

[IN THE PESHAWAR HIGH COURT, PESHAWAR]
LOCOMOTIVE FACTORY PAKISTAN, RAILWAYS
through Managing Director
Versus
APPELLATE TRIBUNAL CUSTOMS, EXCISE AND SALES
TAX, PESHAWAR and 2 others
Present Khalid Mehmood and Shah Jehan Khan Akhundzada
Sales Tax References Nos.23 to 25 and 70 of 2009,
decided on 15-1-2013.

Faisal Khan, for the Appellant.

Abdul Lateef Yousafzai, for the Respondents.

Date of hearing: 15-1-2013.

J U D G M E N T

[**The Judgment of the Court was delivered by Khalid Mehmood, J.**] - Tax References Nos.23 to 25 of 2009 have been filed by the Pakistan Locomotive Factory Risalpur Nowshera against the Respondents/Department of Customs, Excise and Sales Tax, whereas the Respondents/Department preferred Tax Reference No.70 of 2009 against the Pakistan Locomotive Factory Risalpur Nowshera, challenging the impugned judgment dated 11-5-2009 of the Customs, Federal Excise and Sales Tax Appellate Tribunal, Peshawar Bench in all the cases.

2. Through this consolidated judgment we propose to dispose of Tax References Nos.23 to 25 and 70 of 2009 as common questions of law and facts are involved in all the cases.

3. The legal questions raised in Reference No. 25 of 2009 are as under:--

- (1) Whether on facts and in the circumstances of the case, the learned Tribunal was right in law to disallow concession of exemption to the appellants from payment of Sales Tax on locomotives rolled out during the period in between 2-2-1993 to 1-12-1998 in term of Notification S.R.O. 580(I)/91 read with S.R.O. 561(I)/94 dated, 9-6-1994, inspite of the fact that appellant unit known as Pakistan Locomotive Factory Risalpur were set-up in January, 1993 i.e. with the stipulated period of 1st July 1991 to 30th June, 1996.
- (2) Whether on facts and in the circumstances of the case, the Tribunal was right to hold that fifteen days' prior notice was mandatory, embodied in the explanation at the foot note of the Notification.
- (3) Whether on facts and in the circumstances of the case, the Tribunal was right in refusing to accept the application bearing No. PR-LF/86/CD&ST/20 pt, dated, 18-12-1993 addressed by the appellant to the Assistant Collector Sales Tax and Federal Excise, Peshawar for the grant of Central Excise License, mentioning therein the date of set-up, as an intimation mentioned in the explanation and whether the same was not enough to fulfill the requirements of prior intimation for availing the exemption under the said notification.
- (4) Whether on facts and in the circumstances of the case, the Tribunal did not commit error to hold that for availing exemption from payment of Sales Tax under the said notification the unit must be a registered person under the Sales Tax Act, however, no such fact is mentioned in the notification.
- (5) Whether on facts and in the circumstances of the case, the Tribunal was right to hold that since the unit availed concession of special exemption Notification S.R.O. No.598(I)/90, dated, 7-6-1990 in respect of three locomotives rolled out on 2-12-1993, 30-3-1994 and 9-5-1994 and since then the said S.R.O. was rescinded vide

Notification S.R.O. No.553(I)/94, dated, 9-6-1994 the unit was not entitled to avail the concession under general S.R.O. No. 580(I)/91, dated, 27-6-1991 as amended vide S.R.O. 561(I)/94, dated, 9-6-1994.

- (6) Whether on facts and in the circumstances of the case, the Tribunal did not err in law to demand Sales Tax from the appellants on the Locomotives rolled out before 1-6-1999 because it was on the said date unit was compulsorily registered under section 19 of the Sales Tax Act and as laid down in charging section 3 of the Sales Tax Act read with 6(4) of the Sales Tax Rules, 2006 it is/was a registered person including compulsory registered person who was to pay sales tax on taxable supply.
- (7) Whether on facts and in the circumstances of the case, the Tribunal did not err in law to hold, while interpreting the Notification S.R.O. 580(I)/91, dated 27-6-1991, that fifteen days prior notice was a condition for availing the exemption from payments of Sales Tax, whereas, the condition given in the body of the notification are those units which set-up in N.-W.F.P. and secondly it should be set up within the stipulated period of 1st July, 1991 to 30th June, 1996 which conditions were fulfilled by the appellants. Fifteen days notice embodied in the explanation at the foot of the notification was not a condition as the same was not a part of the main body of the notification.
- (8) Whether on facts and in the circumstances of the case, when it was established beyond any shadow of doubt that the unit in question is a government owned enterprise and none of the members of management had only financial interest to evade payment of Sales Tax, the tribunal was right to hold that non-payment of Sales Tax was intentional and the appellants were thus not entitled to the waiver of the default surcharge and the penalty thereof.
- (9) Whether on facts and in the circumstances of the case, the tribunal was justified to disallow input tax adjustment under section 7 of the Sales Tax Act, 1990 after it has been conceded that the appellant unit known as Pakistan Locomotive Factory Risalpur is the Federal Government

establishment under the Ministry of Railway and all taxes on import of components as also on finished locomotives rolled out from the factory and/are paid by Pakistan Railways through book adjustment or out of fund allocated to Pakistan Railways for this purpose.

4. In Tax Reference No.70 of 2009 the Customs, Excise and Sales Tax Department has formulated the following questions for determination of this Court:--

- (a) Whether the Appellate Tribunal has the powers to reopen the matter as a whole when the appeal was filed by respondent under section 46 of the Sales Tax Act, 1990?
- (b) Whether the proceedings before the Appellate Tribunal under section 46 of the Sales Tax Act, 1990 are considered in continuation of original proceedings when the adjudicating authority has already passed Order-in-Original No.1/2005 dated 14-12-2004 at original stage?
- (c) Whether the learned Appellate Tribunal, has considered the statements of the respondents showing that 10 CUB's (AGE-30)(600) were received at Karachi?

5. After hearing the arguments from both the sides we have come to the following conclusion.

6. Though both the learned counsel for the parties had elaborately argued the legal as well as factual aspects of the case on the points raised in the respective References for adjudication by this Court, while perusing the record of the case it transpired that in Reference No.25 of 2009 the impugned Show-Cause Notice No.C.No.ST(ADJ)C/3/2003/131 dated 9-4-2003 was issued by Muhammad Hamayun Khan Sikandri and appeal against the said show cause notice was heard by the same Customs Officer namely Muhammad Hamayun Khan Sikandri. The appeal was decided on 11-5-2009 in the said order-in-original. Appeal was filed before the learned Appellate Tribunal Customs, Excise and Sales Tax Peshawar Bench. The said Tribunal comprised of two Members, one Member (Judicial) namely Muhammad Ibrahim Khan and the other Member (Technical) namely Muhammad Hamayun Khan Sikandri. The impugned judgment was authored by Muhammad Hamayun Khan Sikandri Member (Technical) in the capacity of Member Tribunal as Member (Technical). All the judgments in the connected References are also authored by the said Member (Technical) namely Muhammad Hamayun Khan Sikandri, who

had issued show cause notice and also passed the order-in-original against the petitioner. As Muhammad Hamayun Khan was instrumental for issuing the show cause notice to save the interest of the respondents being its employee, rather appeal against the said show cause notice was also heard and decided by him. The interest of the respondents is directly involved in the present case and the beneficiary of the impugned judgment is the respondents/department, Muhammad Hamayun Khan Sikandri happened to be the employee of the respondents/department is certainly obliged to save the interest of the department. Being Member (Technical) he had issued show cause notice and decided the appeal against the petitioner, how he can sit as a Member of the Tribunal before whom the same issue in the shape of appeal, which was filed for decision afresh. It is settled law that no one can sit as a Judge to save and decide the matter, in which his interest is directly involved. In the present case not only the interest of the author of the impugned judgment is involved, rather the decision rendered by him the impugned order-in-original was challenged before the Appellate Tribunal, in which, the same Officer Muhammad Hamayun Khan Sikandri was Member (Technical) of the lower Appellate Tribunal. No one can be a Judge for his own cause and no one can decide an appeal against the order, which he himself has passed. In all the cannon of law, ethics, the demand of justice and equity, the impugned judgment is not sustainable. Without touching the merits of the case and replying to the References to decide the legal point raised in the References will be a futile exercise, as the very judgment rendered by the learned Appellate Tribunal is nullity in the eye of law.

Hence while allowing all the References, the impugned judgment is set aside and the cases are remanded back to the Appellate Tribunal to decide the same afresh according to law, but the Tribunal should comprise of the Members, excluding the said Muhammad Hamayun Khan Sikandri Member (Technical).