JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

WRIT PETITION NO. 4252/2023

HOTEL MARGALA (PRIVATE) LIMITED

Vs

CHIEF COMMISSIONER INLAND REVENUE, LTO, ISLAMABAD, ETC

Petitioner by : Mr. Nasir Muhammad Malik, Advocate.

Respondents by : Mr. Abual Hassan Chaudhry Advocate for the Respondents Nos. 1 to 3.

Date of hearing : 27.02.2025

MUHAMMAD AZAM KHAN, J.

1. The Petitioner [Hotel Margala (Private) Limited], has filed the instant Writ Petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, **("Constitution")** challenging therein the Notice dated 31.08.2023 **("Impugned Notice")** issued by the Chief Commissioner Inland Revenue, Zone-II, LTO Islamabad **("Respondent No. 1")**.

2. The brief facts giving rise to the filing of the instant Writ Petition are that the Petitioner in this case is a Private Limited Company engaged in the hotel business. The Petitioner received a notice from Respondent No. 2 under Section 177(1) of the Income Tax Ordinance, 2001 **("Ordinance of 2001")** dated 31.08.2023 regarding its selection for Income Tax Affairs' Audit for the Tax year 2022. The Petitioner received Notice from Respondent No. 2 on 28.09.2023 for calling of records, the reply of which was filed on 09.10.2023, and the request was made for the withdrawal of audit notice as per Clause 105A of Part IV 2nd Schedule of the Ordinance of 2001 **("Clause 105A")** but such request was turned down vide Letter dated 13.11.2023. Being aggrieved of the Impugned Notice dated 31.08.2023, Petitioner has filed the instant Writ Petition.

3. The learned counsel for the Petitioner argued that the reasons/basis of selection for income Tax Audit of the Tax Year 2022 is invalid, incorrect, illegal, unlawful, violative of Articles 04, 18 & 25 of the Constitution of the Islamic Republic of Pakistan, 1973 **("Constitution")** and also against Clause 105A for

which no remedy in the form of appeal lies; that the Impugned Notice regarding audit selection for the tax year 2022 issued by Respondent No. 2 is against Clause 105A therefore the same is void *ab initio*, Illegal, bad in law and is also violative of Articles 04, 18 & 25 of the Constitution; that Clause 105A has been re-inserted vide Finance Act, 2022 that provides exemption from Sections 177 and 214C to the taxpayers whose income tax affairs have been audited in any of the preceding four tax years; that the Ordinance of 2001 is being procedural, and curative, will apply retrospectively therefore the Petitioner is not liable for audit for the tax year, 2022 without due process of law; that the law, specifically Clause 105A makes it clear that if a person has already been audited in any of the previous four tax years, Sections 177 and 214-C of the Ordinance of 2001 do not apply to them; that it is crucial to note that the Petitioner's audit for the tax year 2015 was completed in the tax year 2020, therefore, according to the law, Sections 177 and 214-C should not be applicable to the Petitioner until the tax year 2024; that this legal provision was designed to exempt the taxpayers such like the Petitioner from further audits during this period; that any attempt by Respondent No. 2 to subject the Petitioner to an audit for the tax year 2022 goes against the clear intent of the law; that it is settled law that the discretionary powers of taxing authorities should be reasonably exercised and if there is some arbitrariness, then Court has ample jurisdiction to interfere in the matter; and that a taxpayer should not be allowed to be pestered and dragged indefinitely through an unending process of scrutiny and audit of his accounts, which would affect his business. The learned counsel for the Petitioner has relied upon *Faisalabad Electric Supply Company Limited (FESCO) versus Federation of Pakistan through Secretary, Finance, Islamabad,* 2019 PTD 1780; *M/s Novitas International v. Income Tax Officer (Films Circle) and others*, 1991 PTD 968; and *Commissioner of Inland Revenue, Sialkot and others v. Messrs Allah Din Steel and Rolling Mills and others*, 2018 SCMR 1328. Lastly, the learned counsel prayed for the declaration to the effect that (i) the Impugned Notice is illegal and without lawful jurisdiction *ab-initio*; (ii) that the Petitioner is not liable for audit for the tax year, 2022 as per Clause 105A, inserted vide Finance Act, 2022 which provides exemption from Sections 177 and 214C to such taxpayers whose income tax affairs have been audited in any of the preceding four tax years and the Petitioner is audited in the tax year, 2020; and (iii) that Clause 105A inserted vide Finance Act, 2022 is to be applied retrospectively. The learned counsel for the Petitioner further seeks direction to the Respondent No. 3 to

restrain from conducting audit proceedings & issuing any order till the decision of this Writ Petition. The learned counsel also prayed for suspension/annulment of the Impugned Notice and award of cost to the Petitioner.

4. On the other hand, the learned counsel for Respondents No. 1 to 3 firmly opposed the Petitioner's version, arguing that the Petitioner's audit was for the tax year 2015. They emphasized that the fact that the audit was completed in 2020 is irrelevant, and that the newly introduced provision under Section 105A of the Ordinance of 2001 will not be advantageous to the Petitioner; that the Petitioner's reliance on Clause 105A is based on an unsustainable and erroneous interpretation of law; that once initiated, audit proceedings cannot be quashed by retrospective operation in the absence of express language to that effect; that the Impugned Notice is not violative of law and is based on sound legal reasoning, which was already furnished to the Petitioner prior to its audit selection; that the Impugned Notice has been issued in accordance with the established legal position that ongoing audit proceedings, commenced in accordance with law, would not be affected by the enactment of Clause 105A; that Clause 105A was enacted with effect from 01.07.2022, which constitutes the Tax Year 2023; that upon plain reading of Clause 105A, it is evident that exemption thereunder would apply if audit proceedings were conducted for the Tax Years 2021, 2020, 2019 or 2018, however, the Petitioner's last audit was conducted for the Tax Year, 2015, hence, they do not fall within the scope of Clause 105A; that the Petitioner's audit selection for the Tax Year 2022 was in accordance with law and well within the jurisdiction of the Respondents. Lastly, the learned counsel prayed for the dismissal of the instant Writ Petition and for the issuance of direction to the Petitioner to participate effectively in the audit proceedings for the Tax Year 2022.

5. I have heard the learned counsel for the parties and perused the available record with their able assistance.

6. The main contention of the Petitioner is that after the insertion of a new amendment under Clause 105A in the Second Schedule of the Ordinance of 2001, the Income Tax department cannot seek an audit of the Petitioner for the tax year 2022, on the ground that it's a beneficial legislation and will effect retrospectively. For ready reference, the newly amended Clause 105A is reproduced hereunder:-

> *"**(105A)**: The provisions of Section 177 and 214 C shall not apply to a person whose income tax affairs have been audited in any of the preceding four tax years:*
>
> *Provided that the commissioner may select a person under section 177 for audit with approval of the board."*

7. This new clause 105A was inserted by the Finance Act, 2022. Meaning thereby that the audit of an income taxpayer cannot be audited in the tax years 2021, 2020, 2019, and 2018. The audit of the Petitioner has already been conducted for the tax year 2015, which culminated in the tax year 2020. Thus, according to the version of the Petitioner, given the new amendment, the audit of the tax year 2022 will be illegal and against the express provision of the Ordinance of 2001; that in light of FBR's interpretation of Clause 105A *ibid*, the four years' time is to be calculated from the year the audit proceedings culminated. The second point raised by the Petitioner is that the new amendment being beneficial legislation is to be given retrospective effect from the date of amendment, in favor of the taxpayer.

8. The case of the Petitioner is selected for audit under Section 177 of the Ordinance of 2001 for the tax year 2022 through the Impugned Notice. The Petitioner replied to the Impugned Notice through its response dated 09.10.2023, and Respondent No. 2, in its Letter dated 13.11.2023, rejected the contentions of the Petitioner vis-à-vis the maintainability of the Impugned Notice, instructing the Petitioner to participate in the audit proceedings.

9. The newly promulgated provision 105A in the Ordinance of 2001 is provided under the Chapter of exemptions from applicability of certain provisions, which reflects that it is a kind of concession or benefit and provides that audit under Section 177 and audit under Section 214C of the Ordinance of 2001 shall not apply to a person whose income tax affairs have been audited in any of the "preceding four tax years". This clearly provided that the said exemption or concession is only available if the taxpayer has been audited in any of the preceding four tax years. The word "tax year" is defined under Section 74 (1) of the Ordinance of 2001, which is reproduced herein below:-

> *"**74. Tax year.— (1)** For the purpose of this Ordinance and subject to this section, the tax year shall be a period of twelve months ending on the 30th day of June (hereinafter referred to as 'normal tax year') and shall, subject to sub-section (3), be denoted by the calendar year in which the said date falls."*

10. The new amendment referred to "preceding four tax years" and it means that the audit of a particular tax year and not the date or year in which the audit is completed. Therefore, the Petitioner's selection of audit for the tax year 2022 (notwithstanding its completion in the year 2020) would be of the tax year 2022 and not of the tax year 2020 to claim any benefit of Clause 105A *ibid. It is immaterial when the audit is completed as it will remain an audit for a particular tax year and it is only that tax year (*2015 in this matter) which is relevant for calculating the period of concession under Clause 105A *ibid*. The finalization of the audit in a particular tax year is not at all relevant nor is it provided in Clause 105A. The Circular dated 21.07.2022 issued by FBR, whereby an example is given that if an audit of a taxpayer for the tax year 2017 has been finalized in the tax year 2022, then the said taxpayer can only be audited again after four tax years i.e. in the tax year 2027, has been discarded by the Sindh High Court in Constitution Petition No.D-6280 of 2024 vide order dated 20.01.2025, as it conflicts with the main provision of law. Scrutiny of record of the Petitioner reflects that the audit for the tax year 2015 was conducted and concluded in November 2019, meaning thereby that no audit/proceedings under Section 177 (1) were conducted for any of the preceding four tax years as per the mandate of Section 105A of the Ordinance of 2001, hence, the Petitioner cannot claim the benefit provided under the Finance Act, 2022.

11. As far as the contention raised by the Petitioner's counsel that the new amendment has a retrospective effect is concerned, it is to be mentioned here that in the absence of any indication of its retrospective operation, it must not be given retrospective effect. Generally, beneficial legislation is to be given liberal interpretation, however, for the said legislation to have a retrospective effect, the beneficial legislation must carry curative or remedial content. Such legislation must, therefore, either clarify an ambiguity or an omission in the existing law and must therefore be explanatory or clarificatory. In the instant case, there is no specific wording that the concession shall apply retrospectively, hence, it cannot be construed by any canon of interpretation that said amendments have a retrospective effect. Consequently, in the absence of any indication in the statute that the legislature intended for it to operate retrospectively, it must not be given retrospective effect. Reliance is placed on *M/s RAJBY Industries Karachi and others versus Federation of Pakistan and others,* **2023 SCMR 1407**. Even

otherwise, the enactments relating to fiscal statutes will be interpreted to apply prospectively, rather than retrospectively.

12. In addition to the above, the power to select for audit through random or parametric balloting is provided under the law. Mere selection for audit does not cause any actionable injury to the taxpayer and the reason and objective for conducting an audit under a scheme of self-assessment is the regime provided by the Ordinance of 2001 to check the accuracy, truthfulness, and veracity of the returns filed by the taxpayers. Reliance is placed on *Commissioner of Inland Revenue, Sialkot versus Allah Din Steel and Rolling Mills,* **2018 SCMR 1328**.

13. In light of the above discussion, this petition, being devoid of any merits, is hereby ***dismissed***.

(MUHAMMAD AZAM KHAN)
JUDGE

Announced in the Open Court on _____ day of March 2025.

JUDGE

Sajid/--