Present:

Mr. Justice Sardar Md. Rashed Jahangir

And

Mr. Justice Dihider Masum Kabir

Income Tax Reference Application No. 07 of 2020

IN THE MATTER OF

Md. Abul Kalam Azad

…Applicant

The Commissioner of Taxes, Taxes Zone-5, Dhaka

…Respondent

No one appear

...For the Applicant

Mr. Tanim Khan, D. A. G.

…For the Respondent

Dated: 02.11.2026

Sardar Md. Rashed Jahangir, J:

This reference application has been appearing in the cause list for a couple of days with name of learned advocate for the applicant but no one appeared. Consequently, no hearing can be taken place as the assessee-applicant who caused the reference to be made is not attending. In such situation, the only question that calls for determination in this case whether this court is under any obligation to decide the question of law referred by the assessee-applicant under section 160(1) of Income Tax Ordinance, 1984.

In order to decide the issue, we may profitably quote Sub- section (2) of Section 161 of the Income Tax Ordinance, 1984, which runs as follows:

> *"2) The High Court Division shall, upon hearing any case referred to it under section 160, decide the question of law raised thereby and shall deliver its judgment thereon stating the grounds on which such decision is founded and shall send a copy of such judgment under the seal of the court and*

> *signature of the Registrar to the Appellate Tribunal which shall pass such orders as are necessary to dispose of the case in conformity with the judgment."*

The language apparently shows mandatory in nature since the section deploys the word "shall" several times but obviously the section opens with the words "The High Court Division shall, upon hearing any case" etc. The pertinent question is that how the High Court Division will decide the question without hearing the party who has caused the reference to be made fails to appear and as such no hearing can take place.

In the case of M/s. Dhaka Steel Works Ltd. -Vs.- The Commissioner of Taxes, Dhaka, reported in (1992) 12BLD (HCD) 334, it is held that:

> *"Whether for the expression 'shall decide the questions of law thereby' the Court is bound to answer the question in absence of the applicant or his lawyer at the time of hearing the application? A plain reading of sub-section (5) indicates so in view of the use of the expression 'shall' several times used in the said sub-section. But a careful scrutiny of the language of sub-section (5) as a whole does not support such view. As sub-section (5) of section 66 of the Act opens with the expression 'The High Court Division upon hearing of any such application.' It directs that there should be a hearing of the application. Can it be said then that without hearing the application the questions are to be decided? We this answer in the negative. Although, on a cursory view of sub-section (5), it is mandatory in nature so far as the decision of the High Court Division is concerned But how the High Court Division will decide the question without hearing the party at whose instance the reference is made seeking answer to the question raised thereby? The decision on the question presupposes a prior hearing and as in absence of the applicant no hearing is*

> *possible, the questions shall remain unanswered as the party does not seek the questions to be answered appearing at the time of hearing as 'upon hearing the application' the Court is to decide the questions. Mere raising the question in an application under section 66(1) ipso facto does not make it obligatory on the part of the High Court Division to answer the question."*

In similar situation Calcutta High Court in the reference application filed by M.M. Ispahani Limited, Calcutta, against commissioner of excess profits tax, West Bengal, under Section 66 of the Indian Income Tax Act, (XI of 1922), reported in 27 ITR 188, held that when a party who has caused the reference to be made and who is in the position of a plaintiff fails to appear, consequently no hearing can take place, in such a case obligation of deciding the question of law and delivering judgment does not arise. The provision of Sub-section (5) of Section 66 of the Indian Income Tax Act, 1922, as it was, reproduced below:

> *"The High Court, upon the hearing of any such case, shall decide the question of law raised thereby and shall deliver its judgment thereon containing the grounds on which such decision is founded and shall send a copy of such judgment under the seal of the court and signature of the Registrar, to the Appellate Tribunal which shall pass such orders as are necessary to dispose of the case conformably to such judgment."*

On a close scrutiny it appears that language of Sub- section (5) of Section 66 of the Indian Income Tax Act, 1922, and amended Sub-section (2) of Section 161 of the Income Tax Ordinance, 1984, are almost similar and though both the sections used the word "shall" several times but starts with

the expression "the High Court Division shall upon hearing any case" which directs that there shall be a hearing of the application. It is apparent that before the duty contemplated by Sub-section (2) of Section 161 of the Income Tax Ordinance, 1984, to decide the question of law referred can arise, a hearing of the case must take place.

Under the facts and circumstances of the case and for the reasons stated above, we refrain ourselves from answering the questions of law without any order as to cost.

Accordingly, the reference application is disposed of.

Order of stay granted at the time of issuance of the rule is hereby vacated.

Dihider Masum Kabir, J:

I agree.