

IN THE LAHORE HIGH COURT, LAHORE

ORDER SHEET.

JUDICIAL DEPARTMENT

I.T.R. No.86725 of 2017

COMMISSIONER INLAND REVENUE ZONE-V

Versus

M/S T.N.W. ENGINEERING WORKS

S. No. of order/ Proceedings	Date of order/ Proceedings	Order with signature of Judge, and that of Parties of counsel, where necessary.
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24.10.2018 Mr. Liaqat Ali Chaudhry, Advocate.

This order will dispose of Tax Reference No.86719 of 2107 titled as “Commissioner Inland Revenue Zone-V vs. M/s T.N.W. Engineering Works” and Tax Reference No.86725 of 2107 titled as “Commissioner Inland Revenue Zone-V vs. M/s T.N.W. Engineering Works” as these arise out of consolidated judgment relating to Tax Years 2010 & 2011.

2. The key issue before us is the scope of section 133 (1) of the Income Tax Ordinance 2001 (“Ordinance”) and whether an order passed, by the Tribunal, in exercise of powers under subsection (5) of Section 131 of the Ordinance is amenable to jurisdiction conferred on this Court under section 133(1)-ibid.

3. Briefly, the facts necessary for adjudication of the lis at hand are that return of income was taken as assessment of taxable income for the relevant year under Section 120 of the

Ordinance, which was amended subsequently under Section 122(1) of the Ordinance accordingly. Aggrieved, the respondent, tax payer, filed appeal, against amended assessment, under section 127 of the Ordinance, which was dismissed and amendment order was upheld. Respondent, thereupon, filed appeal under section 131 of the Ordinance before the Appellate Tribunal Inland Revenue, Lahore Bench ("the Tribunal"). Respondent sought stay order, which was granted vide order dated 20.03.2017. Since the appeals remained pending, the respondent sought extension in the stay orders by filling applications, M.A (Stay) No.916/LB/2017 and M.A (Stay) No.917/LB/2017. Tribunal extended the stay granted vide order dated 26.04.2017 ("impugned order"). Hence, these reference applications, filed by the department.

4. At the outset, the learned counsel was confronted with the question of maintainability of instant reference; whether reference in terms of section 133 of the Ordinance can be filed, firstly, against interlocutory order and secondly, in the absence of any order under sub-section (3) of Section 132 of the Ordinance, to be communicated under sub-section (7) of Section 132-ibid, which becomes amenable to the jurisdiction under Section 133(1)-ibid.

5. Learned counsel conceded that reference applications were filed against the orders passed by the Tribunal, on miscellaneous applications, seeking extension in the stay orders granted. Learned counsel attacked, the legality of the impugned order and erroneous exercise of discretion by the Tribunal. It was argued that order impugned was contrary to the mandate of sub-section (5) of section 131 of the Ordinance. Per learned counsel, reliance placed by the Tribunal on case reported as "*Dowell Schlumberger (Wastern) S.A v Federation of Pakistan & others*" (2016 PTD 1702) was misplaced. Learned counsel in support of contentions relied upon case reported as "*Mst. Shaqufta Abdullah v Commissioner Inland Revenue & 3 others*" (2015 PTD 1855).

6. Heard, Available record perused.

7. The moot question involved, for the purposes of adjudication, is not about availability of power of the Tribunal to grant interim order – such power is available with the Tribunal under sub-section (5) of section 131 of the Ordinance - but whether impugned order, which is otherwise interlocutory in nature, can be subjected to a challenge by invoking section 133 of the Ordinance-ibid. Section 133, reads as:

“133. Reference to High Court. --- (1) within ninety days of the communication of the order of the Appellate Tribunal under sub-section (7) of section 132, the aggrieved person or the Commissioner may prefer an application, in the prescribed form along with a statement of the case, to the High Court, stating any question of law arising out of such order.”

8. Literal reading of section 133(1)-ibid, suggests that jurisdiction made available, thereunder, can be invoked only against an order of the Tribunal communicated under sub-section (7) of section 132 of the Ordinance and none other. Specific reference to sub-section (7) of section 132, ibid, is meaningful and must be given effect while ascertaining the legislative intent. The import and nature of the orders passed under section 131 (5) and section 132 (3) of the Ordinance are distinct, which distinction has to be acknowledged and appreciated while determining the scope of jurisdiction under section 133-ibid. Needless to mention that section 133-ibid, per-se, draws conspicuous cleavage inter-se orders under section 131 (5) and one under section 132 (3) of the Ordinance, former being in the nature of interim/interlocutory order, passed during the pendency of appeal, and later attracting status of finality, certainly subject to decision under section 133-ibid. A collective reading of sub-sections (3), (7) &

(10) of section 132 would fortify the point that only “final order” is amenable to jurisdiction under section 133-ibid. It is reiterated that the order communicated, to the tax payer or the Commissioner, under sub-section (7) of section 132, providing essentially required eligibility for invoking jurisdiction of the High Court under section 133-ibid, is final for all intent and purposes, impregnated with questions of law arising out of such order. Whether finality, as envisaged under sub-sections (3), (7) & (10) of Section 132, can be attributed to the impugned order? It is evident that impugned order cannot be treated as final order on two counts, which are;

i) The impugned order was passed in exercise of powers under sub-section (5) of section 131 of the Ordinance;

ii) The appeal was pending adjudication (at the time when impugned order was passed); neither any decision made under section 132 (3) of the Ordinance nor communicated in terms of sub-section (7) of section 132, ibid, which, in essence, makes it an interim/interlocutory order”.

9. legislative intent, expressed through section 133, ibid, is reinforced in a recent judgment of the Hon’ble Supreme Court of Pakistan in case reported as “Messrs Squibb Pakistan

Pvt. Ltd. and another v Commissioner of Income Tax and another” (2017 PTD 1303).

Paragraph No. 49 at page 1350 reads as....

“An independent interpretation of section 133 of the Ordinance, 2001, as it stands today, on the plain language of the law, liberated from the burden or benefit of earlier judgments, would make the position very clear. Sub-section (1) confers a right on any person or the Commissioner aggrieved by a final order of the Appellate Tribunal to file an application before the High Court along with a statement of the case stating any questions of law arising out of the Tribunal’s order-----The order being challenged is the final order but the challenge is limited to question of law only” (emphasis supplied)

10. The Hon’ble Supreme Court of Pakistan while adjudicating upon the scope of section 79 of the Income Tax Ordinance 1979 (as it stood prior to Finance Act, 1992) has elucidated the nature/scope of remedy available by way of reference under section 133-ibid, which is termed as “appellate” in nature. The identity, extended by the Hon’ble Supreme Court of Pakistan, to the nature of remedy under section 133(1)-ibid, when read with the expression “arising out of such order”, conclusively establish that order in terms of sub-sections (3), (7) & (10) of Section 132 is final for the purposes of Section 133-ibid.

11. The cases relied upon by the learned counsel for the applicant are distinguishable, hence, not applicable to the

facts and circumstances of the case under reference. In **Dowell Schlumberger**, case (supra), constitutional jurisdiction was invoked for seeking determination of the scope and applicability of limitation prescribed under section 34 of the Federal Excise Act 2005, section 46 (2) of the Sales Tax Act 1990, read with section 131 (5) of the Ordinance of 2001– whether a stay order can be extended beyond a period of 180 days, in aggregate – wherein it was held that *“time specified in section 131 (5) is directory and, therefore, if the appeal is not decided within the said period, the stay would continue till the disposal or decision of the appeal unless expressly recalled by the Tribunal”*.

In **Mst Shagufta Abdullah’s** case (supra) writ petition was filed to challenge order of refusal to grant stay and to seek stay against recovery– the case was under Sales Tax regime. The question raised and decided therein is not relevant to the issue at hand.

12. Before concluding the matter, it is apt to briefly discuss the case, decided by learned Division Bench of Islamabad High Court, reported as **“Pak Gulf Construction (Pvt.) Ltd. v Commissioner Inland Revenue”** (2016 PTD 1061), wherein reference application was entertained by the High Court against the order of the Tribunal, refusing to stay recovery on

the premise that Tribunal was not legally competent to stay recovery. The ratio / reason of the decision in **Pak Gulf Construction** case (supra) at page 1065 – reads as.....

“The right of appeal and its scope is provided under sub-section (1) of section 131 of the Ordinance. Sub-section (1) extends the right of appeal to an order and not a final order. We are, therefore, of the opinion that the learned Tribunal has not properly appreciated the first proviso of section 131 of the Ordinance in its true perspective” - not applicable to the facts of this case”.

13. The principle of law enunciated in **Pak Gulf Construction** case (supra), is that the Tribunal had requisite power to entertain and decide application for stay of recovery under sub-section (5) of section 131-ibid. The question of maintainability of reference application against order passed under Section 131(5) of the Ordinance was neither raised nor the provisions of Section 133(1) and sub-sections (3), (7) & (10) of Section 132 delineated upon, by the learned Bench, therefore, the decision therein is distinguishable and has no persuasive value qua the question, subject matter of adjudication in this case.

14. In these circumstances, the order impugned dated 20.04.2017 – under section 131 (5) of the Ordinance – is not amenable to the jurisdiction, conferred on this Court, under

section 133(1) of the Ordinance. The reference application is not maintainable.

15. In view of the above, reference application is dismissed being not maintainable.

(Shahid Jamil Khan)
Judge.

(Asim Hafeez)
Judge.

APPROVED FOR REPORTING

JUDGE.

JUDGE.

A.D. Mian*