

Income Tax Reference No. 578 of 2004

Present:

Mr. Justice Md. Shahinur Islam

And

Mr. Justice Sardar Md. Rashed Jahangir

In the matter of:

Burroughs Welcome & Company Bangladesh Ltd.

--- Applicant

-Vs-

The Commissioner of Taxes, Chattagram

--- Respondent

Mr. Md. Rezaul Hasan, Adv.

... For the applicant

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

... For the respondent

Judgment on: 22.04.2024

Md. Shahinur Islam. J

1. The instant reference application has been appearing in the cause list for a couple of days with name of learned Advocate for the applicant who failed to appear.

2. Subsequently Mr. Md. Reajaul Hasan, the learned Advocate appearing on behalf of Mr. M. A. Noor for the applicant and took adjournment to make this court appraise of current situation of the case and today by filing an affidavit of facts sworn in by learned Advocate has been filed where it has been stated that when the matters came up for hearing before this Bench and earlier before other Benches of this

Hon'ble court for hearing Mr. M.A Noor failed to trace any whereabouts of the assessee-applicant. The assessee-applicant could not be found at its last – known address as appearing in the cause title. The email sent to the assessee-applicant's email address also bounced back.

It has been also stated that under such circumstances, in absence of any instructions from the assessess-applicant, Mr. M.A. Noor is unable to place the income Tax Reference Application Nos. 577, 578, 579, 580, 613 and 614 of 2004 .

3. Today by the affidavit sworn in by the learned Advocate for the applicant may be presumed that the applicant is not willing to pursue his cause by pressing instant reference.

4. The learned DAG filed an affidavit in reply.

5. 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.”

6. 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.

7. 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.

8. 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.”

9. 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 directs, there shall be a hearing of the application.

10. 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 question of law referred 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**.

11. 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.

Sardar Md. Rashed Jahangir, J.

I agree