

Income Tax Reference No. 217 of 2003

Present:

Mr. Justice Md. Shahinur Islam

And

Mr. Justice Sardar Md. Rashed Jahangir

In the matter of:

Bangladesh Jatiya Matshajibi Samaby Samity
Ltd. Chattogram

---Applicant

-Vs-

The Commissioner of Taxes, Chattagram

---Respondent

No one appears

...For the applicant

Mr. Prince -Al-Masud, A.A.G

...For the respondent

Judgment on: 23.04.2024

Sardar Md. Rashed Jahangir, J.

1. The instant reference application has been appearing in the daily cause list of this Bench as well as another Bench for a couple of days, and since the learned Advocate for the applicant has been elevated to the Bench, a notice in N-10 form was issued and served by usual course as well as through registered post with acknowledgment due vide Memo No. 7378 dated 25.11.2018 but

neither the applicant nor his engaged Advocate appeared before this Court, as such no hearing can take place.

2. Learned DAG filed an affidavit-in-reply.

3. Now, in order to resolve the issue involved, we require to quote it profitably that Sub-section (2) of Section 161 of the Income Tax Ordinance, 1984 which runs as 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 conformable to such judgment.”

4. It is to be noted that the language of the provision enunciated above apparently demonstrates it mandatory in nature that since the section deploys the word “shall” several times but obviously the section opens with the word “The High Court Division shall, upon hearing any cause” etc. Thus the pertinent question is that how the High Court Division will move to 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.

5. In similar situation Calcutta High Court in disposing of 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 and in such a case obligation of deciding the question of law and delivering judgment does not arise.

6. 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 conformable to such judgment.”

7. On a closer 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 alike 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 contemplates, there shall be a hearing of the application.

8. It is thus unerringly apparent that before the duty contemplated by Sub-section (2) of Section 161 of the Income Tax Ordinance, 1984, to decide the referred question of law can arise, a hearing of the case must take place. This view finds support in the judgment of Calcutta High Court referred above and also in the case of M/S. Dhaka Steel Works Ltd. vs. the Commissioner of Taxes, reported in **12 BLD 334**.

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

Accordingly, the reference application is disposed of.

Md. Shahinur Islam, J.

I agree