application of well settled law, apply to the charge contained in subsection (1). The respondents would not, accordingly, be within the levy. (Emphasis ours)

9. For what has been discussed supra, the orders passed by the authorities below are not sustainable in the eye of law which accordingly are hereby set aside and the appeal filed by the appellant is hereby accepted.

10. The appeal along with miscellaneous application for additional grounds is disposed of in the manner as indicated above.

S.d

(FAKHAR-UL-ZAMAN AKHTAR)
MEMBER

S.d

(SHAHID MEHMOOD SHEIKH)
MEMBER

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