

Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Sales Tax Reference No. 20 of 2008

M/s Attock Refinery Limited, etc.

Vs

The Collector of Sales Tax, etc.

DATE OF DECISION: 01.02.2021

APPLICANTS BY: Syed Tauqeer Bukhari and Syed Ali Murtaza Abbas, Advocates.

RESPONDENT BY: Mr. Babar Bilal, Advocate.

BABAR SATTAR, J.- This Sales Tax Reference has been filed under section 47 of the Sale Tax Act, 1990 (hereinafter referred to as the "**Act**") and the question of law stated to have arisen out of judgment, dated 20.05.2008 passed by the learned Customs, Central Excise and Sales Tax Appellate Tribunal, Islamabad (hereinafter referred to as the "**Tribunal**") proposed for our consideration is as follows:

"Is the show cause notice legally sustainable in view of the provisions of section 36 of the Sales Tax Act, 1990."

2. The brief facts of the case are that a show cause notice dated 16.04.1997, issued to the applicant, was vacated vide Order-in-Original 03/2004, dated 25.02.2004 by the Collector Adjudication on the basis that the MTT Oil in relation

to which liability was being generated by the Department could not be classified under PCT heading 27.07 and goods instead fell under PCT heading 27.10 and were thus exempt from sales tax. This order was challenged before the learned Tribunal which through a reasoned judgment dated 26.05.2008 set aside the Order-in-Original and held that the disputed item (i.e. MTT Oil) was to be classified under PCT heading 3814 of the First Schedule to the Customs Act, 1969, while relying on explanatory notes by the World Customs Organization. The learned Tribunal allowed the appeal with the direction that no additional tax or penalty would be recovered from the applicant/respondent if the principal amount of sales tax were deposited by the applicant/taxpayer within 60 days of the receipt of the order. Aggrieved by this order the applicant filed the instant reference.

3. Learned counsel for the applicant states, at the very outset, that a series of questions had been framed as part of the reference but they now stand answered in view of the various judgments passed by the august Supreme Court and it is the only aforementioned question regarding the legality of the show cause notice that requires adjudication. The learned counsel submits that show cause notice dated 16/04/1997 (hereinafter referred to as "**SCN**") did not explicitly state that it was being issued in exercise of powers under section 36 of the Act, even though the SCN did refer to violations under section 3, 6 and 23 of the Act attracting penalties under sections 33 and 34 of the Act.

4. We have heard the arguments of the learned counsel for the parties.

5. Learned counsel for the applicant has been unable to convince us of any infirmity in the SCN. It is not the applicant's case that the Department levied or sought to recover any penalties on the basis of any collusion or deliberate evasion. Through the SCN the applicant was asked to show cause as to why a tax liability not discharged due to inadvertence should not be recovered. In short, the applicant was put on notice to explain how the disputed item fell within a PCT heading that was exempt from the payment of tax and the learned Tribunal through the impugned judgment held that sales tax was payable as the MTT Oil fell within PCT heading 3814 and that no additional tax or penalty was to be recovered from the applicant so long it deposited the principal amount of sale tax within a period of sixty (60) days of the receipt of the appellate order.

6. The jurisprudence on legality of show cause notices is guided by fundamental principles of fairness. A person being put a notice ought to know the allegation or charge against them together with identification of the consequences of the infraction if found to be true along with being provided an opportunity to answer the allegation or charge. It is settled law that misstatement of a provision of law within the SCN or omission of the provision of the statute under which the Show cause notice has been issued, in the absence of additional factors or circumstances rendering the show cause notice

incomplete or unfair for not clearly stating the allegation, does not invalidate such show cause notice. We are, therefore, not convinced that the show cause notice in the instant matter suffers from any jurisdictional defect or illegality that could prejudice the rights of the applicant. The learned counsel for the applicant has not pointed out any other illegality or infirmity in the appellate order. The learned Tribunal infact granted relief to the applicant that it could not grant under section 34 of the Act as it held that the applicant was not liable to any additional tax or penalty over and above the principal amount of sales tax if the said tax was deposited within a period of sixty days. Section 34 (1)(a) of the Act states the following:

34. Default Surcharge.— (1) Notwithstanding the provisions of section 11, if a registered person does not pay the tax due or any part thereof, whether willfully or otherwise, in time or in the manner specified under this Act, rules or notifications issued thereunder or claims a tax credit, refund or makes an adjustment which is not admissible to him, or incorrectly applies the rate of zero per cent to supplies made by him, he shall, in addition to the tax due, pay default surcharge at the rate mentioned below:—

(a) the person liable to pay any amount of tax or charge or the amount of refund erroneously made, shall pay default surcharge at the rate of [KIBOR plus three per cent per annum] of the amount of tax due or the amount of refund erroneously made.”

6. From the language of the aforementioned provision, it is patent that the legislature has not vested the learned

Tribunal with any authority to create a window period for the taxpayer, to pay any tax due that has not been paid willfully or inadvertently, without attracting a default surcharge. Once the Tribunal had held that payment of tax was due it could not have carved out a period of sixty days for payment of principal amount within which no default surcharge would be payable. The application of default surcharge under section 34 of the Act is automatic and is triggered even in cases, such the instant one, where nonpayment of tax due is not deliberate but inadvertent.

7. In view of the above, we answer the question proposed for our consideration is in the affirmative.

8. A copy of this orders is directed to be sent to the Registrar of the learned Tribunal under the seal of this Court.

(CHIEF JUSTICE)

(BABAR SATTAR)
JUDGE