

2012 P T D 999

[Islamabad High Court]

Before Shaukat Aziz Siddiqui, J

FIVE STAR BUILDING MATERIALS AND GEN. ORDER SUPPLIERS and another

versus

FEDERATION OF PAKISTAN through Secretary, Islamabad and 6 others

Writ Petition No.1884 of 2007, decided on 13th March, 2012.

Sales Tax Act (VII of 1990)---

----Ss. 11(4), 33, 34, 36(3) & 46---Establishment of the Office of Federal Tax Ombudsman Ordinance (XXXV of 2000), Ss. 9(2)(b) & 32---Constitution of Pakistan, Art. 199---Constitutional petition---Evasion of sales tax, charge of---Issuance of show-cause notice---Passing of order-in-original by Additional Collector---Order of Appellate Authority dismissing petitioner's appeal not challenged before Appellate Tribunal---Complaint before Federal Tax Ombudsman---Order of Ombudsman accepting complaint set aside by the President in revision---Validity---Petitioner had a remedy of appeal under S. 46 of Sales Tax Act, 1990 against order of Appellate Authority---Petitioner had adopted course of filing complaint after expiry of period provided for filing such appeal---Ombudsman had no jurisdiction to entertain such complaint' due to specific bar contained in S.9(2)(b) of Establishment of the Office of Federal Tax Ombudsman Ordinance, 2000---Filing of complaint was tainted with mala fide, ulterior motives and result of misrepresentation High Court dismissed constitutional petition in circumstances.

PLD 1998 SC 64; 1999 SCMR 2744; 1999 SCMR 2189; PLD 2004 SC 99 and 2006 PTD 181 ref.

Farhat Nawaz Lodhi for Petitioners.

Moulvi Anwar-ul-Haq, Attorney -General of Pakistan for the State.

Nazir Abbassi, Standing Counsel.

Ms. Miraj Tareen for Respondent No.4.

Date of hearing: 16th February, 2012.

JUDGMENT

SHAUKAT AZIZ SIDDIQUI, J.---Brief facts glean out from the instant Petition are that petitioner No.1 being "registered juristic person" with Collectorate of Sales Tax, Rawalpindi, having registration no.07-03-7318-006-91 dated 23-9-1999 was engaged in the business of "supply of different materials".

2. Show-Cause Notice dated 13-11-2003 was served upon petitioner No.1, with an allegation that during the period from July, 1998 to June, 2002, petitioner failed to charge sales tax from its customers and to pay, to the Sales Tax department on the supply of "Laterite" and on carriage/transportation charges thereof. The amount of tax alleged to remained unpaid vide C.B.R. letter C.' No.3920/STP/99, dated 24-4-1999 was calculated to be Rs.39,44,148. According to petitioner, allegations of the concerned auditor, who submitted audit report, very basis of SCN was factually incorrect, therefore, rechecking (re-audit) was requested but same was not responded.

3. However, as required, reply to show cause was filed* and order-in-original was passed on 1-6-6-2005 by the Additional Collector. Appeal preferred against the order-in-original before learned Collector (Appeals) Rawalpindi was dismissed vide order dated 15-12-2005. Consequently being aggrieved a "Complaint" was preferred before the Federal- Tax Ombudsman, which was accepted vide "Findings/Recommendations" dated 22-5-2006 whereby the impugned order-in-original was struck down, primarily, on the ground that it was time barred, even after an extension granted by CBR, vide letter C.No.5(10)-CEJ/2000 dated 11-6-2005. The "Findings/Recommendations" of learned FTO (Federal Tax Ombudsman) were stated to be reversed by the President, on representation under section 32 of the Ordinance XXXV of 2000, as communicated by Law, Justice & H.R Div. vide letter No.F.No.95/06-Law (FTO)) dated 9-6-2007.

4. The learned counsel for the petitioner argued that Collector of Sales Tax, had no authority to file representation under section 32 of the Ordinance, 2000, nor he was authorized by Revenue Division. The "representation" was examined and recommendations were made by some officer, in the Law, Justice and H.R Div. Islamabad (an executive establishment) which, on one hand against the concept of separation of judiciary from executive as per provisions of Article 75 of the Constitution and on the other hand is against the established judicial norms. The "Finding" by the learned FTO have been examined by a much junior officer (executive) officer in the Division. That the president himself is an executive authority inter alia under Article 90 of the Constitution, hence cannot perform judicial or quasi-judicial acts vis-a-vis functions performed by the FTO. The provisions and section 32 of the Ordinance 2000 are simply against the concept of "tricotomy of powers". The impugned order is not a speaking' order, under section 24-A of General Clauses Act, 1897 (amended). The learned counsel for petitioner prayed that writ may be issued and proceedings including impugned orders of the President of Pakistan, conveyed vide letter F.95/06-Law (FTO) dated 9-6-2007 may be vacated and section 32 of the Ordinance, 2000 may be struck down, with consequential relief being void-ab-initio, without jurisdiction/authority, unlawful, against the provisions of Constitution, 1973. The learned counsel for the petitioner placed reliance on PLD 1998 SC 64, 1999 SCMR 2744, 1999 SCMR 2189, PLD 2004 SC 99 and 2006 PTD 181.

5. In response to notice issued under order 27-A C.P.C., learned Attorney General appeared and advanced his arguments. Learned Attorney General argued that no prejudice has been caused to petitioner, by condpnation of delay, if any. There is no reason of declaring the provision of section 32 as ultravires, however, learned Attorney General is of the view that legislation is required to be made, in order to bring harmony between section 9 and section 2(3) of Federal Tax Ombudsman, Ordinance, 2000, as definition of "maladministration" in the statute, is too void.

6. Learned counsel for respondent No.4 Ms. Miraj Tareen, adopted the arguments advanced by the learned Attorney General of Pakistan.

I have heard the learned counsel for parties and perused' the record.

7. In my humble estimation, conduct of petitioner itself is dubious and questionable. Against order dated 31-12-2005, remedy of appeal under section 46 of Sales Tax Act, 1990 was available, which was required to be filed within 60 days of the date of issuance of order but it appears that, after lapse of period provided for appeal, some legal brain, advised to invoke the jurisdiction of learned FTO by way of filing complaint. It is being observed with concern that neither, the complaint filed before learned FTO, nor the findings/decision dated 22-5-2006 made on it by learned FTO provide the date of the institution of complaint. This

fact fully substantiates the observation of this, court that after elapse of period of filing appeal under section 46 of the Sales Tax Act, 1990 which obviously is a statutory remedy, petitioner adopted the Course of lodging the complaint. With utmost reverence to the learned FTO, jurisdiction assumed by him was not vested in him, due to specific bar of subsections (2)(b) contained in section 9, of Federal Tax Ombudsman, Ordinance, 2000 which reads as under:--

"(9) Jurisdiction, functions and powers of the Federal Tax Ombudsman.---(1) Subject to subsection (2), the Federal Tax Ombudsman may on a complaint by any aggrieved person, or on a reference by the President, the Senate or the National Assembly, as the case may be, or on a motion of the Supreme Court or a High Court made during the course of any proceedings before it or of his own motion, investigate any allegation of maladministration on the part of the Revenue Division or any Tax Employee.

(2) the Federal Tax Ombudsman shall not have jurisdiction to investigate or inquire into matters which

(a) are sub judice before a court of competent jurisdiction or tribunal or board or authority on the date of the receipt of a complaint, reference or motion by him; or

(b) relate to assessment of income or wealth, determination of liability of tax or duty, classification or valuation of goods, interpretation of law rules and regulations relating to such assessment determination, classification or valuation in respect of which legal remedies of appeal, review or revision are available under the Relevant Legislation. (underlining is mine)

(3) Notwithstanding anything contained in subsection (1), the Federal Tax Ombudsman shall not accept for investigation any complaint by or on behalf of a Tax Employee concerning matters relating to the Revenue Division in respect of any personal grievance relating to his service.

(4) For carrying out the objectives of this Ordinance and, in particular for ascertaining the causes of corrupt practices and injustice, the Federal Tax Ombudsman may arrange for studies to be made or research to be conducted and may recommend appropriate steps for their eradication

(5) The Federal Tax Ombudsman may set up regional offices as, when and where required."

8. It appears that, this important aspect escaped notice of learned FTO as well as Worthy President, as orders, dated 22-5-2006 and B 9-6-2007 do not reflect any reference to this effect. The entire emphasis of petitioner is that order in original was passed after elapse of statutory period, which somehow extended by the board but when it came to petitioner himself, instead of seeking condonation, petitioner opted for a device, which was not available under both the statutes i.e. Sales Tax B Act, 1990, and Federal Tax Ombudsman, Ordinance, 2000. It is globally respected and fallowed principle of law that, "he who seeks equity, must do equity" but petitioner approach is not only cryptic but polluted as well.

9. In these circumstances, I hold that, very filing of complaint was tainted with mala fide, ulterior motives and result of mis-representation. C The findings/decision passed by learned FTO was liable to be struck down on this score alone.

10. Now, as for as second limb of arguments of learned counsel for petitioner of declaring section 32 of Federal Tax Ombudsman, Ordinance, 2000 as void-ab-initio and against the provisions of Constitution of 1973 is concerned, learned counsel did not press it seriously and even no serious challenge was put through the writ petition itself, which aspect is being substantiated from the fact that in the prayer clause, following sentence was inserted, apparently later on which is hand written "and section 32 of the Ordinance, 2000 may be struck down". Even otherwise, when learned counsel for petitioner was asked to assist the court 'for striking down the provision from a statute, on the touch stone of Article-8 of the Constitution, learned counsel kept his focus of arguments on the extension of period for passing the order-in-original Judgments relied by the learned counsel for petitioner are not applicable on the issue in hand.

In this view of the matter, instant writ petition is dismissed with no orders as to costs.

S.A.K./66/IsI

Petition dismissed.