

[Sindh High Court]

Before Munib Akhtar and Mrs. Ashraf Jahan, JJ

COLLECTOR OF CUSTOMS, SALES TAX AND
CENTRAL EXCISE APPEAL, KARACHI

versus

Messrs NIZAM IMPEX (PVT.) LTD.

Special Sales Tax Reference Applications Nos. 36 and 37 of 2007,
decided on 23rd September, 2013.

Dilharram Shaheen for Appellant.

Abdul Sattar Silat for Respondent.

Date of hearing: 6th September, 2013.

JUDGMENT

MRS. ASHRAF JAHAN, J.---By this single Judgment we intend to dispose of Special Sales Tax Reference Applications Nos. 36 and 37 of 2007 as they both arise out of common facts and involve identical questions of law.

2. These Departmental References have been filed against the order dated 13-9-2006, passed in Sales Tax Appeals Nos. K-111/2000 and K-112/2000, by the Customs Excise and Sales Tax Appellate Tribunal, (hereinafter referred as the "Tribunal" Karachi Bench-I) whereby order in appeal passed by the Collector Appeals-I, Karachi in respect of imposition of sales tax upon the respondent was maintained. However the demand of additional tax was remitted. Thus, the Department has

challenged the impugned order only to the extent of remission of the additional tax.

3. Following questions of law as per case of the appellant have arisen out of the order of the Tribunal:-

"(1) Whether learned Tribunal has justified to pass an order and judgment and remit the statutory obligation as required under section 34 of Sales Tax Act, 1990 without giving the specific reason?

(2) When charges against the contravention of provisions of section mentioned in the show-cause notice are established, and there is no illegality or infirmity in claim raised, the re-mission of Additional Tax by the learned Tribunal is justified or not?"

4. The facts of the case in brief are that the respondent was served with two show-cause notices dated 5-4-1999 and 19-8-1999. It had been alleged in the show-cause notice dated 5-4-1999 that during the course of investigation for determining the Sales Tax liabilities' in respect of M/s Nizam Impex, it was observed that they were engaged in the business of Imports and had not applied for Sales Tax registration, as the exemption from Sales Tax on local supply made by the Importers was withdrawn with effect from 13-6-1997 by the Finance Act, 1997. They were, therefore, asked to furnish the monthly details of supplies made with effect from 13-6-1997. Upon scrutiny it was revealed that they had a total stock of 87,98,071. As per their declaration, they had 'NIL' closing stock on 30-6-1998 when in fact a Stock of 87,98,071 was sold by them and the same was taxable and their liability after addition of net expenses of Rs.30,98,631 (as per profit and loss account) came to Rs.1,18,96,702 and therefore, an amount of Sales Tax of Rs.14,87,087 along with additional tax of Rs.8,19,873 was demanded from them under sections 11 and 36 read with section 34 of Sales Tax Act, 1990.

5. As per the other show-cause notice dated 19-8-1999 it has been alleged that during the course of investigation of Import data in respect of Messrs Nizam Impex it was revealed that another firm with the name of Nizam Impex (Pvt.) Limited also existed and was engaged in commercial Imports of Welding Electrodes and M.S. Welding Electrodes without having registered with the Sales Tax Department. Upon scrutiny of monthly details of supplies made by the Nizam Impex with effect from 13-6-1997 to June 1998 it was observed that they had sold the items on plain cash memos without mentioning any particulars as provided under section 23 of the Sales Tax Act, 1990. Thus, they had violated the provisions of sections 3, 6, 14, 15, 22, 23 and 26 of the Sales Tax Act, 1990 punishable under section 33 read with sections 34 and 36 of Sales Tax Act, 1990.

6. The respondent Messrs Nizam Impex (Pvt.) Limited in replies to the above show-cause notices had denied the charges and had taken the plea that they had paid the sales tax at the import stage but did not get themselves registered for sales tax as there was no wide publicity and a lot of confusion prevailed in the market among the traders in this regard. The respondent contended that the calculations made in the aforementioned show-cause notices were not based on the value of supply and they had suffered great loss due to competition. The adjudication officer did not accept the plea of Messrs Nizam Impex and passed Orders-in-Originals Nos. 161 and 162/1999 dated 20-12-1999 ordering payment of principal amount of Sales Tax along with additional tax. The order was challenged by the present respondent before the Collector Appeal-I Karachi, who was pleased to dismiss the appeal vide order dated 17-5-2000. Thereafter the respondent being aggrieved preferred appeal before the Customs, Excise and Sales Tax Appellate Tribunal, Karachi, who passed the order dated 13-9-2006 (impugned before this Court), upholding the order regarding payment of Sales Tax, whereas imposition of additional tax was remitted on the ground that the department had not been able to show that the default was wilful and that too, to defraud the Government.

7. We have heard the learned counsel for the parties and have perused the record.

8. The learned counsel for appellant has reiterated the grounds already stated in the present reference. Conversely it is argued by the learned counsel for the respondent that there is plenty of law available on the point that in the absence of any allegation in respect of the deliberate or wilful default, imposition of additional tax is not justified. In support of his contentions he has relied upon the case of D.G. Khan Cement Company Limited and others v. Federation of Pakistan and others, (2004 SCMR 456).

9. It is well settled law that provisions of Section 34 are attracted when there is a deliberate failure to pay the sales tax. In the present reference the perusal of the show-cause notices, order-in-original and order in appeal reveal that there was no allegation against the present respondent in respect of deliberate or wilful default, or to defraud the Government. We are, in agreement with the learned counsel for respondent that ample law is available on the point that imposition of penalty was illegal where the evasion of duty was not wilful as held by the Hon'ble Supreme Court of Pakistan in the case of D.G. Khan and others. Further reliance is placed upon the case of Messrs Lone China (Pvt.) Ltd. v. Additional Secretary, Government of Pakistan decided by the Hon'ble Lahore High Court, reported as PTCL 1995 CL 415 wherein it has been held that if the party did not act mala fide with intention to

evade the tax, the imposition of penalty of additional tax and surcharge was not justified. In another case Additional Collector Sales Tax Collect-orate of Sales Tax Multan v. Messrs Nestle Milk Pak Ltd., Kabirwala and another, 2005 PTD 1850, it has been held that in such circumstances the Tribunal has discretion to waive/remit additional tax and penalties.

10. Thus in the light of case-law discussed above it is clear that imposition of penalty or additional tax under section 34 is not mandatory and the authorities have discretion to allow such concession. The important issue which needs to be examined is as to whether the evasion or nonpayment of tax by the respondent was wilful or mala fide.

11. As mentioned earlier, no where it is case of department that the respondent had mala fide intention, or that default was wilful and that too to defraud the government. In such circumstances when the imposition of sales tax has been made, the demand of additional tax appears to be harsh and unjustified.

12. As a sequel of above discussion, we are of the considered view that the Tribunal has rightly held that the Department has failed to show that the default was wilful or to defraud the Government, therefore, has justifiably remitted the payment of additional tax.

13. Consequently, it is held that the order of the Tribunal needs no interference. Both the questions of law arising out of the impugned order are answered against the Department and in favour of the respondent with the result that these references stand dismissed.

14. Above are the reasons for the short order dated 6-9-2013.
