**IN THE SUPREME COURT OF PAKISTAN**
(Appellate Jurisdiction)

**PRESENT:**
**MR. JUSTICE AMIR HANI MUSLIM**
**MR. JUSTICE QAZI FAEZ ISA**
**MR. JUSTICE IJAZ UL AHSAN**

**CIVIL PETITION NO. 1983 OF 2012**
*(On appeal from the judgment dated 24.4.2012 in SAO No. 2 of 2000 passed by the Peshawar High Court, Peshawar)*

Army Welfare Trust (Nizampur Cement Project), Rawalpindi and another
…. Petitioners

Versus

Collector of Sales Tax (Now Commissioner Inland Revenue), Peshawar
…. Respondent

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|---|---|---|
| For the Petitioners | : | Mr. Ali Sibtain Fazli, Advocate Supreme Court<br>Mr. Mahmood A. Qureshi, AOR (**absent**). |
| For the Respondent | : | Dr. Farhat Zafar, Advocate Supreme Court<br>Mr. M. S. Khattak, AOR |
| Date of Hearing | : | 23rd September 2016 |

**JUDGMENT**

**QAZI FAEZ ISA, J:** A learned Division Bench of the Peshawar High Court, Peshawar vide judgment dated 24th April 2012 ("**the impugned judgment**") had set aside the order dated 12th June 1999 passed by a two member Bench of the Customs, Excise and Sales Tax Appellate Tribunal, Islamabad ("**the Appellate Tribunal**") and restored the orders and demand of the Collector (Appeals), Rawalpindi and Additional Collector Sales Tax, Peshawar.

**Office Objection**

2. When this case was filed the office recorded the following Office Objection:

> "High Court vide the impugned judgment has allowed S.A.O No.02/2000 by setting aside the order of Court below and the value of the subject matter of dispute is not less than Rs.50,000/-.

> Therefore instead of CPLA a Direct Civil Appeal lie before this Court."

The petitioner's appeal against the said objection was heard in Chambers on 2nd December 2014 when the following order was passed:

> "… it will be appropriate that the petition may be fixed in Court along with this objection, which will be decided by the Court itself, after hearing the parties' counsel.
> 2. In terms of the above, this appeal is disposed. Office is directed to assign proper number to this petition and fix in the Court."

Therefore, the first point that requires to be attended to is whether a petition for leave to appeal was correctly filed or instead an appeal against the impugned judgment lay. The matter acquires significance because an appeal is to "*be presented within thirty days*" as provided by Order XII Rule 2 of The Supreme Court Rules, 1980, ("**the Rules**") whereas "*a petition for leave shall be lodged in this Court within sixty days*" as stipulated by Order XIII Rule 1. This petition was filed after forty-five days.

3. Mr. Ali Sibtain Fazli, the learned counsel for the petitioner, stated that the Collector of Sales Tax (the respondent) against the order of the Appellate Tribunal filed a First Appeal against Order ("**FAO**") No. 6 of 2000, which was converted into a Second Appeal against Order ("**SAO**") No. 2 of 2000 wherein the High Court passed the impugned judgment. Therefore, the impugned judgment of the High Court is the first "*judgment, decree or final order*" of "*the court*" in terms of Article 185 (2) (d) of the Constitution of the Islamic Republic of Pakistan, 1973 ("**the Constitution**") as the Appellate Tribunal is clearly not a court, consequently, paragraph (d) was not applicable and the petitioner could only file a petition for leave to appeal under Article 185 (3) of the Constitution. To appreciate the contention, the said provisions are reproduced hereunder:

> **185.**
> "**(2)** An appeal shall lie to the Supreme Court from any judgment, decree, final order or sentence of a High Court -

> [*(a) to (c) are not relevant*]
>
> **(d)** if the amount or value of the subject-matter of the dispute in the court of the first instance was, and also in dispute in appeal is, not less than fifty thousand rupees or such other sum as may be specified in that behalf by Act of Majlis-e-Shoora (Parliament) and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the court immediately below;
>
> [*(e) and (f) are not relevant*]
>
> **(3)** An appeal to the Supreme Court from a judgment, decree, order or sentence of a High Court in a case to which clause (2) does not apply shall lie if the Supreme Court grants leave to appeal."

The learned counsel further stated that the Constitution uses both terms (court and tribunal) which are not interchangeable and Article 185 (2) (d) of the Constitution consciously does not include the orders / judgments of tribunals, therefore, if an order or judgment of a tribunal is set aside by the High Court, the only remedy against a judgment of the High Court would be by filing a petition for leave to appeal, as was filed in the present case. The learned counsel for the respondent supported the office objection by relying upon Article 185 (2) (d) of the Constitution and the case of Gul Jan v Naik Muhammad (PLD 2012 Supreme Court 421).

4. Significantly, the Constitution itself does not prescribe any period within which either an *appeal* or a *petition for leave to appeal* may be preferred. To avail the right of an appeal a lesser period (thirty days) is provided in the Rules however in respect of a discretionary remedy of a petition for leave to appeal it may be done within a greater period (sixty days). This is somewhat of an anomaly. At times, when a tardy party has missed the thirty days period for filing an appeal, rather than submitting an application to condone delay, a petition for leave to appeal is filed. A five member judgment of this Court, which was authored by Asif Saeed Khan Khosa, J, in the case of Gul Jan v Naik Muhammad (above), categorically held that, where an appeal is provided for as of right a petition for

leave to appeal can not be filed. And, if the *appeal* is filed after a period of thirty days then an application for extension of time or condonation of delay should be submitted.

5. The office objection mentions that, since the High Court had set aside "*the order of the Court below*" and as the value of the disputed amount was over fifty thousand rupees a direct appeal lay to the Supreme Court under Article 185 (2) (d) of the Constitution. There is no dispute as to the amount, which in this case is seventy two million, one hundred fifty four thousand, two hundred and forty two rupees. The only question requiring consideration is whether, in terms of paragraph (d) of clause (2) of Article 185 of the Constitution, the Appellate Tribunal is a *court*? The Constitution does not specifically define court/s however Article 175 (1) provides that, "There shall be a Supreme Court of Pakistan, a High Court for each Province and a High Court for the Islamabad Capital Territory and such other **courts as may be established by law**" [emphasis has been added].

6. Therefore, the question arises whether the Appellate Tribunal is a *court* established by law. The Act does not set up the Appellate Tribunal, but utilizes the "Customs, Excise and Sales Tax Appellate Tribunal" already set up under section 194 of the Customs Act, 1969 (see subsection (1) of section 2 of the Act). The Federal Government constitutes the Appellate Tribunal which comprises of *judicial and technical* members (subsections (1) and (2) respectively of section 194 of the Customs Act). The qualification of a *judicial member* is provided in subsection (2) and of a *technical member* in subsection (3) of section 194 of the Customs Act. The Federal Government also appoints the Chairman and determines the terms and conditions of appointment of the judicial and technical members (subsections (4) and (5) respectively of section 194 of the Customs Act). Neither through the Sales Tax Act, 1990 ("**the Sales Tax Act**" or "**the Act**") nor through the Customs Act a *court* was established, therefore, the Appellate Tribunal can not be categorized as a *court*.

7. The Appellate Tribunal can also not be equated with the tribunals envisaged in the Constitution which exercise judicial powers, such as the tribunals established under Article

212 and election tribunals under Article 225 of the Constitution. Ajmal Mian, CJ, heading a five member bench of this Court in the case of Mehram Ali v Federation of Pakistan (PLD 1998 Supreme Court 1445) held, "*that any Court or Tribunal which is not founded on any of the Articles of the Constitution cannot lawfully share judicial power with the Courts referred to in Articles 175 and 203 of the Constitution*" (subparagraph (iii) of paragraph 11, page 1477). A more recent judgment of a three member bench of this Court authored by Iftikhar Muhammad Chaudhry, CJ, in the case of Riaz-ul-Haq v Federation of Pakistan (PLD 2013 Supreme Court 501) held, that, since the Federal and Provincial Service Tribunals perform judicial functions and are set up pursuant to Article 212 of the Constitution they have to be made autonomous and independent of the Executive arm of the government/s in compliance with the mandate of the Constitution (clause (3) of Article 175) which provides for the separation of the Judiciary from the Executive. The Appellate Tribunal is not mentioned or provided for in the Constitution, therefore, it can not be categorized or be deemed to be a *court* in terms of paragraph (d) of clause (2) of Article 185 of the Constitution. When through the impugned judgment the High Court set aside the Appellate Tribunal's order it did not do so of a *court immediately below*. Consequently, the petitioner acted in accordance with the Constitution when it preferred a petition seeking leave to appeal the impugned judgment. The above mentioned office objection is therefore overruled.

**Respective Contentions by the Learned Counsel on the Merits of the Case**

8. Mr. Fazli, the learned counsel for the petitioner, stated that all industrial units that had been set up in the Provinces of Khyber Pukhtunkhwa (previously North-West Frontier Province) and Balochistan (except the Hub-Chowki area) had been exempted from the payment of sales tax for a period of five years from the date that they commenced production as per the notification issued pursuant to subsection (1) of Section 13 of the Act, being S.R.O.561(I)/94 dated 9th June 1994 ("**the Notification**"). The subject industrial unit, 'Nizampur Cement Plant', was set up by the Army Welfare Trust (the petitioner) in District Nowshera of Khyber Pukhtunkhwa Province and had commenced production on 25th November 1996 therefore it was entitled to the benefit of the Notification. However, as the

cement manufactured by the petitioner was available in the market at the same price as was charged by the other manufacturers of cement (whose plants were not covered by the Notification) it was presumed that the petitioner was collecting sales tax on the sale of cement and, the learned counsel contended, it was on this erroneous assumption that the High Court decided the matter. He further stated that section 3B of the Act, had no application to the dispute in hand nor was the decision in the case of Facto Belarus Tractor Ltd. v Government of Pakistan (PLD 2005 Supreme Court 605) relevant as the petitioner had not collected sales tax.

The learned counsel next contended that at the relevant time an appeal did lay against the order of the Appellate Tribunal, but it could only be filed "*in respect of any question of law*" under subsection (1) of Section 47 of the Sales Tax Act. He stated that the High Court did not consider this legal bar of jurisdiction and proceeded to hear and decide the case as it would normally hear and decide a regular appeal wherein questions of fact could also be agitated. The Appellate Tribunal, according to Mr. Fazli, had correctly determined that the petitioner had not collected any sales tax and as this was a factual finding it could not be set aside by the High Court pursuant to subsection (1) of section 47 of the Act as it did not involve *any question of law.* The learned counsel further stated that the contents of the appeal before the High Court reveal that the challenge before the High Court was against a factual determination by the Appellate Tribunal with regard to whether sales tax was collected by the petitioner. Mr. Fazli submitted that there was no evidence on record that the petitioner was charging, collecting or recovering sales tax from its consumers (the purchasers of cement), but despite there being no evidence in this regard the High Court wrongly assumed so and on the basis of this wrong assumption ordered that the same be paid to the respondent.

9. On the other hand, Dr. Farhat Zafar, the learned counsel for the respondent, supported the impugned judgment. The learned counsel contended that the Notification was aimed to give an edge to the supplies of those manufacturers who had set up their industrial units in the notified areas to enable them to sell their goods for less than the price that the

same supplies were being sold by their competitors, however, the petitioner was selling cement at the same price, which price incorporated the amount of sales tax that would have been payable if the supplies were not exempted. The learned counsel stated that after collecting such sales tax the petitioner did not pay it to the respondent as required by section 3B of the Act. It was next contended that when supplies have been exempted from the payment of sales tax the benefit of such exemption must be passed on to the consumers.

**Jurisdiction of the High Court Under Section 47 of the Act**

10. The preamble to the Sales Tax Act provides for, "*the levy of a tax on the sale, importation, exportation, production, manufacture or consumption of goods*" and its Chapter VIII is titled 'Appeals'. An appeal under the Act is preferred before the Commissioner of Inland Revenue (Appeals) (previously it was before Collector (Appeals)) and against his order a further appeal lies to the Appellate Tribunal under section 46 of the Act. The Act (as it presently stands) provides for the filing of a *reference* under section 47 against the order of the Appellate Tribunal, but at the relevant time it provided for the filing of an appeal. However, an appeal too, like a reference, could only be filed "*in respect of any question of law arising out of an order*" of the Appellate Tribunal. Subsection (5) of Section 47 of the Act provides, that, the High Court, "*shall decide the question of law raised thereby* [in the appeal/reference] *and shall deliver judgment thereon*". The jurisdiction of the High Court under the Act was, and is, restricted to matters involving only questions of law. Similar provisions are also found in other statutes. In the income tax laws, a reference to the High Court can be made on a question of law, in interpreting a similar provision this Court in the case of F. M. Y. Industries Ltd. v Deputy Commissioner Income Tax (2014 SCMR 907) held that the, "*High Court and this Court cannot entertain any question on a finding of fact*" (page 912A) and that, "*It is now a settled law that only those questions can be raised before the learned High Court which are questions of law and are arising from the order of the Tribunal*" (page 913B). It is therefore clear that an appeal, or reference, to the High Court against a judgment of the Appellate Tribunal under the Act could only be filed on a question of law.

**The Factual Aspect of the Case**

11. Section 13 of the Sales Tax Act enables the Federal Government to exempt, with or without conditions, supplies which are otherwise taxable from the whole or any part of the tax chargeable under the Sales Tax Act. In exercise of such powers the Notification was issued, the relevant portion whereof is reproduced hereunder:

> "**S.R.O. 561(I)/94.—** In exercise of the powers conferred by sub-section (1) of section 13 of the Sales Tax Act, 1990, and in supersession of this Ministry's Notification No. S.R.O.580(I)/91, dated the 27th June, 1991, the Federal Government is pleased to direct that all supplies made by manufacturers or producers of industrial units which are set up in the North-West Frontier Province and the Province of Baluchistan (except Hub-Chowki area) between the 1st July, 1991, and the 30th June, 1994, shall be exempt from the tax payable under the said Act for a period of five years from the date the industry is set up.
>
> Explanation. – For the purpose of this Notification, the expression "set up" shall mean the date on which the industrial unit commences its production including trial production, which date shall be intimated, in writing, by manufacturer to the Assistant Collector of Sales Tax having jurisdiction in the area at least fifteen days before commencing such production but shall not include the date of expansion, balancing, modernization or replacement of such industry."

There is no dispute that the industrial unit of the petitioner was set up in an area notified under the said Notification, nor is there any dispute regarding the date of commencement of production or with regard to the duration for which the exemption under the Notification was available.

12. The point of difference between the two sides is whether the petitioner, in fact, collected sales tax from its consumers. Since the learned counsel for the respondent has relied upon subsection (1) of section 3B of the Act it would be appropriate to also reproduce it:

> **3B. Collection of excess sales tax etc. –**
>
> "(1) Any person who has collected or collects any tax or charge, whether under misapprehension of any provision of this Act or otherwise, which was not payable as tax or charge or which is in excess of the tax or charge actually payable and the incidence of which has been passed on to the consumer, shall pay the amount of tax or charge so collected to the Federal Government."

It also needs examination whether in terms of the Notification the petitioner was obliged to sell its goods at a lower price, that is, by excluding from the price the amount equivalent to the sales tax.

13. To attract the aforesaid subsection (1) of section 3B of the Act it must be established that the petitioner had collected sales tax on the supplies made by it. The Appellate Tribunal had found that the petitioner had neither charged nor collected sales tax. The Appellate Tribunal had further held that the respondent had not produced any evidence to indicate that the petitioners had charged or collected sales tax. In this regard, the Appellate Tribunal had determined as under:

> "7. We have given a careful consideration to the submissions made by the learned counsel for the appellants, departmental representative and the Law Officer of the Collectorate. A careful perusal of section 3-B of the Sales Tax Act, 1990 shows that its application is contingent on the fulfillment of the following conditions:
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> i) A person has charged sales tax on his supplies which otherwise is not chargeable under the law and
>
> ii) Its incidence has been passed on to the consumers.
>
> As regards the first condition **there is no evidence that the appellants ever** conveyed to their customers that sales tax was chargeable on their supplies of cement **or they actually charged and collected sales tax** thereon. In their ARIs (application for removal of excisable goods) which they furnished to the Central Excise Officer for the clearance of goods on payment of central excise duty the relevant column relating to sales tax has no indication that sales tax was charged by them. The detecting agency could not produce any tax return, or invoice indicating that the

> appellants charged sales tax on their business transactions." [emphasis has been added]

14. In the appeal, filed by the respondent before the High Court, no proof was attached nor any particulars mentioned to controvert the above mentioned finding of the Appellate Tribunal. The learned judges of the High Court however stated that the Department "*had provided ample proof of charging and collecting sale* [sic] *tax on the exempted supplies.*" However, there is no mention of such *ample proof* in the impugned judgment, instead an internal document of the petitioner which had set out the pricing mechanism for the cement was referred to, which document had already been attended to and the contention of the respondent in this regard had been rebutted by the Appellate Tribunal. In the said document the petitioner had calculated its sale price by taking into consideration the applicable sales tax as if the Notification had not been issued or as if the exempted period of five year period had expired. The judgment of the Appellate Tribunal had attended to this matter as under:

> "10. The fact that while selling their product the appellants charged the market price, the same as was charged by the tax paying units, does not lead to the conclusion that they charged and collected sales tax on their transactions. Section 3-B of the Sales Tax Act, 1990 would come into play only if a person makes a supply and collects a sum of money from his customers by representing the same as sales tax which he is otherwise not authorized under the law to collect and its incidence is passed on to the consumers. The mere fact that the appellants charged market price for their product can in no way be construed to mean that they charged and collected sales tax on their business transactions."

The High Court not only decided a pure question of fact but did so without any evidence. Needless to state that if at all it was permitted to overturn a finding of fact arrived at by the Appellate Tribunal (which the Act did not permit) then too it could be only done on the basis of evidence. No evidence of sales tax collection was produced before the Appellate Tribunal, before the High Court or even before us. Merely because the petitioner, in determining the price at which it would be selling cement, had mentioned a notional amount

as 'sales tax' led the Department to presume that sales tax had been collected. The internal pricing mechanism of a manufacturer is not a substitute for proof/evidence of actual collection of sales tax in terms of section 3B of the Act. Section 3B also does not refer to a notional recovery of sales tax. Therefore, since sales tax was not collected by the petitioner the question of paying the same to the respondent simply did not arise.

15. The other argument put forward by the learned counsel for the respondent was that, the object of the Notification was to make the goods of the manufacturers covered by the Notification more competitive, is one that is not supported either by the language of section 13 of the Act or by the language of the Notification. The Notification clearly and emphatically states that an industrial set up in the notified area "*shall be exempt from the sales tax payable under the said Act for a period of five years*." The Notification is not aimed to benefit consumers. The Notification also does not state that it seeks to provide manufacturers who have their industrial units in the notified area with a more advantageous market for their goods. If, as contended by the respondent's counsel, the petitioner was required to sell goods at a lesser price, then the petitioner would not be advantageously placed with regard to those manufacturers who did not have their industrial units in the notified areas. The object of the Notification was undoubtedly to encourage industrialization in the notified areas, which object would be defeated if we were to accept the respondent's contention.

**Conclusion**

16. The decision of the Appellate Tribunal had attained finality on all matters of fact. The appeal filed by the respondent before the High Court did not raise any *question of law* nor was any *question of law* decided by the impugned judgment in terms of subsection (5) of section 47 of the Act. Be that as it may, we have also examined the facts of the case and have found that the decision of the Appellate Tribunal was in accordance with the Act. Consequently, the petition is converted into an appeal and is allowed by setting aside the impugned judgment of the High Court and restoring that of the Appellate Tribunal. In view

of the legal questions involved in the case, some of which had not been previously determined, there shall be no order as to costs.

**Judge**

**Judge**

**Judge**

*Bench-IV*
Announced in open Court
at Islamabad

By Justice Ijaz ul Ahsan

On 14-10-2016

**APPROVED FOR REPORTING**
*(Zulfiqar)*