

3 SCOB [2015] HCD 21**High Court Division
(Special Original Jurisdiction)**

I.T. Ref: Application No. 306 of 2013
With
I.T. Ref. Application No. 307 of 2013
With
I.T. Ref: Application No. 308 of 2013
And
I.T. Ref: Application No. 309 of 2013

Mrs. Shahana Parvin,
Proprietor M/S. Al-Madina Traders,
40/1A, Moulovibazar, Dhaka.
....Assessee-Applicant.

Versus

The Commissioner of Taxes,
Taxes Zone-02, 2nd 12 Storied Building 1st
floor, Segunbagicha, Dhaka.

Mr. Mosharaf Hossain, Adv. with
Mr. Md. Shafiqul Islam, Adv

....For the Assessee-applicant.

Present:

Justice A.F.M. Abdur Rahman
And
Justice Md. Emdadul Haque Azad

Income Tax Ordinance 1984**Section 75:**

A return filed under the normal procedure of section 75 of the Income Tax Ordinance 1984 has to be assessed within the period of limitation of six month, so also the reopening procedure against deemed assessment under the Self Assessment Scheme has to be confined to the period of limitation of two years. No proceeding for assessment of any return can be taken after the period for limitation and any such proceeding initiated shall be a nullity.

...(Para 37)

Section 93 and 94:

Since the assessment year for 2004-2005 shall expire on 30th June, 2005 and the assessment has to be made thereafter within six months i.e. within 31st December, 2005 under the provision of section 94(1) of the Income Tax Ordinance 1984. So far the commencement of limitation is concerned under the provision of section 93(3) of the Income Tax Ordinance 1984 it shall commence from 1st July, 2005 and will expire on 30th June 2010. Therefore, the reopening of the assessment under the provision of

Mr. S. Rashed Jahangir, D.A.G. with
Ms. Nurun Nahar, AAG and
Ms. Nasrin Parvin, AAG

...For I.T. Department.

Heard on: 19.10.14 & 27.10.2014.

And

Judgment on: The 9th & 16th November, 2014.

section 93(1) of the Income Tax Ordinance 1984 for the assessment year 2004-2005 after the expiry of the limitation period was a palpable illegality and that being a question of law the Taxes Appellate Tribunal was required to consider the same. ...(Para 38)

Judgment

A.F.M. Abdur Rahman,J:

1. These 4(four) instant Income Tax Reference Applications, preferred by the Assessee-applicant Mrs. Sahana Perveen, having been related to the similar question of law arising out of similar factual aspects, were heard analogously and now disposed of by this single judgment.

2. Income Tax Reference Application No. 308 of 2013 is related to assessment year 2004-2005 and the Assessee-applicant challenged the legality and propriety of the order passed by the Taxes Appellate Tribunal as to the assessment of tax liability made by the DCT concern and affirmed by the 1st Appellate Authority.

3. Income Tax Reference Application No. 307 of 2013 is though also related to assessment year 2004-2005 but a different question is involved as to the legality and propriety of the imposition of penalty under section 128 of the Income Tax Ordinance 1984 against the Assessee-applicant on the ground of concealment of income in the return of the assessment year 2004-2005.

4. Income Tax Reference Application No. 309 of 2013 is related to assessment year 2005-2006 which has been preferred against the legality and propriety of the assessment of tax liability made by the DCT concern and affirmed by the 1st Appellate Authority and ultimately directed to the legality and propriety of the decision made by the Taxes Appellate Tribunal.

5. Income Tax Reference Application No. 306 of 2013 is similarly though also related to assessment year 2005-2006 but a different question is involved as to the legality and propriety of the imposition of penalty under the provision of section 128 of the Income Tax Ordinance 1984 on the ground of concealment of income in the return of the assessment year 2005-2006.

6. Facts of the Cases:

An accumulated reading of the four Income Tax Reference Applications reveals that the Assessee-applicant is a business woman and proprietor of M/S. Al Madina Traders, which deals in trading of oil and sugar in the whole sale market. The Assessee-applicant derives its income from the said business and also from the house property. The assessee-applicant is a regular assessee of income tax, holding TIN.113-100-1059/Circle-14. The Assessee-applicant submitted its income tax return for the assessment year 2004-2005 and 2005-2006 under the normal procedure of section 75 and under the self assessment scheme as provided in section 83(A) of the Income Tax Ordinance 1984 respectively, on 06.10.2004 and within the statutory time respectively, showing an income of Tk. 97,650.00 and Tk. 3,07,950.00 respectively for the assessment year 2004-2005 and 2005-2006 which was assessed by the DCT concern on 20.10.2004 for the assessment year 2004-2005. The receipt for self

assessment return for the assessment year 2005-2006 was issued on the day of filing of the return under section 83(A) of the Income Tax Ordinance 1984 which as per the provision of the said section became deemed assessment order. But although the National Board of Revenue did not select the Self Assessment return of the assessee-applicant under the provision of section 83A(2) of the Income Tax Ordinance 1984, nevertheless the Central Intelligence Cell (CIC) of the National Board of Revenue taken up the matter for themselves and sent the income tax file of the assessee-applicant to the Inspecting Additional Commissioner of Taxes, (IACT), Range-1, Taxes Zone-2, Dhaka, on 24.2.2011, directing the said authority to reopen the assessment of the assessee-applicant for both the assessment years of 2004-2005 and 2005-2006 on the basis of its obtaining information regarding concealment of income. Thereafter, the Inspecting Additional Commissioner of Taxes (IACT) taken step for complying the said direction and ultimately approved the proposal sent by the DCT concern for reopening of the income tax cases for the assessment year 2004-2005 on 15.3.2011 and 2005-2006. Thereafter, the DCT concern without serving any notice either under section 93 or under section 83(1) of the Income Tax Ordinance 1984 for hearing of the reopened case, disposed off the case of the said two assessment years under the provision of section 84 of the Income Tax Ordinance 1984, on the ground of non-appearance of the assessee-applicant purportedly adopting the procedure of best judgment as provided in section 84 of the Income Tax Ordinance 1984 and ascertained the income of the Assessee-applicant exparte, at an amount of Tk. 24,40,754.00 for the assessment year 2004-2005 and Tk. 70,67,608.00 for the assessment year 2005-2006.

7. Being aggrieved with and highly dissatisfied by the said order of assessment by the DCT concern for the assessment year 2004-2005 and 2005-2006, the Assessee-applicant, preferred first appeal before the Commissioner of Taxes (Appeal) for those two assessment years being আয়কর আপীলপত্র নং- ৬,৭/সার্কেল-৪০/২০১১-২০১২, which were heard analogously by the Appellate Additional Commissioner of Taxes, Appellate Range-4, Appellate Zone-2, Dhaka, and that being an unsuccessful one, the Assessee-applicant preferred 2nd appeal before the Taxes Appellate Tribunal, being ITA No. 2270 of 2012-2013 for the assessment year 2004-2005 and ITA No. 2271 of 2012-2013 for the assessment year 2005-2006. Those two appeals were heard by the Division Bench No. 1, Dhaka, of the Taxes Appellate Tribunal, Dhaka, analogously and the same were disposed off by the order dated 27.3.2013 by which, although the Taxes Appellate Tribunal set aside the order of the assessment, but remanded the case to the DCT concern for making fresh assessment.

8. Being aggrieved with and highly dissatisfied by the said order of the Taxes Appellate Tribunal, the Assessee-applicant preferred the instant two Income Tax Reference Applications being Income Tax Reference Application No. 308 of 2013 and 309 of 2013.

9. It has been further alleged that one Mr. Sarwar Hossain Chowdhury, Deputy Director General, Central Intelligence Cell, Dhaka asked the assessee-applicant to come to his office with her husband for verification of some papers and documents submitted by them to the taxes department. In pursuant to the said instruction, the assessee-applicant with her husband went to the officer of the Central Intelligence Cell whereupon the Director General of CIC directed the assessee applicant to make payment at the minimum at Tk. 1,00,000,00.00 (one cror) for both for herself and her husband through pay order on that day, otherwise the Central Intelligence Cell shall file criminal case under section 165 and 166 of the Income Tax Ordinance 1984 against the assessee-applicant and her husband were detained till end of the day at their office and thereafter finding no other alternative the assessee-applicant was

compelled to make payment of an amount of Tk. 50,00,000.00 in her own income tax file through pay order and thereafter the assessee-applicant and her husband were released.

10. It has been asserted in the identical language in Income Tax Reference Application No. 307 of 2013 and Income Tax Reference Application 306 of 2013 that after the assessment of tax liability of the Assessee-applicant, after reopening the same most illegally, purportedly under the provision of section 93 of the Income Tax Ordinance 1984 for the assessment 2004-2005 and 2005-2006, the DCT concern initiated proceeding under section 128 of the Income Tax Ordinance 1984 for imposition of penalty upon the Assessee-applicant on the ground of concealment of income and thereafter without serving any notice under section 130 of the Income Tax Ordinance 1984, passed his order under the provision of section 128 of the Income Tax Ordinance 1984, imposing penalty of Tk. 2,53,095.00 for the assessment year 2004-2005 and Tk. 8,24,105.00 for the assessment year 2005-2006.

11. Being aggrieved with and highly dissatisfied by the said imposition of penalty, the Assessee-applicant preferred two appeals before the Commissioner of Taxes (Appeal) for those two assessment years, being আয়কর আপীলপত্র নং- ৮,৯/সার্কেল-৪০/২০১১-২০১২ which were heard by the Appellate Additional Commissioner of Taxes, Appellate Range-4, Appellate Zone-2, Dhaka, who heard both the appeals analogously and rejected the appeals by his order dated 15.11.2005 affirming the order of the DCT concern regarding the imposition of penalty.

12. Being aggrieved with and highly dissatisfied by the said order, the Assessee-applicant preferred two appeals before the Taxes Appellate Tribunal, being ITA No. 2272 of 2012-2013 for the assessment year 2004-2005 and ITA No. 2273 of 2012-2013 for the assessment year 2005-2006 against the imposition of penalty. But the Taxes Appellate Tribunal although set aside the order of imposition of penalty but remanded the case to the DCT concern to make penalty order consequent to revised assessment order which may be passed on remand by the DCT concern for the assessment year 2004-2005 and 2005-2006 as decided off in the ITA no. 2270 of 2012-2013 and ITA No. 2271 of 2012-2013.

13. Being aggrieved with and highly dissatisfied by the said order, the Assessee-applicant preferred the instant two Income Tax Reference Applications being Income Tax Reference Application 306 of 2013 and Income Tax Reference Application 307 of 2013, questioning the legality and propriety of the order passed by the Taxes Appellate Tribunal.

14. Claim of the Taxes Department:

15. Pursuant to the service of notice, the learned Assistant Attorney General Ms. Nurun Nahar and Nasrin Parvin appeared on behalf of the Taxes department and submitted affidavit-in-reply in four of the Income Tax Reference Application, out of which two being in Income Tax Reference Application No. 308 of 2013 and 309 of 2013 wherein it has been asserted that the Deputy Commissioner of Taxes reopened the income tax cases of the Assessee-applicant for the assessment year 2004-2005 and 2005-2006 under the provision of section 93 of the Income Tax Ordinance 1984, as he had obtained clear, explicit and definite information of tax evasion by the Assessee-applicant as informed by the Central Intelligence Cell (CIC) of the National Board of Revenue. In order to deduce the true income of the Assessee-applicant the DCT concern passed the revised assessment order under section 93 of the Income Tax Ordinance 1984. In addition to the above, the case was thoroughly investigated by the Central Intelligence Cell (CIC) of the National Board of Revenue and the assessment order passed by the DCT concern under section 93 of the Income Tax Ordinance 1984 was

based upon the finding of the said investigation. As the Assessee-applicant failed to disclose the amount of income for the concern income year and evaded the rightful amount of tax, the DCT being informed by the Central Intelligence Cell (CIC) and equipped with prior approval of the concerned Inspecting Additional Commissioner of Taxes (IACT) reopened the income tax cases of the assessee-applicant for those assessment years 2004-2005 and 2005-2006. That being in accordance with law, the first appellate authority did not interfere with the assessment orders. But although the Taxes Appellate Tribunal set aside the assessment order but correctly and lawfully remanded these two cases to the DCT concern for making revised assessment and therefore the question as has been formulated in the instant two Income Tax Reference Applications are not lawful and as such not required to be answered in negative and in favour of the Assessee-applicant.

16. The taxes department also submitted affidavit-in-reply in Income Tax Reference Applications No. 306 of 2013 and Income Tax Reference Applications No. 307 of 2013 and so far the question of imposition of penalty are concerned it has been asserted in the affidavit-in-reply that after completion of the assessment under section 93 of the Income Tax Ordinance 1984, the DCT concern rightly imposed the penalty upon the evaded portion of income of the Assessee-applicant for those two assessment years under the provision of section 128 of the Income Tax Ordinance 1984 and therefore the question in respect of imposition of penalty made in these two Income Tax Reference Applications, being Income Tax Reference Application No. 307 of 2009 and Income Tax Reference Application No. 306 of 2013 relating to assessment years 2004-2005 and 2005-2006 are not required to be answered in negative and in favour of the Assessee-applicant.

17. The learned Advocate Mr. Mosharaf Hossain represented the Assessee-applicant while the learned Assistant Attorney General Ms. Nasrin Parvin conducted hearing on behalf of the taxes department at the time of hearing of these four Income Tax Reference Applications.

18. Argument of the Assessee-Applicant:

The learned Advocate Mr. Mosharaf Hossain at the very out set has drawn the attention of this court to the fact that the assessee-applicant submitted her income tax return for the assessment year 2004-2005 under the normal procedure under section 75 of the Income Tax Ordinance 1984 and further submitted her income tax return for the assessment year 2005-2006 under the Universal Self Assessment Scheme of section 83A of the Income Tax Ordinance 1984. But the DCT concern and both the appellate authorities most callously mentioned in their respective order that both the return was filed under the self assessment scheme, which mislead him while he was drafting the substantive petition in Income Tax Reference Application No. 308 of 2013 relating to assessment year 2004-2005 and accordingly he mentioned the same in Income Tax Reference Application No. 308 of 2013. But later it appears that such assertion not being correct, the commission of error in Income Tax Reference Application 308 of 2013 is required to be amended and accordingly he preferred a supplementary-affidavit annexing the photocopy of the certified copy of the return for the assessment year 2004-2005 and stated the correct fact as to the provision of statute relied upon for filing the income tax return for the assessment year 2004-2005.

19. The learned Advocate Mr. Mosharaf Hossain while taken this court through the assessment order made by the DCT concern for the assessment year 2004-2005 and the order for imposition of penalty for that assessment year, drawn the attention of this court to the fact that the DCT concern did not apply his mind at all in the case since he has mentioned, in the

assessment order, that the return was submitted under the normal procedure, but mentioned in the order for imposition of penalty that the return was submitted under the Self Assessment Scheme. So also the 1st Appellate Authority and the Taxes Appellate Tribunal were so negligent in making the same error. These apparent negligent assertions clearly proved the fact that the DCT concern and these two appellate authorities did not make justice to the assessee-applicant and the DCT concern with an ulterior motive re-opened the finalized assessment order of the assessee-applicant for the assessment year 2004-2005.

20. The learned Advocate Mr. Mosharaf Hossain while taken this court through the assertion made in assessment order, concerning the assessment years 2004-2005 and 2005-2006, strenuously argued that the return was submitted by the Assessee-applicant for the assessment year 2004-2005 on 6.10.2004 which was assessed by the assessment order dated 20.10.2004 and the Assessee-applicant upon complying the demand notice served under section 135 of the Income Tax Ordinance 1984 paid the due tax and accordingly the same became past and closed transaction after the statutory period of limitation of five years. But the assessment order later made purportedly under section 93 of the Income Tax Ordinance 1984, beyond the knowledge of the assessee-applicant, itself shows that the Central Intelligence Cell (CIC) of the National Board of Revenue in order to reopen the said past and closed assessment, initiated a proceeding on 24.2.2011 apparently after six years and upon the said initiation of file by the Central Intelligence Cell (CIC) of the National Board of Revenue, the Inspecting Additional Commissioner of Taxes, Range-1, Taxes Zone-2, Dhaka, initiated his file in this respect on 15.3.2011 and thereafter, although it has been asserted in the assessment order that notice under section 83(1) and 79 of the Income Tax Ordinance 1984 was served upon the Assessee-applicant, but practically no such notice was even served upon the Assessee-applicant, for which the DCT concern illegally invoked its power under the provision of section 84 of the Income Tax Ordinance 1984 and passed the order under the purported Best Judgment Procedure.

21. The learned Advocate Mr. Mosharaf Hossain contends that the reopening of the assessment for the assessment year 2004-2005 was barred by limitation under the provision of section 93(3)(B) of the Income Tax Ordinance 1984, which provides that no such past and closed transaction can be reopened after the expiry of five years.

22. The learned Advocate Mr. Mosharaf Hossain next argued that a proceeding barred by limitation if proceeded will be treated as *void ab-initio* and that being a question of law is always opened to be considered by the court, so also by the taxes appellate tribunal. But the Taxes Appellate Tribunal did not at all notice that the entire proceeding being barred by limitation should, not only liable to be set aside but also should be nullified as barred forever. That not being done by the tribunal, the said issue is required to be considered by this court and accordingly the Assessee-applicant formulated the question in the instant Income Tax Reference Application No. 308 of 2013 for making an answer in negative and in favour of the assessee-applicant.

23. The learned Advocate Mr. Mosharaf Hossain further argued that the Taxes Appellate Tribunal being the final authority in appeal in the Taxes department is empowered to dispose of any case by itself, if all the evidence is adequately available before it. The question of limitation being apparent on the face of the record, the Taxes Appellate Tribunal was adequately equipped to dispose off the same by itself and not to make remand of the case to the DCT concern and therefore the question as has been formulated by the Assessee-applicant

in Income Tax Reference Application No. 308 of 2013 is required to be answered in negative and in favour of the Assessee-applicant.

24. The learned Advocate Mr. Mosharaf Hossain while taken this court through the assessment order regarding the assessment year 2005-2006 drawn the attention of this court to the fact that admittedly the return was submitted under the provision of section 83(A) of the Income Tax Ordinance 1984 known as universal Self Assessment Scheme. Any return filed under the provision of universal self assessment scheme, as provided under section 83A of the Income Tax Ordinance 1984, as prevailing at the relevant period, if compliant with the provision of the said section, the DCT concern usually issues receipt, which deemed to be the finalization of the assessment for that relevant assessment year. In the instant case admittedly the DCT concern issued the receipt against the submission of return under the provision of section 83A(1) of the Income Tax Ordinance 1984, which became deemed finalized assessment order. That deemed finalized assessment order can only be reopened under the provision of section 83A(2) of the Income Tax Ordinance 1984 only by the National Board of Revenue if it selects the said return on random basis and to direct the DCT concern to make audit and thereafter if required to proceed for reopening of the case. But in the instant case the assessment order for the assessment year 2005-2006 made purportedly under section 93 of the Income Tax Ordinance 1984, clearly established the fact that such procedure was not adopted by the National Board of Revenue and the DCT concern has re-opened the same on 24.2.2011 on the initiation of Central Intelligence Cell (CIC). Although the assessment order asserted that notice under the provision of section 93 of the Income Tax Ordinance 1984 was served upon the Assessee-applicant, but practically no such notice was ever served upon the Assessee-applicant and that being the case, the revised assessment order passed by the DCT concern, purportedly under the provision of Best Judgment Procedure provided in section 84 of the Income Tax Ordinance 1984 is palpable illegal.

25. The learned Advocate Mr. Mosharaf Hossain strenuously argued that non-compliance of substantive procedure of law is a question of law and therefore the highest appellate authority in the taxes department were required to consider the same, especially the issue that the past and closed assessment order for the assessment year 2005-2006 was reopened not under the proper procedure of law and was liable to be set aside for ever. But the Taxes Appellate Tribunal wrongfully remanded the case to the DCT concern for a further revised assessment. This being a palpable illegality this court is required to consider the same under the provision of law.

26. The learned Advocate Mr. Mosharaf Hossain further contends that in the case of assessment year 2004-2005 clear illegality was committed by the Taxes Appellate Tribunal, in as much as that neither the question of non-compliance of procedure of law was considered, nor the question of limitation for reopening any such assessment order passed under the provision of section 83(2) of the Income Tax Ordinance 1984 was at all considered and as such the question, as has been formulated by the Assessee-applicant in this Income Tax Reference Application No. 309 of 2013, is required to be answered in negative and in favour of the Assessee-applicant.

27. The learned Advocate Mr. Mosharaf Hossain while finally advanced his argument in respect of the imposition of penalty against the assessee-applicant under the provision of section 128 of the Income Tax Ordinance 1984, involved in Income Tax Reference Application No. 307 of 2013 relating to assessment year 2004-2005 and Income Tax Reference Application No. 306 of 2013 relating to assessment year 2005-2006, strenuously

argued that although the Taxes Appellate Tribunal set aside the order of imposition of penalty by the DCT concern as affirmed by the CT(Appeal), yet the order of remand is a palpable illegality since the tribunal did not notice that the invocation of power under section 93 of the Income Tax Ordinance 1984 for reopening of the assessment order for the assessment year 2004-2005 and 2005-2006 was barred by limitation and as such the direction for reassessment made by the tribunal is an infructuous order. So also the remand of the issue of imposition of penalty by the DCT concern is also infected with the same fate and therefore the remand order for imposition of penalty, not being lawful, as decided in so many cases in this court, cannot stand on the facts and circumstances of the case, which ought to be considered by the Taxes Appellate Tribunal and therefore the order of remand to the DCT concern for imposition of penalty after further assessment cannot stand on the provision of law and therefore the question as has been formulated in this respect is required to be answered in negative and in favour of the Assessee-applicant.

28. Arguments of the taxes department.

On the other hand the learned Assistant Attorney General Ms. Nasrin Parvin while taken this court through the assessment order strenuously argued that the Central Intelligence Cell (CIC) under the National Board of Revenue is amply empowered to dig out any fact of concealment of income by any assessee of income tax. The Assessee-applicant having concealed his income for the assessment year 2004-2005, the Central Intelligence Cell (CIC) obtained the information of such concealment and initiated the file for reopening of the assessment for the assessment year 2004-2005 and 2005-2006 and therefore no question of limitation arises at all. Because, the Central Intelligence Cell (CIC) has empowered to initiate file to reopen any case for the purpose of collection of revenue for the state.

29. The learned Assistant Attorney General Ms. Nasrin Parvin further strenuously argued that since the Assessee-applicant concealed her income, the DCT concern lawfully re-opened the assessment order under the provision of section 93 of the Income Tax Ordinance 1984. That being not illegal under the provision of section 93(3)(B) of the Income Tax Ordinance 1984, the question which have been formulated by the Assessee-applicant in these two Income Tax Reference Application being No. 308 of 2013 and 309 of 2013 are not required to be answered in negative and in favour of the Assessee-applicant.

30. The learned Assistant Attorney General Ms. Nasrin Pervin further argued that as the Taxes Appellate Tribunal set aside the imposition of fine upon the impugned assessment order, it has correctly remanded the same to the DCT concern for imposition of penalty upon the revised assessment, which not being illegal, the question formulated in the two Income Tax Reference Application No. 307 of 2013 and Income Tax Reference Application No. 306 of 2013 is not required to be answered in negative and in favour of the assessee-applicant.

31. We have heard the learned Advocate and perused the materials on record.

32. Deliberation of the court:

In Income Tax Reference Application No. 308 of 2013 the DCT concern in the body of the assessment order mentioned that the return for the assessment year 2004-2005 was submitted under the normal procedure i.e. under the provision of section 75 of the Income Tax Ordinance 1984. But at column No. 7 of the assessment order it has been mentioned that the assessment is made under section 83A of the Income Tax Ordinance 1984, which being absurd proves the non application of mind and the negligence in making assessment order by

the concerned DCT. Further the 1st Appellate Authority and the Taxes Appellate Tribunal committed the same mistake and passed their order on the mistaken view. This court upon perusing annexure-F found that the return for the assessment year 2004-2005 was submitted under the normal procedure, i.e. under section 75 of the Income Tax Ordinance 1984. This commission of error by all the lower authorities is serious in nature which has effected adversely the assessment of tax liability of the assessee applicant. However, the Assessee-applicant formulated the following question seeking opinion from this court;

(i) *In the circumstances and on the facts, whether the Taxes Appellate Tribunal, was justified maintaining unauthorized ex-parte assessment order and subsequent appeal order passed by the first appellate authority.*

(ii) *In the circumstances and on the facts whether the Taxes appellate Tribunal Division Bench Dhaka-1 is justified maintaining ex-parte assessment order and the order of first appeal ignoring the provision of section 94(1A) of the Income Tax Ordinance 1984 regarding limitation of assessment.*

(iii) *In the circumstances and on the facts whether the Taxes Appellate Tribunal Division Bench Dhaka-1 was justified directing the DCT concerned to make assessment again.*

(iv) *In the circumstances and on the facts whether the Taxes Appellate Tribunal Division Bench Dhaka-1, was justified maintaining the proceeding under section 93 of the Income Tax Ordinance 1984 as made by the DCT and subsequently was confirmed by the first appellate authority.*

(v) *In the circumstances & facts, whether the Taxes Appellate Tribunal was justified maintaining the assessment order u/s 93/94 of the ordinance for the assessment year 2004-2005 which is barred by limitation.*

33. The pertinent question practically raised in Income Tax Reference Application No. 308 of 2013 is regarding the issue of legality of assessment under section 93 of the Income Tax Ordinance 1984 after the period of limitation. It has been asserted that the assessment of the tax liability of the assessee-applicant for the assessment year 2004-2005 was basically assessed on 20.10.2004 and the DCT concern re-opened the same through the approval of the IACT on 15.03.2011 and accordingly it has been argued that since the provision of section 93(3)(B) of the Income Tax Ordinance 1984 provided for limitation of five years from the end of the assessment year as to reopening of any assessed return under the provision of section 93 of the Income Tax Ordinance 1984, the re-assessment made by the DCT is palpable illegal. This has prompted this court to examine the provision of entire section 93 of the Income Tax Ordinance 1984, which is reproduced below for better appreciation;

34. Income Tax Ordinance 1984

Section 93: Assessment in case of income escaping assessment, etc.—

1) *If, for any reason, any income chargeable to tax for any assessment year has escaped assessment or has been under assessed or has been assessed at too low a rate or has been the subject of excessive relief or refund under this Ordinance, the Deputy Commissioner of Taxes may issue a notice to the assessee containing all or any of the requirements which may be included in a notice under section 77 and may proceed to assess or determine, by an order in writing, the total income of the assessee or the tax payable by him, as the case may be, and all the provisions of this Ordinance shall, so far as may be, apply accordingly:*

2) *No proceeding under sub-section (1) shall be initiated unless definite information has come into the possession of the Deputy Commissioner of Taxes [and*

he has obtained] the previous approval of the Inspecting Joint Commissioner in writing to do so, except in a case where a return has not been filed under section 75 or 77.

3) A notice under sub-section (1) may be issued by the Deputy Commissioner of Taxes,-

(a) In any case in which he has reason to believe that the assessee or any other person on his behalf has not filed a return under section 75 or 77, at any time;

(b) In any case in which he has reason to believe that the assessee has for any assessment year concealed the particulars of his income or furnished inaccurate particulars thereof or omitted or failed to disclose all material facts necessary for the assessment for such year, within [five years] from the end of the assessment year for which the assessment is to be made.

Provided that in a case where a fresh assessment is made for any assessment year in pursuance of an order [sections 120, 121A, 156 or 159], the period of [five years] a referred to in this clause shall commence from the end of the year in which the fresh assessment is made;

(c) in any other case, within two years from the end of the assessment year for which the assessment is to be made.

4) In computing the period of limitation for the purpose of making an assessment or taking any other proceedings under this Ordinance, the period, if any, for which such assessment or other proceedings has been stayed by any court, tribunal or any other authority, shall be excluded.

5) Notwithstanding anything contained in-subsection (3) where an assessment or any order has been annulled, set aside, cancelled or modified, the concerned income tax authority may start at which such annulment, setting aside, cancellation or modification took place, and nothing contained in this Ordinance shall render necessary the re-issue of any notice which has already been issued or the re-furnishing or refiling of any return, statement or other particulars which has already been furnished or filed, as the case may be.

35. Under the aforesaid provision of section 93 of the Income Tax Ordinance 1984, prevailing during the relevant period, the Deputy Commissioner of Taxes is empowered to issue any notice under section 93 of the Income Tax Ordinance 1984 if he has reason to belief that the Assessee-applicant has for any assessment year concealed the particulars of his income. But that has been limited under the provision of sub-section (3) to five years from the end of the assessment year for which the assessment is to be made. In the instant case of Income Tax Reference application No. 308 of 2013, related to assessment year 2004-2005, the return under the provision of section 75 of the Income Tax Ordinance 1984 was admittedly submitted on 6.10.2004, whereupon under the provision of section 94 of the Income Tax Ordinance 1984, the DCT concern was liable to assess the said return within six months from the end of the assessment year in which the income was first assessable. The entire provision of section 94 of the Income Tax Ordinance 1984 is reproduced below for better understanding, which reads as follows;

36. Income Tax Ordinance 1984

Section 94. Limitation for assessment.

(1) Subject to the provisions of sub-sections (2) and (3), no order of assessment under the provisions of this Chapter in respect of any income shall be made after the expiry of six months from the end of the assessment year in which the income was first assessable]

[1A) Notwithstanding anything contained in sub-section (1), no order of assessment under sub-section (2) of section 82B, [sub-section (3) of section 82BB] or sub-section (2) of section 83A shall be made

(a) after the expiry of two years from the end of the assessment year in which the income was first assessable; or

(b) after the expiry of the period of fifteen months from the end of the month in which the return is submitted, whichever is earlier]

(1B) Notwithstanding anything contained in sub-section (1) or (1A) no order of assessment under section 107C of this Ordinance shall be made after the expiry of three years from the end of the assessment year in which the income was first assessable.

(2) Notwithstanding anything contained in sub-section (1) assessment under section 93 may be made-

a) In the cases falling under section 93(3)(a) and (b), within [two years] from the end of the year in which notice under the said sub-section was issued; and.

b) In the cases falling under section 93(3)(c), within [one year] from the end of the year in which notice under the said sub section was issued.

(3) Notwithstanding anything contained in this section, limiting the time within which any action may be taken or any order or assessment may be made, order or assessment, as the case may be, to be made on the assessee or any other person in consequence of, or to give effect to, any finding or direction contained in an order under [section 120, 121A, 156, 161, or 162] or, in the case of a firm, an assessment to be made on a partner of a firm in consequence of an assessment made on the firm [shall be made within thirty days] from the date on which the order was communicated and such revised order shall be communicated to the assessee within thirty days next following:

[Provided that where an order of assessment has been set aside by any authority in that case the assessment shall be made within forty five days from the date on which the order was communicated to him.

Explanation I.- *Where, by an order under [sections 120, 121A 156, 159, 161 or 162], any income is excluded from the total income of the assessee for an another assessment year shall, for the purposes of this section, be deemed to be one made in consequence of, or to give effect to, any finding or direction contained in the said order.*

Explanation II: *where, by an order under [sections 120, 121A 156, 159, 161 or 162] any income is excluded from the total income of one person and held to be the income of another person, an assessment of such income of such other person, shall, for the purposes of this section, be deemed to be one made in consequence of or to give effect to, any finding or direction contained in the said order.*

(4) Where the Deputy Commissioner of Taxes fails to give effect to any finding or direction contained in an order referred to in sub-section (3) within the period stipulated therein, such fails of the Deputy Commissioner of Taxes shall be construed as misconduct.

37. The aforesaid provision of limitation is a imperative one. A return filed under the normal procedure of section 75 of the Income Tax Ordinance 1984 has to be assessed within the period of limitation of six month, so also the re-opening procedure against deemed assessment under the Self Assessment Scheme has to be confined to the period of limitation of two years. No proceeding for assessment of any return can be taken after the period for limitation and any such proceeding initiated shall be a nullity.

38. But in the instant case the Central Intelligence Cell (CIC) of the National Board of Revenue initiated to investigate the concealment of income of the Assessee-applicant by initiating a file on 24.2.2011, upon which the DCT concern purportedly taken approval from the Inspecting Additional Commissioner of Taxes (IACT) on 15.3.2011 and thereafter the DCT served the notice under section 93 of the Income Tax Ordinance 1984, which is beyond the statutory period of limitation of five years. Since the assessment year for 2004-2005 shall expire on 30th June, 2005 and the assessment has to be made thereafter within six months *i.e.* within 31st December, 2005 under the provision of section 94(1) of the Income Tax Ordinance 1984. So far the commencement of limitation is concerned under the provision of section 93(3) of the Income Tax Ordinance 1984 it shall commence from 1st July, 2005 and will expire on 30th June 2010. Therefore, the reopening of the assessment under the provision of section 93(1) of the Income Tax Ordinance 1984 for the assessment year 2004-2005 after the expiry of the limitation period was a palpable illegality and that being a question of law the Taxes Appellate Tribunal was required to consider the same.

39. But it appears that such a vital question of law was not even noticed by the Taxes Appellate Tribunal, which although set aside the order of assessment, for the assessment year 2004-2005, but erroneously remanded the case to the DCT concern for revised assessment. A time barred assessment cannot be revitalized by the order of the tribunal and that being not sustainable under the provision of law, this court is required to answer the question related to the same in negative and in favour of the Assessee-applicant.

40. Turning to Income Tax Reference Application No. 309 of 2013 it appears that the Assessee-applicant formulated the similar questions of law seeking opinion from this court, which are as follows;

(i) In the circumstances and on the facts, whether the Taxes Appellate Tribunal, was justified maintaining unauthorized ex-parte assessment order and subsequent appeal order passed by the first appellate authority.

(ii) In the circumstances and on the facts whether the taxes appellate Tribunal Division Bench Dhaka-1 is justified rejecting the appeal of the assessee applicant ignoring the provision under section 83A of the Income Tax Ordinance 1984 specifically selection of return for the purpose of audit.

(iii) In the circumstances and on the facts whether the Taxes appellate Tribunal Division Bench Dhaka-1 is justified maintaining ex-parte assessment order and the order of first appeal ignoring the provision of section 94(1A) of the Income Tax Ordinance 1984 regarding limitation of assessment.

(iv) In the circumstances and on the facts whether the Taxes Appellate Tribunal Division Bench Dhaka-1 was justified directing the DCT concerned to make assessment again.

(v) In the circumstances and on the facts whether the Taxes Appellate Tribunal Division Bench Dhaka-1, was justified maintaining the proceeding under section 93 of the Income Tax Ordinance 1984 as made by the DCT and subsequently was confirmed by the first appellate authority.

41. In the instant case it appears from the Assessment order Annexure-A for the assessment year 2005-2006 that admittedly the Assessee-applicant submitted its return on 19.9.2005 under the provision of section 83A of the Income Tax Ordinance 1984 known as Self Assessment Scheme, prevailing at the relevant period. The provision of section 83A(2) of the Income Tax Ordinance 1984 provides for selecting such return by the National Board

of Revenue for the purpose of audit upon some condition precedent and to direct DCT concern to reassess the same, if so required upon holding the audit. The provision of section 83A of the Income Tax Ordinance 1984, prevailing at the relevant time, is reproduced below for better appreciation;

42. Income Tax Ordinance 1984

Section 83A. Self assessment.-

1) *Notwithstanding anything contained in this Ordinance, where the return of income for any income year filed by an assessee, in accordance with the rules for self assessment made by the Board for that year or any instructions or orders issued thereunder, the Deputy Commissioner of Taxes shall receive such return himself or cause to be received by any other official authorized by him and issue a receipt of such return with signature and official seal affixed thereon and the said receipt shall be deemed to be an order of assessment under section 82 for the assessment year for which the return is filed.*

2) *Notwithstanding anything contained in sub-section (1) and section 93, the Board or any authority subordinate to the Board, if so authorized by the Board in this behalf, may select, in the manner to be determined by the Board, of the returns filed under sub-section (1) and refer the returns so selected to the Deputy Commissioner of Taxes for the purpose of audit and the Deputy Commissioner of Taxes shall thereupon proceed, if so required, to make the assessment under section 83 or section 84, as the case may be:*

3)

4)

5) *Notwithstanding anything contained in this section the Deputy Commissioner of Taxes may initiate proceedings under section 93 if definite information regarding concealment of income comes to his possession.*

43. In the instant case the provision of section 83A(2) of the Income Tax Ordinance 1984 was admittedly not invoked by the National Board of Revenue at the due point of time, rather the DCT concern upon the investigation made by the Central Intelligence Cell (CIC) of the National Board of Revenue, initiated proceeding under section 93 of the Income Tax Ordinance 1984 to reopen the said return, which was earlier treated as deemed to have been finalized the tax liability of the Assessee-applicant, upon grant of receipt, under the provision of section 83A(1) of the Income Tax Ordinance 1984. But as the provision of section 83A was amended by the Finance Act 2003 inserting sub-section (5) providing the applicability of the provision of section 93 of the Income Tax Ordinance 1984, the DCT concerned was on bounden duty to follow the terms and condition of the provision of section 93 of the Income Tax Ordinance 1984, if the DCT desires to invoke such provision. The prime consideration for invoking the provision of section 93 is the definite information came to the possession of the DCT concerned. Here in this case it appears that the DCT concerned relied upon investigation report sent by the Central Intelligence Cell (CIC) which found bank deposit was not disclosed in the self assessment return, upon which DCT assessed the tax liability of the assessee applicant. But further appears that the taxes appellate tribunal found that the DCT concern although reopened the deemed finalized assessment order under the provision of section 93 and assessed the tax liability of the assessee-applicant for that assessment year, yet the DCT concern did not issue any notice under section 93 of the Income Tax Ordinance 1984 upon the assessee-applicant and as such the assessment made by the DCT concern under section 93 of the Income Tax Ordinance 1984 is not sustainable and accordingly the Taxes Appellate Tribunal set aside the assessment made by the DCT concern. But

surprisingly the Taxes Appellate Tribunal remanded the case to the DCT concern for fresh assessment after serving notice under section 93 of the Income Tax Ordinance 1984. This order of remand is a palpable illegality, since in the meantime the authority to reopen the deemed finalized assessment is infested with limitation under the provision of section 93(3)(b) of the Income Tax Ordinance on the date of remand order, which was passed on 27.03.2013. Therefore, the questions formulated in this respect are required to be answered in negative and in favour of the Assessee-applicant.

44. In Income Tax Reference Application No. 307 of 2013 and Income Tax Reference Application No. 306 of 2013 the Assessee-applicant formulated identical questions of law challenging the legality and propriety of the imposition of penalty under section 128 of the Income Tax Ordinance 1984 in the following language;

(i) *In the circumstances and on the facts, whether the Taxes Appellate Tribunal, was justified maintaining unauthorized ex-parte assessment order u/s 128 of the ordinance and subsequent appeal order passed by the first appellate authority.*

(ii) *In the circumstances and on the facts whether the Taxes Appellate Tribunal Division Bench Dhaka-1 is justified maintaining separate ex-parte assessment order u/s 128 and the order of first appeal.*

(iii) *In the circumstances and on the facts whether the Taxes Appellate Tribunal Division Bench Dhaka-1, was justified maintaining the separate proceeding under section 128 of the Income Tax Ordinance 1984.*

45. The DCT concern upon assessing the tax liability of the Assessee-applicant for the assessment years 2004-2005 and 2005-2006 under the provision of section 93 of the Income Tax Ordinance 1984, found that the Assessee-applicant has concealed his income for those two assessment years and accordingly the DCT concern has initiated a proceeding under the provision of section 128 of the Income Tax Ordinance 1984 for imposition of penalty. The provision of section 128 of the Income Tax Ordinance 1984 reads as follows;

46. Income Tax Ordinance 1984

Section 128. Penalty for concealment of income-

(1) *Where, in the course of any proceeding under this Ordinance, the Deputy Commissioner of Taxes, the Appellate Joint Commissioner, [the Commissioner (Appeals) or the Appellate Tribunal is satisfied that any person has, either in the said proceeding or in any earlier proceeding relating to an assessment in respect of the same income year,-*

a) *concealed particulars of his income or furnished inaccurate particulars of such income; or*

b) *understated the value of any immovable property in connection with its sale or transfer with a view to evading tax*

[he or it shall impose upon such person a penalty of ten percent] of tax which would have been avoided had the income as returned by such person or as the case may be, the value of the immovable property as stated by him been accepted as correct.

Provided that if the concealment referred to in clause (a) and (b) of this sub-section or sub-section (2) is detected after a period of more than one year from the year in which the concealment was first assessable to tax, the amount of penalty shall increase by an additional ten percent for each preceding assessment year.

Provided that where concealment referred to in this sub-section is in a case where the assessment of tax was made by the assessee himself in accordance with any rule

made in this behalf and accepted by the Deputy Commissioner of Taxes as correct, the words “two and a half times” occurring in this sub-section shall be read as “five times]

(2) For the purpose of sub-section (1), concealment of particulars of income or furnishing of inaccurate particulars of income shall include-

a) The suppression of any item of receipt liable to tax in whole or in part, or

b) Showing any expenditure not actually incurred or claiming any deduction therefor.

[(2A) Notwithstanding anything contained in sub-section (1) and (2), in a case where a certificate is issued by a chartered accountant as to the correctness of the total income of an assessee under the first proviso to section 82 it is subsequently discovered by the Deputy Commissioner, the Appellate Additional Commissioner, the Commissioner (Appeal) or the Appellate Tribunal that the chartered accountant wilfully or knowingly withheld any information relating to the particulars of such income, he or it may impose upon such chartered accountant a penalty of a sum not exceeding two and a half times the amount of tax which would have been avoided had the total income as certified by such chartered accountant been accepted as correct.

(3) Notwithstanding anything contained in sub-section (1) and (2), in a case where a certificate is issued by a chartered accountant as to the correctness of the total income of an assessee under the [first or the second proviso] to section 82 it is subsequently discovered by the Deputy Commissioner of Taxes, the Appellate Joint Commissioner, the Appellate Additional Commissioner, the Commissioner (Appeal) or the Appellate Tribunal that the chartered accountant wilfully or knowingly withheld any information relating to the particulars of such income, he or it may impose upon such chartered accountant a penalty of a sum not exceeding two and a half times the amount of tax which would have been avoided had the total income as certified by such chartered accountant been accepted as correct.

47. In this respect this court in the case of Abul Kalam-Vs-The Commissioner of Taxes in Income Tax Reference Application No. 397 of 2010 heard and disposed off along with Income Tax Reference Application No. 398 of 2010, Income Tax Reference Application No. 399 of 2010 and Income Tax Reference Application No. 400 of 2010, decided that issue of imposition of penalty has to be decided in the original proceeding either under the provision of section 93 of the Income Tax Ordinance 1984 or in any other relevant proceeding and no further step under the provision of section 128 of the Income Tax Ordinance 1984 could be taken without first deciding the issue of imposition of penalty in the original proceeding.

48. But in the instant case the DCT concern simultaneously with the initiation of reopening of the case under the provision of section 93 of the Income Tax Ordinance 1984, commenced the proceeding under the provision of section 128 of the Income Tax Ordinance 1984, although no concealment of tax could be imagined before the proceeding under section 93 of the Income Tax Ordinance 1984 is concluded. Therefore, imposition of penalty under the provision of section 128 of the Income Tax Ordinance 1984 upon the Assessee-applicant for the two assessment years are palpable illegality which was required to be considered by the Taxes Appellate Tribunal, which erroneously remanded the proceeding under the provision of section 128 of the Income Tax Ordinance 1984 to the DCT concern. Therefore, the question as has been formulated in respect to this issue is required to be answered in negative and in favour of the Assessee-applicant.

49. Under the reasoning and discussion as above, this court finds merit in these four Income Tax Reference Applications which are required to be allowed by answering the questions, as have been formulate by the Assessee-applicant in negative and in favour of the Assessee-applicant.

50. In the result, these four Income Tax Reference Applications are allowed.

51. The questions as have been formulated by the Assessee-applicant in these four Income Tax Reference Applications are hereby answered in negative and in favour of the Assessee-applicant.

52. However, there shall be no order as to cost.