

## JUDGMENT

**MUHAMMAD MUNIR PERACHA, J.**---The petitioners were served with show-cause notice dated 13-6-2005 by Additional Collector Customs Sales Tax and Central Excise adjudication Peshawar under section 36(1) of the Sales Tax at 1990 to show cause as to why:--

"(a) they should not pay sales tax amounting to Rs. (as detailed in the irregularities at S. Nos. 1 to 5 of the preceding paragraphs along with the additional tax under section 34 *ibid* besides imposition of penalties in terms of section 33 of the Sales Tax Act, 1990 on them on account of violation of the provisions of sections 3, 6, 7, 11, 22, 23, 24, 26 and 34 etc.; *ibid*."

In the show-cause notice, it was observed:--

"That audit of the record for the period July 2003 to June, 2004 revealed that the petitioners had;

(i) suppressed purchases of goods valuing Rs.6753605 and evaded sales tax of Rs.1239962 on the value addition @ 2%;

(ii) claimed excessive input tax adjustment of Rs.10139;

(iii) short paid sales tax of Rs.41784;

(iv) failed to pay sales tax of Rs. 180147;

(v) were liable to pay sales tax of Rs.88725 on sales value depressed by the appellants.

2. The petitioners submitted written reply dated 17-8-2005 to the show-cause notice. After hearing the representatives of the parties, the learned Additional Collector passed order in original No.03/05 dated 21-10-2005 and upheld first four allegations stated above and directed the petitioners to pay the evaded amount of sales tax along with additional tax and penalty. The petitioners feeling aggrieved approached the appellate Court, who vide order dated 16-6-2006 upheld the order-in- original. The petitioners thereafter filed appeal before the Customs, Central Excise and Sales Tax Appellate Tribunal. The appeal was dismissed by the Tribunal vide judgment dated 1-2-2008. The petitioner therefore, approached this Court through the present Tax Reference Application. The application was placed before a learned Division Bench of this Court on 4-3-2008. A pre-admission notice was ordered to be issued. In response to the pre-admission notice, Mr. Zahid Idrees Mufti, Advocate appeared for the Department.

3. We have heard the learned counsel for the petitioners as well as the learned counsel for the respondents.

4. According to the learned counsel for the petitioners, the following questions of law arise from the order of the Tribunal:

(A) Whether on facts and circumstances of the case and in view of the relevant statutory/trite law, the learned Tribunal was justified to (partially) confirm the earlier Orders/ actions omissions?

(B) Whether the learned Tribunal has properly and correctly appreciated/applied the relevant provisions of the Sales Tax Act, 1990, especially section 3 thereof. Whether it was the duty of the prosecution to establish, beyond doubt, the "supply" of taxable goods, for "consideration", in order to demand sales tax?

(C) Whether the order-in-original is time barred, in terms of section 45 of the Sales Tax Act, 1990?

(D) Whether it is not a case of mis-reading and non-reading of the record?

(E) Whether in the facts and circumstances of the case, the applicants have not been discriminately treated in this case, since in the similar circumstances, SCNs have been vacated?

(F) Whether in the facts and circumstances of the case, Additional Tax/Duty and / or penalty can be imposed?"

5. First of all, we will take question "C" framed by the learned counsel for the petitioners. Show-cause notice in this case was issued under section 36 of the Sales Tax Act, 1990 on 13-6-2005. The order-in- original was passed by the learned Additional Collector on 15-10-2005. Subsection (3) of section 36 of Act reads as under:--

"The officer of Sales Tax empowered in this behalf shall, after considering the objections of the person served with a notice to show cause under subsection (1) or subsection (2), determine the amount of tax or charge payable by him and such person shall pay the amount so determined:

Provided that order under this section shall be made within ninety days of issuance of show-cause notice or within such extended period as the Collector may for reasons to be recorded in writing, fix, provided that such extended period shall in no case exceed ninety days."

6. The submission of the learned counsel for the petitioner is that the learned Additional Collector could not have passed the order after 11-9-2005 in view of proviso to subsection (3) of section 36 of the Act. The contention of learned counsel is that there is no order passed by the Collector for extending the period. It is urged by the learned counsel for the petitioner that the order of extension has to be passed by the Collector before expiry of 90 days counted from issuance of the show-cause notice. In this respect, learned counsel relies on the judgment of the Division Bench of the High Court of Lahore in Sales Tax Reference No.68/06 and Writ Petition No.13331/06.

7. On the other hand, the submission of learned counsel for the respondent is that the period prescribed in subsection (3) is directory and an order passed by an officer of Sales Tax cannot be set aside on the short ground that the same has not been passed within the period prescribed by subsection (3) of section 36 of the Act.

8. Section 36 of the Sales Tax Act, 1990 before amendment did not provide' any time limit within which the order has to be passed by an officer of Sales Tax. However, a proviso was added in subsection (3) of section 36 through Finance Ordinance 2000:

"Provided that order under this section shall be made within forty-five days of issuance of show-cause notice or within such extended period as an Officer of Sales Tax may, for reasons to be recorded in writing, fix, provided that such extended period shall in no case exceed ninety days."

Vide Finance Act, 2003, the word "forty-five" was substituted by the word "ninety". The present shape of subsection (3) of section 36 is:

"The Officer of Sales empowered in this behalf shall, after considering the objections of the person served with a notice to show cause under subsection (1) or subsection (2), determine the amount of tax or charge payable by him and such person shall pay the amount so determined:

Provided that order under this section shall be made within ninety days of issuance of show-cause notice or within such extended period as the Collector may, for reasons to be recorded in writing; fix, provided that such extended period shall in no case exceed ninety days."

9. Subsection (2) of section 45 added by Finance Act, 2006 may also be relevant, which is reproduced:--

"Notwithstanding anything contained in subsection (4) of section 11 and subsection (3) of section 36 or any other provision of the Act or any other law for the time being in force and notwithstanding any decision or judgment of any forum, authority or Court, the time for adjudication in all the cases pending as on 30th June, 2006, shall be deemed always to have been extended up to 31st December, 2006 from the date on which the time-limit prescribed under subsection (4) of section 11 and subsection (3) of section 36, expires.

10. In earlier laws, dealing with the taxation, whenever a limitation was intended to be imposed on passing of an order, the provision has been couched in the negative language. In this respect, proviso to 61 of Income Tax Ordinance 1979 may be referred, which reads as:--

"Notice for production of books of account, etc.---The Deputy Commissioner may serve' upon any person who has furnished a return of total income for any income year, or upon whom a notice has been served to furnish such return, a notice requiring him on a date specified therein, to attend at the 'Deputy Commissioner's office or to produce, or cause to be produced, any evidence on which such person may rely in support of the return, if furnished and such accounts, documents or evidence (including accounts or documents) relating to any period prior or subsequent to the said income year) as the Deputy Commissioner may require:

Provided that the Deputy Commissioner shall not require the production or any accounts relating to a period more than three years prior to the income years."

11. Similar are the provisions of section 64 (1), (2) and (3), which provides:--

"(1) No assessment under section 59-A, section 62 or section 63 shall be made after the expiration of two years from the end of the assessment year in which the total income was first assessable.

(2) Notwithstanding anything contained in subsection (1), where a return of total income has been filed after the end of the financial year in which the last date of filing of such return specified in section 55 falls, no assessment under section 59-A, section 62 or section 63 shall be made after the expiration of two years from the end of the financial year in which the said return is filed.

(3) Notwithstanding anything contained in subsection (1), where for any income year, an assessee has failed to furnish the return of total income, no assessment under section 62 or section 63 shall be made after the expiration of two years from the end of the financial year in which notice under section 56, sub-section (3) of section 72 or subsection (3) of section 81, as the case may be, was served."

12. Section 65(3-A) of Income Tax Ordinance, 1979 and section 17-A of the Wealth Tax Ordinance, 1963 can also be referred.

13. In Income Tax Ordinance 2001, a different language has been employed. In this respect section 121 (3) and section 122 (2) of Income Tax Ordinance 2001 can be referred:--

"121(3). An assessment order under this section shall only be issued within five years after the end of the tax year of the income year to which it relates.

122(2) An assessment order shall only be amended under subsection (1) within five years after the Commissioner has issued or is treated as having issued the assessment order on the taxpayer."

14. Had the provisions of subsection (3) of the section 36 only been, that order under this section shall be made within "ninety days" of issuance of show-cause notice, it could have been urged that it is directory in nature. However, it is further provided that the Collector may for reasons to be recorded in writing extend such period by another "ninety days". The provisions that the Collector has to record reasons in writing for extension of the period makes the legislature intent clear. If still there was any doubt, the same stood removed by addition of subsection (2) of section 45, which has already been reproduced in paragraph 9 of the judgment. Had the provisions of subsection (3) of section 36 been directory in nature, there was no need to extend the period through an amendment in law in certain cases. We are therefore, of the considered opinion that subsection (3) of section 36 is a mandatory provision and no order under section 36 can be passed after the period prescribed under subsection (3). The learned Tribunal in this respect relied on Article 254 has no applicability when the ordinary laws are being examined. However, we would not agree with the learned counsel for the petitioners that the order of extension must be passed by the Collector within "ninety days" of the show-cause notice issued under section 36. The order of extension in our view can be passed by the Collector even after the expiry of the ninety days at any time before 180 days of the show-cause notice. In order in original, the learned Additional Collector has observed that the Collector granted the extension of another ninety days. We have already held that the order of extension can be passed even after the expiry of original ninety days.

In view of what has been said above, we will answer Question No. "C" in the negative.

16(sic) Section 3 of the Sales Tax, Act, 1990 is the charging section. Subsection (1) of section 3 reads as under:

"Subject to the provisions of this Act, there shall be charged, levied and paid a tax known as sales tax at the rate of fifteen per cent of the value of:

(a) taxable supplies made by a registered person in the course or furtherance of any taxable activity carried on by, him; and

(b) Goods imported into Pakistan."

17. Taxable supply is defined in clause 41, taxable activity in clause 35 and supply in clause 33 of section 2 of the Act.

"41. Taxable supply" means a supply of taxable goods made by an importer, manufacturer, wholesaler (including dealer), distributor or retailer other than a supply of goods which is exempt under section 13 and includes a supply of goods chargeable to tax at the rate of zero per cent under section 4.

35. "taxable activity" means any activity which is carried on by any person, whether or not for a pecuniary profit, and involves in whole or in part, the supply of goods or rendering of services on which sales tax has been levied under the respective Ordinance and use of goods acquired for private purposes or for the manufacture of exempt goods without making supply to any other person, whether for any consideration or otherwise, and includes any activity carried on in the form of a business, trade or manufacture.

33. "Supply" includes sale, lease or other disposition of goods carried out of consideration and also includes---

(a) putting to private, business or non-business use of goods acquired, produced or manufactured in the course of business;

(b) auction or disposal of goods to satisfy a debt owed by a person; and

(c) possession of taxable goods held immediately before a person ceases to be a registered

person.

18. We agree with the learned counsel for the petitioners that the burden of proving that the taxable supply has been made by a registered person in the course or furtherance of any taxable activity carried on by him is on the department. However, in this case, it is an admitted position that the goods subject matter of the reference were entered in stock register of the petitioners. The case of the petitioners is that the goods were destroyed for being unfit for further consumption. The burden to prove that the goods were destroyed would shift to the petitioners because "goods were not destroyed" is a negative fact, which cannot be proved by the department. The findings of the Tribunal are that the petitioners failed to prove fact of destruction of the goods. This finding is a finding of fact, which cannot be interfered with in a reference under section 47 of the Act. We will therefore, answer questions "A" and "B" in the positive. Questions "D" and "F" framed by the learned counsel for the petitioners do not arise from the order of the Tribunal.

19. Section 34(1) of the Sales Tax Act, 1990 substituted by Finance Act, 2005, reads as under:--

"Default surcharge.---(1) Notwithstanding the provisions of section 11, if a registered person does not pay the tax due or any part thereof, whether wilfully 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) for the first six months of default, 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 one per cent per month, of the amount of tax due or the amount of refund erroneously made;

(b) from the seventh month onwards, 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 one and a half per cent per month, of the amount of tax due or the amount or refund erroneously made, till such time the entire liability including the amount of default surcharge is paid; and

(c) in case, the default is on account of tax fraud, the person who has committed tax fraud shall pay default surcharge at the rate of two per cent per month, of the amount of tax evaded or the amount of refund fraudulently claimed, till such time the entire liability including the amount of default surcharge is paid."

20. Before amendment by the Finance Act, 2005, Section 34(1) was as under:

"Additional Tax.---(1) Notwithstanding the provisions of section 11, if a registered person or enrolled person does not pay the tax due or any part thereof in time or in the manner specified under this Act, rules or notification 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, and the prescribed penalties, pay additional tax at the rate of one per cent of the tax due per month or any part thereof."

21. While interpreting section 34(1) before amendment made in it by Finance Act, 2005, the Honourable Supreme Court in case reported as "D. G. Khan Cement Company Limited a. Federation of Pakistan and others, 2004 SCMR 456", held:--

"27. In view of these decisions, it could not be argued by the appellants that imposition of penalty or additional tax under section 34 was mandatory and there was no discretion left with the authorities to allow any concession.

28. Each and every case has to be decided on its own merits as to whether the evasion or

payment of tax was wilful or mala fide, decision on which would depend upon the question of recovery of additional tax. In the facts and circumstances of this case, we find that non-payment of the sales tax within tax period was neither wilful nor it could be construed to be mala fide evasion or payment of duty, therefore, the recovery of additional tax as penalty or otherwise was not justified in law."

However, in the amended section 34(1), the phrase "wilfully or otherwise" has been added. The period relevant in case in hand is July, 2003 to June, 2004. In our view, therefore, un-amended section 34(1) would be applicable. The next question is whether the default made in payment of sales tax by the petitioners was wilful. In our view, the default in payment of the sales tax has to be termed as "wilful". The payment of sales tax was not made on the ground that the goods were destroyed by the petitioners. The finding recorded all along is that the destruction of the goods is not established. The petitioners were therefore, liable to pay the additional tax under section 34 of the Sales Tax Act, 1990 and penalty under section 33 of the Act. The question "G" is therefore, answered is positive.

22. Reference is thus answered:--

- (a) Questions "A, "B" and G" are answered in positive whereas question "C" is answered in negative.
- (b) Questions "D" and "F" do not arise from the order of the Tribunal.

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