

[IN THE APPELLATE TRIBUNAL INLAND REVENUE,
PESHAWAR BENCH PESHAWAR]

*Present: Muhammad Pervez Alam, Accountant Member and Javid
Iqbal, Judicial Member.*

**S.T.A. No. 05(PB) of 2013 and MA (Addl. Ground) No. 09(PB)
of 2013. decided on 28-8-2013.**

Babar Nazir Advocate, for the Appellant.

M. Tariq Arbab DR & Ajmal Khan IRAO., for the Respondent.

Date of Hearing: 28-5-2013.

ORDER

[The Order was passed by Muhammad Pervez Alam, Accountant Member.] - This appeal at the instance of appellant/registered person has been filed against the order of learned CIR(A) whereby its appeal was rejected.

2. Briefly stated the facts of the case as per Record are that during scrutiny of the computerized record of Inland Revenue, Sales Tax & Federal Excise Wing, RTO, Peshawar it was observed that the appellant is non filer of the sales tax returns for tax period November 2008 to August 2011 who was required to file sales tax returns electronically within due date under section 26(1) of the Sales Tax Act, 1990 but they failed to do so. Therefore, appellant violated the provisions of section 26(1) read with sections 3 & 6 of the Sales Tax Act, 1990 and thus was liable to penal action against the appellant u/s 33 & 34 of the Act. Accordingly, show cause notice u/s 11 of the Act was issued to them as to why penal action should not be taken against them for non payment of sales tax and non filing of the sales tax return. After giving ample opportunities

of being heard to the appellant, the department decided the case and an assessment order dated 27.12.2011 was passed wherein the appellant was directed to deposit the government dues amounting to Rs.4,904,796/- as principal amount u/s 11(2) and 36(1) of the Sales Tax Act, 1990 along with default surcharge to be calculated up to August 2011, which was later on recalculated up to Rs.73,523/- and Ks.1,295,735/- vide corrigendum order dated 20-1-2012. Penalty of Rs.170,000/- u/s 33(1) was also imposed upon the appellant. Feeling aggrieved, the appellant went in appeal before the learned CIR(A) who vide the impugned order dismissed the appeal. Hence this second appeal by the appellant before this forum on the following grounds:

That show-cause notice is silent about the sub-section of section 11, therefore, illegal and defective.

- i. That show-cause notice u/s 11(4) specifying the ground on which respondent intended to proceed, was issued before passing of order, hence order is illegal, unwarranted and merits cancellation,
- ii. That appellant was enrolled as turnover taxpayer in 2004 and has been regularly filing sales tax returns as retailer up to October 2008 under sales tax special procedure rules.
- iii. That learned CIR(A) is incorrect in holding that the sales declared in the income tax returns were inclusive of sales tax. In fact the taxpayer has declared sales u/r 113B as per Sales Tax Special Procedure Rules, 2007.
- iv. That appellant has been registered as a retailer, hence should be assessed under the Sales Tax Special Procedure Rules, 2007.
- v. That no notice u/s 57 of the, Act was served upon the appellant, the corrigendum order is incorrect and unwarranted.
- vii. That the default surcharge and penalty imposed are incorrect, harsh and without any basis.

Addl. Ground:

- That the impugned order of the respondent No.2 is illegal, against the facts and law, without jurisdiction and void.
3. Representatives of both the parties have been heard and record perused. The learned counsel for the registered person/appellant contended that though show cause notice was issued to the taxpayer but the same is silent about sub-section of section 11 of the Sales Tax Act, 1990. The learned counsel further argued that

Even no notice under section 57 of the Sales Tax Act, 1990 was issued to the registered person for making correction of clerical errors, etc, which was absolutely mandatory and without issuance of such a notice the corrigendum issued regarding assessment order No. 152/2011 dated 26.12.2011 by calculating and enhancing default surcharge from "Rs.73,572/-" to Rs.1,295,735/- is illegal. The arguments of the learned AR carry weight and the taxation officer is directed to recalculate the default surcharge as directed by the learned CIR(A) on page-6 of the appellate order in paragraph-13. However, opportunity of being heard in this respect be positively provided to the registered person in view of the contents of section 57 of the Sales tax Act, 1990 which for

4. convenience is reproduced as under:

"57. Correction of clerical errors, etc. - Clerical or arithmetical errors in any assessment, adjudication, order or decision may, at any time, be corrected by the officer of Inland Revenue who made the assessment or adjudication or passed such order or decision or by his successor in officer.

Provided that before such correction, a notice shall be given to the registered person or to a person affected by such correction."

5. The original assessment order also suffers from certain infirmities as the correct sub-section of section 11 of the Sales Tax Act has not been mentioned in the show cause notice as section 11 of the Act has seven sub-sections and each sub-section deals with different situation, hence it is required that correct sub-section is to be mentioned in the show cause notice as well as in the assessment order but contrary to it, the original adjudicating authority has not done so, therefore, it is directed that re-assessment be framed and the correct sub-section be positively reflected in the assessment order, needless to say that in legal matters, every "comma", "inverted commas"; "semi colon" and sub-section have different meaning/interpretation.

6. It has further been observed from the grounds of appeal as well as the assessment order that the taxpayer has been enrolled as a retailer under Enrolment No. 05002683 under the Sales Tax Special Procedure Rules but later on was compulsorily registered and STRN 2100999801255 was allotted to the appellant. The appropriate procedure was to cancel the registration of the appellant as retailer first and then it was to be followed by compulsory registration but it appears that the original adjudicating authority has not done so, which has created confusion and has made the order of the adjudicating authority much more vulnerable as far as legal and procedural norms are concerned. Hence while framing re-assessment the adjudicating authority is required to keep in view this aspect of the case, as presently prima-facie the status of the taxpayer/appellant is standing on retailer tax roll under the Special Procedure Rules, 2007 as well as on STRN of compulsory registration. It is also directed that proper procedure regarding compulsory registration be adopted.

As a result, this appeal is disposed of as above.