IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE MUNIB AKHTAR
MR. JUSTICE YAHYA AFRIDI

CIVIL APPEALS NO. 1660 AND 1661 OF 2014
(On appeal against the judgment dated 16.05.2012 of the Islamabad High Court, Islamabad passed in Tax Appeal No.7 and 8 of 2005)

M/s Al-Khair Gadoon Ltd. ...Appellant(s)

versus

The Appellate Tribunal etc. ...Respondent(s)

For the Appellant(s): Mr. Saood Nasrullah Cheema, ASC (in both cases)

For the Respondent(s): Dr. Farhat Zafar, ASC (in both cases)

Date of Hearing: 21.01.2019

JUDGMENT

Yahya Afridi, J.— Leave to appeal was sought by M/s Al-Khair Gadoon Limited, appellant in both the appeals, challenging the decision of the Islamabad High Court, Islamabad in Tax Appeals No.7 and 8 of 2005 both dated 16.05.2012. This Court allowed leave vide order dated 25.11.2014 in terms that:

> "In order to consider whether the impugned judgment dated 16.5.2012 is erroneous as the learned High Court failed to take into account the fact that the learned Tribunal gave the clear cut findings that provisions of Section 4(2) of the Central Excise Act, 1944 (the Act) were not attracted and that the show cause notice was issued on the basis that the petitioner was evading central excise duty by clearing finish products at a value less than the value declared by applying the provisions of Section 4(2) of the Act as opposed to Section 4(1) of the Act; whether the question, which had been raised in the tax appeal, had arisen out of the judgment of the learned Tribunal and the view set out by the learned High Court otherwise is not in consonance with the record; whether the petitioner had cleared the goods absolutely per the price, which has been determined on the day when the goods were cleared per Section 4(1) of the Act; what is the relevance of the law laid down in the cases reported as *Atlas Battery Limited Karachi Versus Superintendent Central Excise and Land Customs Circle 'C' Karachi*

> *and others* (PTCL 1984 CL 250), *M/s Riaz Bottlers (Pvt.) Ltd. Versus Central Board of Revenue and others* (PTCL 2000 CL 455), *M/s Lucky Cement Limited Versus C.B.R. and others* (PTCL 2002 CL 449), *M/s Paramount Paper Board (Pvt.) Ltd., Hattar Haripur Versus Deputy Director, Intelligence and Investigations (Customs, Central Excise and Sales Tax), Peshawar and two others* (PTCL 2003 CL 396) and *Collector of Central Excise, Lahore and others Versus M/s Riaz Bottlers (Pvt.) Ltd., Lahore and others* (PTCL 2004 CL 298) vis-à-vis interpretation of Section 4(1) and (2) of the Act; and the propositions in hand, leave is granted."

2. The brief and essential facts leading to the present appeals are that the Revenue served two show cause notices (**"Notices"**) upon the present appellant contending violation and contravention of provisions of Sections 3, 4(2) and 9 of the Central Excise Act, 1944 (originally titled as Central Excise and Salt Act, 1944, and hereinafter referred to as the **"Act"**) read with rules 7, 9, 210, 223(6) and 294 of the Central Excise Rules, 1944 (**"Rules"**). The main allegation against the appellant in the Notices was that the appellant had cleared excisable goods, i.e. foam and foam products, during the specified period stated therein, deliberately on a price far less than the price declared for the purpose of payment of Central Excise Duty (**"Excise Duty"**), and thus evaded Excise Duty and Additional Excise Duty specified therein.

3. The appellant responded to the Notices by asserting that the excisable goods were produced prior to June 1995, when excise duty was levied on foam or foam products, and thus, no Excise Duty could be levied thereon. It was further asserted that the excisable goods cleared were defective stock due to production loss, the clearance whereof was duly intimated to the concerned staff of the Revenue, and thus, the same was cleared on reduced price warranting no action by the Revenue for the alleged evasion of Excise Duty as asserted in the Notices. The stance taken by the appellant was not accepted before the department adjudicatory forum provided under the Act. Finally, the matter was agitated by the appellant before the Appellate Tribunal, and the same was declined.

4. Feeling aggrieved, the present appellant moved the appellate jurisdiction of the Islamabad High Court, provided under

the Act, and that too was declined in terms that:

> "7. The arguments put forward by the learned counsel for the appellants are totally different from the issue mentioned in appeal. It was not necessary for the department to mention in the show-cause notice the subsection when section 4 has been mentioned. In addition to that, the points raised in the appeal were not raised before the Tribunal and as such, there were no findings to that effect. According to law, the appeal will be filed only regarding points of law arising out of the judgment of Tribunal. In the judgment of Tribunal, it was not held that Section 4(2) was not attracted. Even otherwise, the issue raised by the appellant in appeal shows that the appellant was assessed under Section 4(1) and the learned counsel for the appellant submitted that he was liable to be assessed under Section 4(1), so the appellant is left with no cause of action. Finding no force in this appeal, the same is hereby dismissed."

5. On carefully considering the submissions of the learned counsel for the parties, and perusing the available record, it is noted that there are two crucial issues for determination. First, whether the non-mentioning of the section of the Act in the Notices, and that too, when the same was not taken as a ground of appeal by the appellant before the Appellate Tribunal, could be taken and decided by the High Court in its appellate jurisdiction under section 36-C of the Act. Second, whether the mentioning of the wrong section of the Act in the Notices would vitiate the entire recovery proceedings under the Act, and if so, which of the legal available legal forums would be appropriate and competent to decide the said challenge made by the appellant.

The wrong mentioning of the section of the Act in the Notices and its effect

6. Before rendering any finding on the next issue stated above, it would be appropriate to first consider the legislative background of section 4 of the Act, as the contravention thereof has remained the main controversy between the parties. The legislature, in its wisdom, originally provided in section 4 of the Act *ad valorem* assessment of excisable goods for the purposes of determining Excise Duty thereon. It was, in fact, The Finance Ordinance, 1969, whereby a new sub-section 2 to section 4 was inserted in the Act. This new insertion introduced another method of assessment of the value of the excisable goods for determining the Excise Duty based on the *retail price* thereof. The said

provision came up before this Court in *Atlas Battery Ltd v.* ***Superintendent, Central Excise & Land Customs Circle 'C', Karachi and others (PLD 1984 SC 86),*** wherein Zafar Hussain Mirza, J., while rendering his opinion for the Court, has very eloquently described the reasons for introducing this new method, and its distinguishing features from the earlier method based on *ad valorem* assessment. It was opined that:

> "Now the concept of retail price as the basis for determination of the excise duty as against the original basis of 'value' as incorporated in section 4 of the Central Excises and Salt Act, 1944 was introduced under a scheme, by means of the insertion of a new provision in subsection (2) in the original section 4 of the said act, by the Finance Ordinance, 1969, which also substituted the Schedule making consequential changes, whereby the scheme was applied to goods of everyday use having a direct bearing on the cost of living, such as tea, cigarettes, vegetable products, beverages, petroleum, lubricating oils, paints, soaps fabricated yarn, batteries and bulbs, etc. The object underlying the scheme was no doubt to stabilize prices and to do away with the unwarranted price hike and to simplify the matter of the payment of excise duty so as to obviate the cumbersome procedure for the determination of the value for the purpose of duty. The two concepts are apparently distinct and operate entirely on different basis as observed in the order of the learned Secretary to Government of Pakistan dated 31-1-1975: "where such duty is levied an *ad valorem* basis, the basis of assessment would be valuable as defined in subsection (1) of section 4, where such duty is levied on retail price, the basis of assessment would be retail price as defined in subsection (2) of section 4". The plain reading of the subsection shows that the retail price of the article chargeable with duty at a rate dependent on the retail price of the same is to be fixed by the manufacturer himself if he wishes to take advantage of the scheme. But if he does so, the equally plain requirement of law for him is to include all charges and taxes while fixing such retail price and further such retail price should be the one at which the article is intended by the manufacturer to be sold to the general body of consumers."

7. During the relevant period under consideration of the Notices, there were two distinct methods provided in the Act to determine the value of excisable goods in cases where the Excise Duty payable thereon was dependent on its value. The essential features of the said two methods provided as follows:

Ad valorem Rule

The first method, based on *ad valorem* assessment, was provided under sub-section 1 of the Act. Under this method, Excise Duty is based on *ad valorem* assessment of the excisable article, which is to be determined by the Revenue Officer, keeping in view the following:

i. The wholesale cash price of a like kind and quality article

sold to the general body of retail traders or, if there is no general body of retail traders, then the general body of the consumers.

ii. Price of the said article to be determined is to be on the day the excisable articles are being removed from the factory or warehouse of the manufacturer.

iii. Price is to be of like article, without any deduction except the amount of duty and sales tax payable thereon.

Retail Price Rule

The second method, based on *retail price* of the excisable articles, was stipulated in the newly inserted sub-section 2 of section 4 of the Act. However, this method only comes into effect if the Federal Government, by notification in the official gazette, declares the goods to be levied Excise Duty based on its *retail price.* The essentials of assessment of Excise Duty under this method of determination are provided as under:

i. The retail price of the excisable article was to be fixed by the manufacturer.

ii. The retail price shall be inclusive of all charges and taxes, other than sales tax levied and collected under the Sales Tax Act, 1990.

iii. The retail price should be the price which the particular brand or variety of such article may fetch in the general market.

iv. In case there is more than one price for the same brand or variety, then the highest of such prices shall be considered.

v. The retail price is to be legible and prominently indicated on each article or packet, container, package, cover or label thereof, as the case may be.

vi. The discretion of the manufacturer to fix the retail price is to be exercised reasonably, and it is to remain within the scope

provided in subsection 2 of section 4 of the Act. Failure to do so would give the assessing excise officer power to decide the correct value of the said excisable article.

8. Admittedly, the Notices served upon the appellant, *inter alia*, expressly alleged evasion of Excise Duty determinable under sub-section 2 of section 4 of the Act. However, the precedent condition for invoking the said method of determination of Excise Duty was not fulfilled, as the requisite declaration of the foam or foam products, manufactured by the appellant, was not notified by the Federal Government in the official gazette. This being so, the appellant had made out a *prima facie* case of questioning the very maintainability of the Notices on the ground that wrong provisions of the Act were stated therein.

9. This very issue of stating a wrong provision of law came up before this Court in ***Collector of Sales Tax & CE, Lahore v. Zamindara Paper & Board Mills etc.*** **(PTCL 2007 CL. 260)**, wherein the legality of the show cause notice quoting a wrong provision of the Act was discussed in terms that:

> "... in our considered opinion the substantial compliance has been made by making reference of the rules to identify the period of time during which tax has been allegedly evaded. Therefore, merely for the reason that sub-rules 2 & 3 of Rule 10 of the Central Excise Rules, 1944 have not been mentioned, it would have not been proper to declare the notice illegal. In this view of the matter, the judgment if the High Court is not sustainable. It is to be noted that instead of taking into consideration technicalities, the Court looks into the matter with different angles namely as to whether substantial compliance has been made or if any of the sub-rule has been omitted then what prejudice is likely to cause to the party to whom the show cause notice is given. But in the instant case, we are of the opinion that no prejudice shall be caused to the respondents because the substantial compliance of the relevant rules has been made. Therefore, under the circumstances, the judgment which has been relied upon by the learned counsel is of no help to him."

10. The *ratio* of the above-stated case has also been applied in other proceedings over the years in ours, as well as in Indian jurisdiction. Some of the leading cases in this regard are discussed hereunder:

Olas Khan v. Chairman NAB **(2018 PLD 40 SC)**

In this case, while commenting on the erroneous assumption

of jurisdiction by the High Court in a matter of bail, it was observed that:

> "it is now settled position in law that merely citing or relying on the wrong provision of law to assume jurisdiction over a list is of no consequence, provided the Court otherwise has jurisdiction under the Constitution, statue or any other provision of law to pass order..."

***Jane Margrete William v. Abdul Hamid Mian* (1994 SCMR 1555)**

The matter in the said case concerned the authority of the Judge in Chambers to treat an application under section 151 of the C.P.C., which was filed by the respondent as cross-objection in the appeal filed by the appellant, the Court observed that:

> "procedural laws and rules cannot be used as a means for denying the relief to an aggrieved party on the ground of technical non-observance of these rules or procedural laws. Keeping these principles in view the Courts have always liberally allowed conversion of proceedings of one kind into another and misdescription in the title of proceedings or mention of a wrong provision of law have never been considered fatal to the grant of relief if it is otherwise available under the law to an aggrieved party".

***Pakistan Fisheries Ltd. v. United Bank Ltd*. (1993 PLD 109 SC)**

In this case, it was noted that where the orders of the Single Judge were not interlocutory, the appellants should not have had invoked the appellate powers of the High Court under section 15 of Ordinance No. X of 1980, but instead should have had preferred an appeal under section 12 *Ibid.* It was observed that:

> "..... not unaware that as long as the power to hear and decide a [matter] vests in a Court, mere reference to a wrong provision of law, for invocation of that power is not a bar to the exercise of that power".

***Safia Bibi v. Aisha Bibi* (1982 SCMR 494)**

In this case, while considering a newly added provision in the C.P.C., which, at the time, was not published in the law journals, it was concluded that:

> "it cannot be denied that mention of a wrong provision of law in an application would not deprive the Court of the power and jurisdiction if otherwise the same is available under the law".

***Vijaya Bank v. Shyamal Kumar Lodh* and *T. Nagappa v. Y.R Muralidhar* (Supreme Court of India)**

In these cases, the Court opined that an incorrect label of the application and mentioning a wrong provision neither confers jurisdiction nor denudes the court of its jurisdiction. The relief

sought for, if it falls within the jurisdiction of the court, cannot be refused on the said ground.

11. Keeping in view the judicial consensus on the issue at hand, it would be safe to conclude that quoting of wrong provisions of law in a show cause notice would not necessarily vitiate the entire process initiated thereunder. What is crucial to note is that, in deciding the legal validity of the show cause notice, it is important to first see whether the *recipient/assessee* of the said notice has been put to any prejudice in preparing and putting up its defence to the allegations made therein. And whether the *issuer* of the notice had the authority to issue the same, provided the notice had all the necessary facts leading to the alleged acts or omission of the recipient constituting the stated contravention of provisions of law, and thus, to be meaningfully responded by the *assessee*.

Legal forum to decide the challenge made by the appellant

12. This would bring us to the last issue of whether the said challenge made by the appellant in writing before the Appellate Tribunal, which has not yet been decided by the Tribunal, should be decided by this Court, at this stage or be left to be decided first by the Appellate Tribunal, where it was originally agitated. We are inclined to remand the matter to the Appellate Tribunal. Firstly, for the reason that the said crucial determination would require considering of mixed question of law and facts, which can best be undertaken by the Appellate Tribunal. Secondly, any finding by this Court or even by the High Court on the said challenge to the very legality of the Notices, on the touchstone of the settled principle enunciated in *Zamindara's case* (*supra*), would surely prejudice the appellant by denying it a forum of redressal under the Act. And finally, another fundamental issue, raised by the appellant in response to the Notices, as to whether the excisable goods questioned in the Notices were manufactured prior to June 1995, when Excise Duty was imposed thereon, and if so, to what legal effect, also requires a definite finding, and the Appellate Tribunal, being the last forum for adjudication such

mixed question of fact and law, would be also carried out to meet the ends of justice.

13. For the reasons stated hereinabove, the appeals of the appellant are accepted. The impugned decisions of the High Court dated 16.05.2012 and that of the Appellate Tribunal dated 17.01.2005, having erred in law, are set aside. And the appeals of the present appellant are deemed to be pending before the Appellate Tribunal, and the same along with the issues highlighted above are to be expeditiously decided in accordance with law.

Judge

Judge

Judge

Announced in open Court on _____
At Islamabad

Judge

ISLAMABAD.
Bench-IV.
21st January 2019.

"Not approved for reporting"