APPELLATE TRIBUNAL INLAND REVENUE LAHORE BENCH LAHORE

S.T.A. NO.461/LB/13

M/S. Mughal Engineering Works
(Private) Limited, Lahore. ... Appellant

Versus

The CIR. Zone-VIII, RTO-01, Lahore. ... Respondent

Appellant by: - Mr. Qamar Rashid, FCA

Respondent by: - Mr. Sajjad Tasleem, D.R.

Date of Hearing:-14-02-2014 Date of Order:-14-02-2014

ORDER

Titled appeal has been preferred at the instance of tax payer calling in question the impugned orders of learned Deputy Commissioner Inland Revenue, Audit-02, Zone-VIII, RTO-2 Lahore, Lahore dated 31-05-2012 and learned CIR (A), Zone-II Lahore dated 18-03-2013. The appellant contested the orders on following grounds;

That the order-in-original and Appeal order-in-Appeal are illegal, bad in law and against the express provisions of law.

2. *That the Learned Commissioner Inland Revenue (Appeals-II) Lahore is unjustified and bad in law in dismissing the appeal filed by the taxpayer;*
3. *That the Learned Commissioner Inland Revenue (Appeals-II) Lahore is unjustified and bad in law in rejecting the appeal filed by the taxpayer on the ground that it was not filed within the prescribed time. The impugned order-in-original was not served upon the appellant as per section 56 of the Sales Tax Act, 1990. On receipt of recovery notices, the taxpayer applied for duplicate copy of the order-in-original and became*

aware of this order. This reason for late filing of appeal was mentioned by the taxpayer in application for condonation of time limit which was filed with appeal before the learned Commissioner Appeals. The Learned Commissioner Appeals rejected the appeal without mentioning the reasons as to why he is not satisfied that the appellant has sufficient cause for not preferring the appeal within the specified period and illegally rejected the appeal;

4. *That the impugned order-in-original is against the law and facts of the case and the decision under challenge proceeds on wrongful assumptions to the material facts of the case;*
5. *That the department has neither demanded the record for audit nor conducted any audit of the appellant and issued show cause notice on the basis of contravention report made by the Directorate of Intelligence and investigation-FBR and decided the matter on presumption basis which is totally illegal and unlawful and liable to be set-aside;*
6. *That the impugned order-in-original is against the maxim of audi alteram partem, which enshrines that no one should be condemned unheard. The DCIR passed the impugned order-in-original without giving proper opportunity of hearing the appellant and passed the impugned order-in-original in slip shod manner. Hence the same is liable to be declared as illegal and unlawful;*
7. *That the impugned show cause notice dated 07-02-2012 as well as assessment order-in-original have been issued illegally by the DCIR because he is not legally powered to adjudicate the case filing under section 11 & 36 of the Sales Tax Act 1990 beyond the pecuniary limit of one million rupees as specified under SRO 555(I)/96 which is still in field as the amount of tax involved in the instant case is Rs. 3,483,101. It is pertinent to mention here that*

every authority working under the hierarchy of the Sales Tax Department has been given power to perform his duty and to exercise jurisdiction within the parameters as specifically provided under the law. Hence any transgression to the above limit would render the entire exercise of authority illegal and void-ab-initio.

8. That the act of DCIR which is otherwise than in accordance with law, has taken away the right of appellant for condonation of any lawful trade or business guaranteed under Article 18 of the constitution of Islamic Republic of Pakistan;
9. That the allegation regarding the appellant has not provided the documents relating to compliance of section 73 of the Sales Tax Act, 1990, it is respectfully submitted that all the invoices under question are under 50,000 and did not require payment through banking channel;
10. That the onus to prove the genuineness of purchase is on the appellant which is crystal clear from the invoices, purchase and supply registers along-with other documents. Furthermore all precautionary measures of normal business regime has been adopted at the time of purchase, hence after elapsing more than 3 years the appellant cannot be penalized for the wrong doing of others if any. So the allegation leveled is not sustainable in the eye of law and is liable to be vacated;
11. That the impugned order-in-original has not been served upon the appellant as per section 56 of the Sales Tax Act, 1990 which is mandatory requirement of law which clearly shows the malafide intention of the DCIR. Hence the impugned order-in-original have no value in the eye of law and liable to be set-aside;

12. *That it is well settled principle of law that the executive orders or notifications, which confer rights and are beneficial, would be given retrospective effect and those which adversely effect or invade upon vested right cannot be applied with retrospective effect;*

13. *That the so called investigation/ audit conducted by the Deputy Director Intelligence & Investigation FBR was without any legal authority, jurisdiction and was, therefore illegal, void-ab-initio and no legal effect hence the super structure built on the basis of illegal footing have no value in the eye of law and liable to be set-aside;*

14. *That it is well settled law of apex court that when a thing is required to be done in a particular manner it must be done in that manner and not otherwise hence the action of DCIR runs contrary to the dictum laid down in the long line judgement of the Apex Courts;*

15. *That the DCIR illegally and unlawfully without having lawful authority have cause illegal harassment to the appellant and the assessment order-in-original has been passed merely on presumption and no inquiry/ audit whatsoever has ever been initiated;*

16. *That the DCIR while passing the impugned order-in-original has not applied his judicious mind and passed the impugned order-in-original in utter violation of Article 24-A of the General Clauses Act, 1897;*

17. *That the appellant has not contravene any provision of Sales Tax Act, 1990 hence the penalty and additional tax imposed by the DCIR is totally illegal and unlawful and liable to be set-aside;*

The facts of the case as argued by the learned council of appellant are that the tax payer is a Private Limited company involved in manufacturing of auto parts for motor cycles,

rickshaws and related items. The case of appellant was selected for audit for the period started from July 2006 to February 2011. The said selection was based on information received from the Directorate of Intelligence and Investigation, FBR, Lahore. During the audit proceedings, the appellant provided all the related documents and records to the audit team. After the completion of audit, a show cause notice dated 07-02-2012 was served on the appellant. This show cause notice was mainly based more on information received from the Directorate of Intelligence and Investigation, FBR, Lahore. The appellant filed a detailed reply dated 18-05-2012 along-with supporting documents. The Deputy Commissioner Inland Revenue failed to communicate to the appellant the objections raised in respect of his reply and, by ignoring the certain facts of the case, passed his order dated 31-05-2012, creating a demand of sales tax of Rs. 2,446,208/-. Being aggrieved, the appellant filed appeal before learned Commissioner Inland Revenue Appeals-II, Lahore, who disposed off the said appeal vide his order dated 18-03-2013. This resulted in present appeal by the appellant against the impugned order of learned Commissioner Inland Revenue Appeals-II, Lahore.

3. The first ground contested by the learned AR was that the Learned Commissioner Inland Revenue (Appeals-II) Lahore was unjustified in rejecting the appeal filed by the taxpayer on the ground that it was not filed within the prescribed time. He stated that the impugned order-in-original was not served upon the appellant as required by section 56 of the Sales Tax Act, 1990. On receipt of recovery notices, the taxpayer applied for duplicate copy of the order-in-original and became aware of this order. This reason for late filing of appeal was mentioned by the taxpayer in application for condonation of time limit alongwith affidavit by the chief

executive of the company, which was filed with appeal before the learned Commissioner Appeals. The Learned Commissioner Appeals rejected the appeal without mentioning the reasons as to why he is not satisfied that the appellant has sufficient cause for not preferring the appeal within the specified period as required by first proviso of section 45 (B)1 and illegally rejected the appeal;

4. The other litigious issue raised by the AR was that taxation officer acted against the law and decisions of higher courts by passing order without giving reasonable opportunity of being heard to the tax payer as required by law. He submitted that a fundamental requirement of personal hearing to appellant which must be undertaken to give opportunity of being heard to tax payer, was totally ignored by the taxation officer. The AR of appellant referred judgment of honorable Karachi High Court cited as (1999) 79 TAX 605 (H.C. Karachi) and 2004 PTD (Trib) 2432 in support of his contention.

5. The learned AR of the appellant vehemently argued before us that the authorities below have misconceived the circumstances of the case and failed to apply the law in its true spirit with proper application of their own judicial mind. It was submitted by the AR that the learned Deputy Commissioner Inland Revenue is unjustified in framing the impugned order which was mainly based on information received from the Directorate of Intelligence and Investigation, FBR, Lahore without considering the detailed record filed during the assessment proceedings. He submitted that investigative jurisdiction over the sales tax cases exercised by Directorate of Intelligence and Investigation, FBR, Lahore was declared null and void vide judgment No. STA No. 55/LB/2012 dated 06-04-2012 and STA No. 430/LB/2012 Dated 23-05-2012 of this tribunal and any order passed on the basis of said illegal

information is also void ab-initio. The AR also asserted that the assessing officer failed to establish that the appellant had knowingly, dishonestly, or fraudulently claimed input tax adjustment. It was also further submitted by the AR that the appellant had complied with all the legal requirements at the time of claiming input tax and assessing officer disregarded all the facts of the case and proceeded in an illegal way.

6. The second limb of arguments pressed by the learned AR was that the learned Deputy Commissioner Inland Revenue has acted beyond his pecuniary powers as laid down in S.R.O.555(1)/96 dated 01-07-1996 as superseded by SRO 1318(I)/98 dated 28-11-1998. Reliance was placed on judgments cited as 2006 PTD 219, 2011 PTD (Trib.) 1943 and S.T.A. 530/LB/2011. Another legal argument submitted by the AR was that the appellant procured the raw material after keeping intact all the required documentation as laid down in sales tax law. He stated that the appellant also verified the status of suppliers as detailed in the impugned order on online web portal of FBR which did not show them as blacklisted on respective dates of purchases from these registered persons. These suppliers were active on respective dates of purchases and have also declared sales and output tax in their Annex-C against the name of appellant. The AR emphasized that assessing officer disregarded all these facts of the case and proceeded in an illegal way while framing the impugned assessment. Reference was also made to judgments of superior courts cited as STAT0518, 2007PTD2456, VOL11NO8TF45.

7. Apart from aforesaid legal arguments, the AR also pleaded the case on factual plane and submitted that the assessing officer acted unlawfully and against the provision of section 73 because majority of payments as

detailed in impugned order were against invoices below Rs. 50,000/- against which appellant was not required to pay vide banking channel u/s 73 of the sales tax act 1990. He illegally ignored aforesaid factual position and assumed that invoices exceeding Rs. 50,000/- each were related to a single date and were broken down to create invoices below the amount of Rs. 50,000/-. The plea taken by the assessing officer in impugned order is based on supposition, surmises and guesswork and is not supported by any documentary evidence and legal provision.

8. The learned DR pleaded for maintaining the impugned orders for the reasons recorded therein.

9. We have considered the rival arguments of the learned AR as well as of the Revenue. After due consideration, we feel persuaded with the arguments put forth by the learned AR of the appellant as supported by statutory provisions and the case laws cited. The Learned Commissioner Appeals rejected the appeal without mentioning the reasons as to why he is not satisfied that the appellant has sufficient cause for not preferring the appeal within the specified period as required by first proviso of section 45 (B)1. The first appellate authority totally ignored this important provision of law that the order refusing condonation of late filing of appeal must be a speaking order with detailed discussion of circumstances and facts of the case with reasons of delay and rejection of appeal must be on the basis of valid reasons of dissatisfaction by the appellate authority. Therefore, the rejection of appeal by the first appellate authority is not in accordance with relevant provision of law.

10. Now we come to other ground pressed by the learned AR. We have observed in this case that the impugned

assessment order has been passed without considering the circumstances of the case and without following the true spirit of law, natural justice and the ratio settled through various judgments. It is settled principle of law that no one can be condemned unheard. The department failed to confront the appellant with the objections raised against reply to show cause notice and proceeded to finalize the impugned assessment order in an injudicious manner and such treatment can never be upheld. The principles of maxim *audi alteram partem* should be followed in every statute and any variation there from has been deemed to be in violation of the principles of natural justice as held in the judgment reported as 2004 PTD (Trib) 2432 and (1999) 79 TAX 605 (H.C. Karachi). It is also imperative to discuss the judgment of honorable Karachi High Court cited as (1999) 79 TAX 605 (H.C. Karachi) in which detailed guidance was provided by the court of the issue of "opportunity of being heard.

> *".....the law required that no order affecting the rights of a person shall be passed without providing him on opportunity of being heard. The word "hear" according to the Chambers Dictionary (1994 Edition) means "to perceive by the ear, to have exercise the sense of hearing, to listen, or be spoken of". The past participle "hears" means "action of perceiving sound" and the noun "hearing" means "power or act of perceiving sound; an opportunity to the heard; judicial investigation and listening to evidence and arguments". The Standard International Dictionary (1973 Edition), Part 1, defines "hear" to mean "to listen, to perceive by means of the ear, to listen to officially, judicially". The phrase "opportunity of being heard" would, therefore, mean that the party concerned should be*

allowed to present his point of view, explanations, clarification and arguments by spoken words which should be heard by the officer passing the order. Any explanation given in writing which is perceived by the sense seated in the eye has generally not been considered sufficient. Experience has shown that many doubts, complaints and misunderstandings between parties are cleared, resolved and remove when they meet face to face and communicate by word of mouth. Appearance in person and explanation by word of mouth, therefore, is placed on a higher footing both in daily life and in judicial and administrative proceedings, where rights of parties are involved. Therefore, it is not the written explanation or the answer submitted to the show-cause notice but the expression of spoken words of the person concerned which have been emphasized by the legislature in the relevant provisions relating to order which would adversely affect the rights of a party should hear that person's explanation, clarification and arguments in his defense submitted by him personally or through his counsel or his duly authorized agent. If such a hearing is not given to the person concerned, the order would be in violation of not only the principles of natural justice but also of the statutory requirement and consequently would be invalid".

The apex court has laid down following strict requirement which must be satisfied before passing order which would adversely affect the rights of a party;

1- Issuance of show cause notice specifying the adverse inferences drawn and consequential effects by the assessing officer.
2- Submission of the written explanation or the answer to the show-cause notice by the tax payer.
3- Appearance in person and explanation by word of mouth in a face to face meeting with tax payer or through his counsel or his duly authorized agent to discuss and present his point of view, explanations, clarification and arguments by spoken words to resolve doubts, complaints and misunderstandings between parties.

In the instant case last fundamental step which must be undertaken to give final opportunity of being heard to tax payer was totally ignored by the taxation officer. Keeping in view the facts of the case and guidance of apex court on matter under consideration we are of considered view that taxation officer did not provided opportunity of being heard to the tax payer and acted against the law and decisions of superior courts.

11. We also find ourselves in agreement with the learned AR that the Deputy Commissioner Inland Revenue has acted beyond his pecuniary jurisdiction as laid down in S.R.O.555(1)/96 dated 01-07-1996 as superseded by SRO 1318(I)/98 dated 28-11-1998. It has also been pointed out by the learned AR that section 72A of the Sales Tax Act, 1990 states that any reference to Deputy Collector shall be construed as reference to Deputy Commissioner Inland Revenue. It has been asserted from S.R.O.555(1)/96 dated 01-07-1996 as superseded by SRO 1318(I)/98 dated 28-11-1998 that the Deputy Commissioner Inland Revenue has the power to adjudicate the cases involving assessment of Sales Tax, charging of additional tax, imposition of penalty and recovery of amount erroneously refunded which does not exceed Rs.

1,000,000/- , whereas , in the instant case the Deputy Commissioner Inland Revenue has adjudicated the case involving Sales Tax for Rs. 3,483,101- with penalties, which is a clear violation of his pecuniary powers. It is a settled principle of law that any proceedings without lawful jurisdiction are illegal and void ab-initio. It is imperative to place reliance on judgments cited as 2006 PTD 219, 2011 PTD (Trib.) 1943 and S.T.A.530/ LB/2011, wherein it has been held that an order without jurisdiction is a fraud on the law and can never be assumed to have been passed under the particular statute.

12) We further agree with the learned AR that the department has also not followed another essential element of natural justice. In the instant case, the assessing officer failed to apply the law in its true spirit through legal process of required investigation by his office in respect of disputed matters after proper application of his own judicial mind. The impugned order primarily relied upon the information received from the directorate of intelligence and investigation, FBR, Lahore. The learned bench of this tribunal has passed a very detailed judgment on the legitimacy of jurisdiction exercised by directorate of intelligence and investigation, FBR in sales tax cases and it was held vide judgment STA No. 55/LB/2012 and STA No. 430/LB/2012 that the investigative audit conducted by the officials of the directorate of General I&I was without law full jurisdiction and in defiance of Board's instructions issued vide letter dated 15-11-2010. It was held that the officials of the directorate of General I&I cannot exercise powers of Inland Revenue Officers unless notification under section 30A of the Sales Tax Act, 1990 is issued appointing such officers. It is further held that acts of omission and commission taken without jurisdiction are illegal and void ab-initio and no action can be taken against the taxpayer in pursuance thereof. Consequently, an order passed on the basis of information received from

authority without legal jurisdiction is a fraud on the law and cannot be assumed to have been passed under particular statute. It vitiates the entire proceedings and cannot be sustained as held in judgments placed before us reported as 2003 CLC 1064 and PLD 1992 SC 531. In addition to above, we also feel persuaded that the assessing officer could not establish that the appellant had knowingly, dishonestly, or fraudulently claimed input tax adjustment from parties detained in impugned notice which is an indispensable element of natural justice to denounce someone jointly in tax fraud under certain statute.

13. As far as the issue of purchases from blacklisted units is concerned, the same has been resolved in a very meticulous manner vide various judgments of this tribunal such as 2010 PTD 1631 (TRIB), 2010 PTD 1675 (TRIB), STAT0518, 2007PTD2456, VOL11NO8TF45. The taxpayer made all the purchases after keeping intact all the required documentation and due verification of suppliers from web portal of FBR as laid down in sales tax law. The web portal of FBR, at the time of said purchases, showed active status of registered persons who issued serially numbered sales tax invoices containing all particulars as defined U/s 23 of the sales tax Act, 1990 to the appellant. Further the suppliers have declared sales and output tax in their Annex-C in appellant's name. In view of the above facts, department could not prove any revenue fraud on part of appellant who proceeded in accordance with law while purchasing items for its unit.

14. Arguments placed by the learned AR on factual plane are also convincing. As far as issue of alleged violation of the provisions of section 73 of the Sales Tax Act, 1990 is concerned the same is again not supported by facts of the case and provisions of section 73. The taxpayer made various

transactions that were below the prescribed limit of Rs. 50,000/- which are nowhere disapproved under the provisions of section 73. There is no prohibition in the said law as regards to multiple transactions on a single day or various days under Rs. 50,000/- and payment thereof on a single day. The assessing officer ignored this legal and factual position and acted on the again on basis of his own assumptions in treating the transactions under consideration as inadmissible under section 73 which is unjust and illegal.

15. For the foregoing reasons, case law and the discussion supra, we are inclined to vacate the order of the learned first appellate authority. The impugned assessment order dated 31-05-2012 which was framed without following the principles of law, natural justice and without lawful jurisdiction is hereby declared illegal, void ab-initio and is hereby annulled.

(JAWAID MASOOD TAHIR BHATTI)
CHAIRMAN

(FIZA MUZAFFAR)
ACCOUNTANT MEMBER