

Form No: HCJD/C-121
ORDER SHEET
IN THE LAHORE HIGH COURT,
RAWALPINDI BENCH, RAWALPINDI
JUDICIAL DEPARTMENT

STR No.35/2022

M/s Astral Constructions (Pvt.)
Limited

Versus

Province of Punjab, etc.

S.No. of order/ proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of parties of counsel, where necessary
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06.03.2025

Mr. Imran-ul-Haq, Advocate for the applicant.
Mr. Hassan Kamran Bashir, Advocate for
respondents No.2 to 4.
Ms. Nadia Murad, Legal Officer, Punjab
Revenue Authority.

This Reference Application under Section 67A of the Punjab Sales Tax on Services Act, 2012 (“**the Act**”) originates from the decision of the Appellate Tribunal, Punjab Revenue Authority, Lahore (“**Appellate Tribunal**”) dated 27.09.2022, and following questions of law, supposedly arisen out of the decision, are proposed for seeking determination:-

“(i) *Whether under the facts and circumstances of the case, the learned Appellate Tribunal was justified to dismiss the appeal without ascertaining the resident status of the Applicant and taxability under the PRA Act, 2012?*

(ii) *Whether under the facts and circumstances of the case, the learned Appellate Tribunal was justified to dismiss the appeal placing reliance in the judgment of Honorable Supreme Court as 2018 SCMR 1474 dated 20.3.2018, whereas the Honorable Supreme Court in its latest judgment dated 12.5.2022 in Civil Petition No.4596 of 2021 termed the previous judgment dated 20.3.2018 as distinguishable (relates to recovery of tax erroneously refunded) and categorically held that the provisions, where the time frame is set out in the statute for deciding the appeal are mandatory and if decided beyond the given time, it makes the order void?*

(iii) *Whether under the facts and circumstances of the case, the learned Appellate Tribunal was justified to confirm the order wherein the*

learned Commissioner Appeals (PRA) failed to comply with the provision of section 65(7) of the PRA Act, 2012 and instead of transferring the appeal to Appellant Tribunal decided the appeal at its own after the expiry of the statutory limit of 180 days?

- (iv) *Whether under the facts and circumstances of the case, the learned Appellate Tribunal was justified to confirm the order wherein the learned Commissioner Appeals failed to comply with the provision of section 65(8) of the PRA Act, 2012 to attach comprehensive report explaining the circumstances and reasons due to which the appeal could not be decided by the Commissioner Appeals (PRA) within time?*
- (v) *Whether under the facts and circumstances of the case, the learned Appellate Tribunal was justified to dismiss the appeal and to charge sales tax for the period when the Applicant was not registered under PRA Act, 2012 moreover there was no allegation on the Applicant that has collected tax from the recipient and not deposited in the government treasury?*
- (vi) *Whether under the facts and circumstances of the case, charging of sales tax prior to date of compulsory registration where no sales tax is being charged from the consumer is within the statutory provisions of the PRA Act, 2012 and Rules keeping in view the fact that sales tax is an indirect tax and burden is to be borne by the ultimate consumer?*
- (vii) *Whether under the facts and circumstances of the case new questions "arising" out of the order of the Tribunal which were not urged or examined by the tribunal could be raised in a reference before the High Court u/s 67A of the PRA Act, 2012 keeping in view the judgment of Supreme court of Pakistan in the case of M/s. Squibb Pakistan Pvt Ltd vs Commissioner of income Tax reported as 2017 PTD 1303?*
- (viii) *Whether under the facts and circumstances of the case the learned Tribunal was justified to dismiss the appeal while applying the provision (Rule.3) of Punjab Sales Tax on Services (Withholding) Rules, 2015 for the period when Punjab Sales Tax on Services (Withholding) Rules, 2012 (repealed on 20.02.2015) were applicable?*

2. Out of variously framed questions of law, some of which are over-lapping, following triable issues requiring attention and adjudication;

- a) Whether the applicant is classifiable as a 'resident' or 'non-resident' for the purposes of present reference.

- b) Whether time-constraints prescribed for deciding the appeal by Commissioner (Appeals) within one hundred and eighty days in terms of sub-section (7) of section 65 of the Act are directory or mandatory in nature and what would be the effect / consequence in case of non-compliance of the timelines provided - [sub-section (7) of section 65 was omitted through Finance Act 2021, which has no application since appeal was decided by the Commissioner (Appeals) before the amendment];
- c) Whether Sales Tax on services rendered could be recovered from the applicant, especially in the circumstances when there was no allegation(s) of collection of tax by the applicant from the recipient of the services including failure to deposit tax, if any collected, in the government treasury.
- d) Whether Sales Tax on services could be claimed, charged or demanded from the applicant when same was not registered under the Act.

3. Briefly the background facts are that applicant entered into agreement with DHA Lahore for the construction of swimming pool – copy of the agreement dated 23.09.2013 is available on record – there is no indication that when did the construction services were completed. It is not in dispute that provisioning of '*construction services and services provided by contractors...*' constitutes taxable services in terms of Entry 14 of the Second Schedule to the Act. Taxable services are defined under section 3 of the Act. And charging provision is section 10 of the Act. Primarily, parties disagree on the point that whether sub-section (1) or sub-section (3) of section 3 of the Act is attracted – difference between aforesaid sub-sections is dependent upon the resident status of the service provider, which may be either a *resident* or *non-resident* – both having different connotation(s) under the Act. Specific meaning(s) has been assigned to the expression '*resident*' and converse thereof is treatable as a '*non-resident*' –

Section 2(35) of the Act defines resident, which provision of law reads as:-

“resident” means--

- (a) *an individual who, in a financial year, has*
 - (i) *a place of business, whole or part thereof, in the Punjab in any mode, style or manner; or*
 - (ii) *his permanent address, as listed in the individual's national identity card, in the Punjab; or*
 - (iii) *a permanent representative to act on his behalf or to provide service on his behalf in the Punjab.*
- (b) *an association of persons or a company which, in a financial year, has*
 - (i) *its registered office in the Punjab; or*
 - (ii) *its place of business, whole or part thereof, in the Punjab in any mode, style or manner, or*
 - (iii) *a permanent representative to act on its behalf or to provide service on its behalf in the Punjab; or*
 - (iv) *the control or management of the affairs of the association of persons is situated in the Punjab at any time during the financial year".*

[Emphasis supplied]

4. Applicant claims that it works, operates and has a place of business in the Capital city, i.e., Islamabad. It is claimed that services rendered qualify under sub-section (2) of section 3 of the Act and not under sub-section (1) thereof. This self-asserted claim has relevance in the context of controversy involved, hence, it is appropriate to reproduce section 3 of the Act, which reads as;

“Taxable service.—(1) Subject to such exclusion as mentioned in Second Schedule, a taxable service is a service listed in Second Schedule, which is provided by a person from his office or place of business in the Punjab in the course of an economic activity, including the commencement or termination of the activity.

Explanation.—This sub-section deals with services provided by a person regardless whether such services are provided to a resident person or a non-resident person.

(2) If a service listed in Second Schedule is provided to a resident person by a non-resident person in the course of an economic activity, including the commencement or termination of the activity, it shall be treated as a taxable service.

Explanation.—This sub-section deals with services provided by a non-resident person to a resident person whether or not the end consumers, if any, of such services are identifiable for purposes of this Act or the rules.

(3) For purposes of sub-section (2), where a person has a registered office or place of business in the Punjab and another outside the Punjab, the registered office or place of business in the Punjab and that outside the Punjab shall be treated as separate legal persons”.

[*Emphasis supplied*]

5. Evidently, question of determination of status of an entity, either a *resident* or *non-resident*, is essentially a question of fact but for the purposes of present case it has legal connotation, which require determination in the context of the expression defined as ‘*place of business*’, in terms of section 2(30) of the Act, which provision is reproduced hereunder:-

“*place of business*” means that a person --

- (a) owns, rents, shares or in any other manner occupies a space in the Punjab from where he carries on an economic activity whether wholly or partially; or
- (b) carries on an economic activity, wholly or partially, either through any other person such as an agent, associate, franchise, branch, office, or otherwise in the Punjab or through virtual presence or a website or a web portal or through any other form of e-Commerce by whatever name called or treated”.

[*Emphasis supplied*]

6. Notwithstanding, claim of having a place of business in the Capital City, Islamabad, Appellate Tribunal, in paragraph 9 of its decision, had referred to document addressed by DHA to the applicant where applicant's site-office address was cited as 'M/s Kestral SPD (Pvt) Ltd Site Office K-Block Phase-V, DHA Lahore'. This fact is not disputed except to the extent that distinction is sought to be drawn between a self-claimed office and site-office. The fact of the matter is that site-office, for the purposes of carrying-out or provisioning of an economic activity, wholly or partially, is covered under the expression '*place of business*', under clause (a) of section 2(30) of the Act. We are not extending serious consideration to the argument that office established was project specific and being a camp office, because description prescribed in document referred – annexure-G in paragraph 9 of the decision - fits within the legal description of the '*place of business*' defined above. Hence, applicant's status, for the purposes of this reference application, is treated and declared as a *resident*, and no error was committed by the Appellate Tribunal, while treating the applicant as such.

7. Second issue is whether time frame prescribed for conclusion of the proceedings before Commissioner Appeals is mandatory or directory. Though principles requiring determination of the scope of directory and mandatory provision(s) of law are clear, and to reiterate those we seek guidance from a recent decision of the Apex Court, dated 25.10.2022, passed in Civil Review Petition No.275 of 2022 in Civil Petition No.4599 of 2021 titled

(*Commissioner Inland Revenue, Zone-III, RTO, Rawalpindi V. M.s Sarwaq Traders, Rawalpindi, etc.*), wherein, while interpreting, by and large, similarly placed provisions of law or *pari materia* provisions in the Sales Tax Act 1990 and the Customs Act 1969, it was held that such time-bound provision(s), specifying conclusion of adjudication of particularly the appeal proceedings – distinction has been drawn between proceedings before appellate authority and adjudicating officer -, are directory and not mandatory, because in the latter case it would cause prejudice to the tax-payer, when same was appellant before the appellate authority. In view of the above, we are not inclined to declare order of the Commissioner (Appeals) void for the reason it was passed beyond the time-prescribed under sub-section (7) of section 65 of the Act or for non-referral or transfer of pending appeal to the Appellate Tribunal if appeal was not adjudicated upon within one hundred and eighty days. Even otherwise, transfer of appeal to Appellate Tribunal, upon lapse of one hundred and eighty days, is prejudicial to the applicant by depriving same of the independent remedy of appeal before the Appellate Tribunal. Above all, applicant was the appellant before Commissioner (Appeals) and had not raised any objection to the passing of the order after expiry of the timeframe prescribed. Decision of the Appellate Tribunal is found in line with the ratio settled, while reviewing the judgment dated 12.05.2022, passed C.P No.4599/2021, *M.s Sarwaq Traders, Rawalpindi, etc.* (supra). Further dictum laid in the case of *Messrs A.J. Traders through Proprietor V. Collector of Customs (Adjudication)*

Islamabad and others (PLD 2022 Supreme Court 817) is also attracted, wherein prejudice to the taxpayer in the context of statutory remedy of appeal. One of the questions framed refers to the decision, dated 12.02.2022, of Civil Petition No.4599 of 2021 titled (Commissioner Inland Revenue, Zone-III, RTO, Rawalpindi V. M.s Sarwaq Traders, Rawalpindi, etc.), which has been subsequently reviewed through Civil Review Petition No.275 of 2022 – noted above. This issue is decided against the applicant.

8. Now we touch upon another significant issue which is whether any liability to pay Sales Tax on services could be placed on the applicant, who is service provider and not recipient thereof. We had already determined the status of the applicant, which bring case within the ambit of sub-section (1) of section 3 of the Act, and which position consequently attracts sub-section (1) of section 11 of the Act, providing a clear and spot-on answer to the question under reference. For ease of understanding, section 11 of the Act reads as:-

"Person liable to pay tax.--(1) where a service is taxable by virtue of sub-section (1) of section 3, the liability to pay the tax shall be on the registered person providing the service.

(2) Whether a service is taxable by virtue of sub-section (2) of section 3, the liability to pay the tax shall be on the person receiving the service.

(3) The Authority may, by notification in the official Gazette, specify the service or services in respect of which the liability to pay tax shall be on any person, other than the person providing the taxable service, or the person receiving the taxable service.

(4) Nothing contained in this section shall prevent the collection of tax from a different person if that person is made separately or jointly or severally liable for the tax under section 19."

[Emphasis supplied]

9. Another issue is regarding non-registration of the applicant and effect thereof. It is alleged that in absence of applicant's registration with the department no claim of Sales Tax could be raised or recovered. Reliance in this behalf was placed on a case reported as *Commissioner Inland Revenue, Gujranwala V. S.K.Steel Casting, Gujranwala (2019 PTD 1493)*.

10. Process of registration is dealt with under Chapter IV of the Act. Before discussing provision relating to registration, it is appropriate to highlight definition of a '*registered person*' through Section 2(33) of the Act, which reads as:-

"(33) "registered person" means a person who is registered or is liable to be registered under the Act but the person liable to be registered and has not registered shall not be entitled to any benefit available to a registered person under any of the provisions of the Act or the rules".

In follow-up to the definition of registered person, Section 25 of the Act deals with registration process, which provision is reproduced hereunder along with Explanation thereto:-

"25. Registration.--(1) A person shall register under this Act, who--

- (a) provides any taxable service from his office or place of business in the Punjab; or
- (b) is otherwise required to be registered under any of the provisions of the Act or the rules; or
- (c) fulfills any other criteria or requirements which the Authority may prescribe under sub-section (2).

(2) The registration under this section will be regulated in such manner and subject to such conditions and restrictions as the Authority may, by notification in the official Gazette, prescribe.

(3) A person who receives a service, which is a taxable service by virtue of sub-section (2) of

section 3, and is not a registered person shall be deemed to be a registered person for the purposes of the tax period in which—

- (a) *such person receives the service;*
- (b) *an invoice for the value of the service is issued or sent to or received by the person; or*
- (c) *consideration for the service is paid by the person—*

Whichever is earlier and all the provisions of this Act and the rules shall be applicable to such person for that particular tax period and any matters relating to, arising out of, or concerning that tax period as if that person had provided the service.

(4) *The Authority may publish on its website a list of persons registered under this Act.*

(5) *It shall be reasonable for a person to believe that another person is registered under this Act if that other person is on the list placed on the website of the Authority.*

[Explanation.--Unless otherwise specified, no person shall be absolved of any tax liability for want of registration under this Act or the rules.]”

[Emphasis supplied]

11. The case of *S.K. Steel Casting, Gujranwala* (supra) has no application to the present case, firstly, in the context of the Explanation provided in Section 25 of the Act, and secondly, levy of Sales Tax under the Sales Tax Act 1990 involves interplay of input and output tax, which is not the case here. In the case of *S.K. Steel Casting, Gujranwala* (supra) Sales Tax was charged on Electricity bills, and in that scenario expression ‘liable to be registered’ was discussed and interpreted. And additionally, provisioning of Explanation is *per se* another major point of distinction. No such Explanation was provided under Sales Tax Act, 1990. In the issue at hand definition of *registered person* aligns with the Explanation provided in section 25 of the Act and any interpretation contrary thereto would

otherwise militate against the legislative intent and render the Explanation redundant – ratio of the decision in the case of *S.K. Steel Casting, Gujranwala* (supra) cannot be applied to jeopardize the effectiveness and application of the Explanation to Section 25 of the Act. No conflict is otherwise found in the substantive provision and the Explanation appended thereto.

12. The applicant is a registered person for all intent and purposes, having place of business in the Province of Punjab, which provides taxable services in the context of sub-section (1) of Section 3 of the Act; hence same is liable to pay the tax under sub-section (1) of Section 11 of the Act. Issues identified are addressed accordingly. No other question is pressed. None of the question(s) raised elicits an answer in affirmative, necessitating declaration contrary to the findings recorded by the Appellate Tribunal. This reference application fails and same is, hereby, **dismissed.**

13. Office shall send a copy of this order, under seal of the Court, to learned Appellate Tribunal, in terms of sub-section (5) of section 67A of the Act.

(MIRZA VIQAS RAUF) (ASIM HAFEEZ)
JUDGE JUDGE

Imran/*

APPROVED FOR REPORTING

JUDGE

JUDGE