

Stereo. H C J D A-38.
JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

STR No.97 of 2013

Commissioner Inland Revenue, Zone-III, Large Taxpayers, Karachi

Versus

M/s Adam Sugar Mills Ltd., Karachi

J U D G M E N T

Date of hearing: 12.04.2023.
Applicant-department by: Mr. Shahzad Ahmad Cheema,
Advocate / Legal Advisor.
Respondent-taxpayer by: Mr. Abdus Salam Sajid, Advocate.

MUHAMMAD SAJID MEHMOOD SETHI, J.- Through instant Reference Application under Section 47 of the Sales Tax Act, 1990 (“**the Act of 1990**”), following questions of law, asserted to have arisen out of impugned order dated 21.12.2011, passed by learned Appellate Tribunal Inland Revenue, Lahore (“**Appellate Tribunal**”), have been proposed for our opinion:-

- (i) Whether learned ATIR was justified in setting aside the Collector's order by holding that 'reasonable belief mentioned in section 40-A of Sales Tax Act, 1990 need to be expressed in writing despite the fact that the department had obtained the documents from the registered person's premises under section 38, which does not contain this precondition?
- (ii) Whether learned ATIR was justified in holding the departmental action as illegal despite the fact that section 40-A and section 38 of Sales Tax Act, 1990 are two independent provisions of law and any procedural flaw in action u/s 40-A does not automatically invalidate a simultaneously taken action under section 38?
- (iii) Whether learned ATIR was justified in setting aside the collector's order by holding that raid taken under section 40-A is procedurally flawed despite the fact that documents seized in the raid show blatant violation of Sales Tax Act, 1990 and conform the belief of Assistant Collector, which was based on an information that he registered person involved in massive e tax evasion?

2. Brief facts of the case are that pursuant to report of Auditor Sales Tax, Bahawalpur regarding involvement of respondent-taxpayer in sales tax evasion, a team under the supervision of Assistant Collector Sales Tax, Bahawalpur visited the premises of respondent-taxpayer and took into custody certain record / documents purportedly exercising jurisdiction in terms of Section 38 & 40-A of the Act of 1990. After scrutiny of record, certain discrepancies were confronted to respondent-taxpayer through show cause notice, which culminated in passing of order-in-original dated 05.03.2008, thereby creating demand of sales tax of Rs.50,182,350/- along with additional tax / default surcharge and penalty. Feeling aggrieved, respondent-taxpayer filed appeal before Appellate Tribunal, which was accepted and order-in-original was set aside vide order dated 21.12.2011, impugned through instant Reference Application.

3. Learned Legal Advisor for applicant-department submits that all legal requirements contemplated in Sections 38 & 40-A of the Act of 1990 were complied with by preparing and delivering a notice to respondent-taxpayer. Adds that order-in-original was passed in accordance with law and there is no legal infirmity in the same.

4. Contrarily, learned counsel for respondent-taxpayer submits that staff of Sales Tax Department along with officials of local law enforcing agencies forcibly entered into the office premises of respondent-taxpayer, break opened doors and almirahs, impounded the record and mal-treated the employees. Argues that record seized in an illegal manner cannot be used against respondent-taxpayer. Contends that raid, search, seizure of record and subsequent proceedings including show cause notice and order-in-original are illegal and without lawful authority. He has referred to Collector of Customs (Preventive) and 2 others v. Muhammad Mahfooz (PLD 1991 Supreme Court 630) and Ghulam Hassan v. Federation of

Pakistan through Ministry of Finance, Islamabad and 5 others
(2021 PTD 1379).

5. Arguments heard. Available record perused.
6. Record reveals that a team headed by Assistant Collector Sales Tax, Bahawalpur raided the respondent-taxpayer's business premises and took into possession record / documents, which formed basis for proceedings culminating in sales tax demand. The questions before us are requiring determination as to whether the impugned proceedings were conducted in line with spirit of law provided in Sections 38 & 40A of the Act of 1990.
7. Section 38 of the Act of 1990 permits an officer authorized by the Federal Board of Revenue or the Commissioner Inland Revenue to have free access to business or manufacturing premises, registered office or any other place whereby any stocks, business records or documents required under this Act are kept or maintained belonging to any registered person; and such officer may, at any time, inspect the goods, stocks, records, data, documents, correspondence, accounts and statements, utility bills, bank statements, information regarding nature and sources of funds or assets with which his business is financed, and any other records or documents and may take into custody such records, statements, diskettes, documents or any part thereof, in original or copies thereof in such form as the authorized officer may deem fit against a signed receipt. Needless to say that while taking cognizance under this provision, inter-alia, the authorized officer must restrict himself to the record / documents that are in plain sight or voluntarily made available by the person present at the premises, for the purposes of inspection and taking into custody. This provision does not envisage any authority to compel the production of any record or document that is not presented voluntarily. Any record or document forcibly taken into custody must not be used adversely against the person from whose custody it was taken. The powers under this provision, by no stretch of imagination, can compromise the

fundamental rights and constitutional guarantees embedded in the Constitution of the Islamic Republic of Pakistan, 1973.

8. Section 40A of the Act of 1990 (since omitted) was to be applied only where *any Officer of Sales Tax not below the rank of an Assistant Collector of Sales Tax has reasons to believe that any documents or things which, in the opinion, may be useful for, or relevant to, any proceeding under this Act are concealed or kept in any place and that there is a danger that they may be removed before a search can be effected under section 40, he may, after preparing a statement in writing of the ground of his belief for which search is to be made, search or cause search to be made in his presence, for such documents or things in that place.*

We have specifically asked learned Legal Advisor for applicant-department to show whether the Assistant Collector had prepared a statement in writing of the grounds of belief that there was danger that the records or the goods may be removed before the search could be effected in terms of section 40, the answer was simply in the negative. Admittedly, it is/was not the stance of applicant-department that there was any likelihood of elimination or taking away the record / documents. Learned Legal Advisor was confronted with the provisions of sections 40 and 40A of the Act of 1990, but he repeatedly referred to the provisions of section 38, without explaining as to whether section 38 could be read in isolation from the provisions of sections 40 & 40A *ibid*, relating to "searches under warrant" and the "search without warrant". The failure to place any material before the Court to establish that there were sufficient reasons and grounds for bypassing normal course of action specified in section 40 and non-satisfaction of prerequisites mentioned in section 40A renders the action taken under section 38 unsustainable and consequently the search and seizure was illegal, without lawful authority and of no legal effect. Apparently, sections 40 & 40A are aimed at to curtail and monitor the unlimited and unbridled powers of the Sales Tax Authorities to

avoid undue harassment to the taxpayers. Reference can be made to Collector of Sales Tax etc. v. M/s. Food Consults (Pvt.) Ltd. and M/s. Diplex Beauty Clinic etc. (PTCL 2006 CL. 441) and Chairman, Central Board of Revenue and others v. M/s. Haq Cotton Mills (Pvt.) Ltd., Burewala (PTCL 2008 CL. 116).

9. In view of the above, our answer to the proposed questions is in **affirmative** i.e. against applicant-department and in favour of respondent-taxpayer.

This Reference Application is **decided** against applicant-department.

10. Office shall send a copy of this judgment under seal of the Court to learned Appellate Tribunal as per Section 47 (5) of the Act of 1990.

(Jawad Hassan)
Judge

(Muhammad Sajid Mehmood Sethi)
Judge

APPROVED FOR REPORTING

Judge

Judge

Sultan