

## JUDGMENT

**MOHSIN AKHTAR KAYANI, J.----**Through this criminal appeal, the appellants have assailed the order dated 25.08.2017 passed by learned Judge Special Court (Customs, Taxation and Anti-Smuggling), Rawalpindi/ICT, Islamabad, whereby the respondent has been discharged from case FIR No. 08/2015 dated 10.09.2015 under section 2(37), Sales Tax Act, 1990 read with under sections 33(13) and 33(7) *ibid* registered at Directorate of Intelligence and Investigation (Inland Revenue) Islamabad mainly on the ground that S.R.O. No. 116/2015 has been declared *ultra vires* and set-aside by the Hon'ble Lahore High Court vide order dated 06.07.2017, passed in W.P. No. 37358/2016 titled as "Messrs FM Textile and others v. FBR".

2. Learned counsel for the appellants contend that the learned Judge Special Court has ignored the question of jurisdiction under S.R.O. No. 116/2015 dated 09.02.2015 which was issued by the Federal Board of Revenue, whereby different officers of the Directorate (Intelligence and Investigation-Inland Revenue) have been authorized to exercise such powers and to perform functions in different jurisdictions, referred in column No. 5, whereas, the Director (Intelligence and Investigation-Inland Revenue). Headquarters Islamabad is allowed to deal with the all cases regarding textile units and persons who carry on business fall within the territorial jurisdiction of RTO Rawalpindi and RTO ICT, Islamabad and as such case FIR No. 08/2015 dated 10.09.2015 under section 2(37), Sales Tax Act, 1990 read with under sections 33(13) and 33(7) *ibid* registered at Directorate of Intelligence and Investigation (Inland Revenue) Islamabad is in violation of Sections 2(25), 3, 6, 7, 22, 23, 26 and 73 of the Sales Tax Act, 1990 punishable under section 33(7) (8) (11c) and (13) read with Section 2(37) *ibid*, read with Chapter VIII of Sales Tax Special Procedures Rules, 2007 and Rule 4(b) and (d) of Chapter I of the Sales Tax Rules, 2006 for tax fraud has been registered against the respondent, whereas, an amount defrauded by the respondent/Naeem Siddiqi is Rs.437,380,435/-, where-after the challan has been submitted before the Special Court (Customs, Taxation and Anti Smuggling) and the same was decided in favour of respondent, however, order was passed mainly on the ground that the question of jurisdiction under SRO 116(I)/2015 has been declared *ultra vires* by the Hon'ble Lahore High Court in W.P. No. 37358/2016. Learned counsel for appellant further contends that the Sales Tax Act, 1990 was amended and in terms of Section 74(a) validation provision has been incorporated, whereby notifications and orders were issued and notified in exercise of powers confer upon the Federal Government that before the commencement of the Finance Act, 2018, therefore, notification and orders shall be deemed to have been validly issued and notified in exercise of those powers. Learned counsel for appellants further contend that after the amendment in Finance Act, 2018 Notification/SRO, which was set-aside by the Hon'ble Lahore High Court stood revised and even the order passed by the Lahore High Court is not meant to frustrate the proceedings of territorial jurisdiction of Islamabad.

3. Conversely, learned counsel for respondent contends that the case suit by the appellant side is based upon SRO 116(I)/2015 dated 09.02.2015, which has already been set-aside by the Hon'ble Lahore High Court in W.P. No. 37358/2016 titled as (F.M. Textile v. FBR) and as such after passing of the said judgment by the Hon'ble Lahore High Court any proceedings under the said SRO are contrary to the law and could not be given protection unless said judgment is set-aside, whereas, the said judgment has been assailed in intra-court appeal, which is pending adjudication.

4. Arguments heard record perused.

5. From perusal of the record, it has been observed that appellants are mainly aggrieved with the order dated 25.08.2017, passed by the learned Judge Special Court (Customs, Taxation and Anti Smuggling) Rawalpindi and ICT, Islamabad, whereby, the respondent was discharged from case FIR No. 08/2015 dated 10.09.2015 under section 2(37) of the Sales Tax Act, 1990 read with under sections 33(13), 33 (7) *ibid* for the following reason:-

"Since the SRO No. 116/2015 had been declared *ultra vires* and set-aside by the Hon'ble Lahore High Court vide judgment dated 06.07.2018 in W.P. No. 37358 of 2016 (Messrs FM Textile and others v. FBR). The FIR/case in hand is also come out of said SRO No.

116/2015 which in light of said judgment also stands-dismissed."

6. The above order is self-explanatory, however, in order to determine the true position of the concerned SRO, I have gone through the judgment reported as 2017 PTD Lahore High Court 1875 (FM Textile Mills v. Federal Board of Revenue), wherein it has been held as under:

"FBR had sufficient powers under the Federal Board of Revenue Act, 2007 to appoint, by posting or transfer, officers of DG (I&I), and upon such appointment such officers were to perform functions, which were peculiar to such Directorate ---Powers and Functions were to be specified by FBR through a notification issued under S. 30E of the Sales Tax Act, 1990 and such powers and functions would have a close nexus with the purpose which DG (I&I) was designed to achieve--by appointment, once again, as officers of Inland Revenue (as has been done through impugned SRO), officers so appointed were to be deemed to have been transferred and thereby ceased to function as officers of DG (I&I)."

7. The above referred judgment passed by learned Single Judge of the Hon'ble Lahore High Court was assailed before Division Bench through I.C.A. No.165730-2018 (Directorate Intelligence and others v. Humayyoun Ahmad Mian and others). Which is still pending and no final decision has been made, therefore, in this view, I have asked the learned counsel for appellants to demonstrate from record as to whether the liability calculated by the customs authorities against Naeem Siddiqui/respondent of M/s. CSM Distribution was settled in terms of Sales Tax Act, 1990 or otherwise. In response to said query, the learned counsel for appellants contended that the Order-in-Original No.6/51 dated 25.04.2018 was passed by Assistant Commissioner Inland Revenue, Unit-II, East-Zone, RTO, Islamabad which was assailed through Order-in-Appeal No.ST-202/2018/295 (M/s. CSM Distributions v. RTO, Islamabad in which the Commissioner of appeal vide order dated 28.06.2018 adjudicated upon the matter in the following manner:

"8. The appellant did not oppose purchases from the supplier. However, it claimed that the said procurements were supplied outside the country. The adjudicating officer's entire reliance is on the letter from HP Singapore. On this stage, first, it is to be established that whether goods are imported in Pakistan and second, whether the appellant can make imports in Pakistan being unregistered person. The department solely put burden on the appellant to prove element of supplies abroad. However, at the same time, the department was unable or unwilling to prove imports in Pakistan through any of the Seaport, Dry port or Air Freight Unit. If the entire imports were not made through legal channels, then it must be smuggled. Such a huge quantum of imports must reflect in records of Customs Authorities. Apart from this, recipient/purchasers of these so-called imported goods are yet to be detected/determined. The appellant provided bills of lading of Messrs Katco Logistic confirming its destination in UAE, which apparently carries weight.

9. In view of the foregoing facts, the impugned order is remanded to the department with the directions to re-examine the entire issue and pass a fresh judicious order after examining records in detail after providing reasonable opportunity of being heard to the appellant. The department is expected to record answers of the following queries:

- i. Does the appellant have sales tax registration number (STRN)?
- ii. How can the appellant import goods legally without getting itself registered with the department or without having STRN?
- iii. How can an unregistered person issue sales tax invoices stipulated under Section 23 of the Sales Tax Act, 1990?
- iv. What are the reasons for not registering a person compulsorily, who is liable to registration in accordance with the provisions of Sales Tax Act, 1990, as prescribed

under Rule 6 of the Sales Tax Rules, 2006?

- v. What is the identity of persons who received/bought the suspected imported goods?
- vi. Is the receipts of alleged supplies verified through any bank records of the appellant?
- vii. Is the department in possession of some other documentary evidence that proves the quantum of supplies in the domestic market?
- viii. Has the appellant paid any income tax on the foreign source income from international trading if its claim is admitted that it sold the goods in the international market?

10. The appellant is also asked to provide complete records to the Adjudicating Officer for examination and verification of its stance.

8. Keeping in view the above background, it appears that the impugned order passed by the adjudicating officer was set aside and matter was remanded to him on the above referred (viii) questions proposed by the Commissioner of Appeals, therefore, at this stage, I am also fortified with the view given by the Hon'ble Lahore High Court in 2015 PTD 1807 (Taj International (Pvt.) Ltd. and others v. FBR), wherein it has been held that:

"26. Even if the criminal prosecution under the present scheme of the Act is initiated after assessment of tax under Section 11 as discussed above, the constitutionality of hurriedly invoking Section 37A on the basis of material evidence requires consideration. Material evidence must be credible and definite if it is to deprive a citizen of his constitutional protection and safeguards under Articles 4 (due process), 9 (human liberty), 10A (fair trial) and 14 (human dignity). Setting in motion of the criminal prosecution cannot be left in the hands of any officer of the Inland Revenue, especially when the said Officers are under an obligation to recover the tax and meet tax targets before the close of the financial year set by the FBR. The process of initiation of criminal prosecution must comply with the requirement of due process and fair trial. The material evidence collected under section 37A needs to be credible and can best pass the test of fair trial and due process if it is an outcome of an inquiry or investigation envisaged under the proviso to section 25(2) of the Act. The outcome of any such inquiry and investigation must be placed before an independent forum like the Directorate General (Intelligence and Investigation), Inland Revenue established under section 30A of the Act to first review the inquiry and investigation and the material evidence and then proceed under the law. Anything short of this process will not only lead to persecution of the tax payers, it will also make a mockery of the fundamental right of fair trial.

27.

28. In view of the above, we hold that the pre-trial steps including arrest and detention cannot be given effect to unless the tax liability of the taxpayer is determined in accordance with section 11 of the Act. In this background, criminal proceedings initiated against the petitioners, and documented as the First Information Report in this case and cases mentioned in Schedule-A is quashed as being unconstitutional, violative of fundamental rights ultra vires the Act and hence illegal and without lawful authority. For the above reasons all there petitions are allowed. In the light of the above discussion, we see no need to answer the question regarding the jurisdiction or competence of the officer who initiated the criminal proceedings in these cases."

9. Similarly, the entire question raised in the criminal case by the appellants could only be resolved in a proper manner unless the liability and the question of jurisdiction is settled on the departmental side through order-in-original, order-in-appeal, or the judgment of the tribunal, and it is improper to prosecute the respondent for the liabilities' which have not yet been settled by the competent sales tax authorities, even otherwise if any sales tax was evaded by the respondent, the same could be recovered under the Sales Tax Act with penalty and default surcharge. The second ground raised by the appellant in this case is based upon the

amendment dated 31.10.2018 made in the Sales Tax Act, 1990, wherein Section 74A has been incorporated, which is reproduced as under for ready reference:

"74A. Validation.---(1) All notifications and orders issued and notified in exercise of the powers conferred upon the Federal Government, before the commencement of Finance Act, [2018] shall be deemed to have been validly issued and notified in exercise of those powers.]

(2) Notwithstanding any omission, irregularity or deficiency in the establishment of or conferment of powers and functions on the Directorate General (Intelligence and Investigation), Inland Revenue and authorities specified in section 30A, all orders passed, notices issued and actions taken, before commencement of the Finance Act, 2018, in exercise or purported exercise of the powers and functions of the officers of Inland Revenue under this Act by the Director General (Intelligence and Investigation), Inland Revenue or the authorities specified in section 30A shall be deemed to have been validly passed, issued and taken under this Act."

10. The provisions referred above although covered all kinds of actions and powers regulated by the D.G. Intelligence and Investigation even before commencement of the Finance Act, 2018, however there is no specific date for retrospective application in the said provision, but in my humble view, the validation provision provides referred above is with reference to Section 30A of the Sales Tax Act, 1990, which deals with the Directorate General of Intelligence and Investigation Inland Revenue in which Director Generals, Directors, Additional Directors, Deputy Directors, Assistant Directors and such other officers, the Board may by notification in the official gazette appoint, has been given protection, therefore, it could not be stretched to that extent that any orders passed by these officials were given validation unless these orders are only meant for their appointments as the powers and functions of Directorate General of Intelligence and Investigation could have only been notified by the Board in the official gazette in terms of Section 30(E), therefore, the validation provision does not cover Section 30(E), rather it only provides the protection to the extent of appointment in terms of Section 30A, whereas Notification SRO No.116(I) of 2015 was issued by the FBR and not by the Director General as referred in Section 30A.

11. By issuance of amendment of Section 74(A) in the Sales Tax Act, 1990 dated 31.10.2018, the tax authorities acknowledged in principle that powers conferred under SRO No.116(I) of 2015 dated 09.02.2015 were not available to the complainant of case FIR No.8/2015; i.e. Rizwan-ur-Rehman/Auditor, Intelligence and Investigation (IR) dated 09.10.2015, and as such, the powers, acts and orders were given protection subsequently through the amendment dated 31.10.2018, if the said analogy is accepted, the registration of criminal case, which was not, validly authorized, could not be given retrospective effect in a criminal case as it is against the fundamental rights of the individual who is facing the trial.

12. Keeping in view the above background, when the original liability is yet to be determined by the adjudicating officer against the respondent accused, it could not be presumed that a tax fraud with reference, to Section 2(37) of the Sales Tax Act, 1990 was committed as alleged in the criminal case registered by the appellants against respondent, therefore, in my humble view, the order passed by the Special Judge Customs Taxation and Anti-Smuggling, Rawalpindi/ICT is in accordance with law and no illegality has been observed, however the appellants may agitate the matter afresh after conclusion of the liability of sales by the department in hierarchy provided under the Sales Tax Act, 1990.

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