

**APPELLATE TRIBUNAL INLAND REVENUE, LAHORE BENCH,
LAHORE.**

MA(AG) No.67/LB/2013

M/s. Sun Tube Pvt. Ltd., Lahore. ...Applicant

Versus

The CIR, RTO, Lahore. ...Respondent

Applicant by: Mr. Majid Jahangir, Advocate

Respondent by: Dr. Qurratulain, DR

STA No.121/LB/2011

M/s. Sun Tube Pvt. Ltd., Lahore. ...Appellant

Versus

The CIR, RTO, Lahore. ...Respondent

Appellant by: Mr. Majid Jahangir, Advocate

Respondent by: Dr. Qurratulain, DR

Date of Hearing: 04.12.2013

Date of Order: 11.03.2014


ORDER

This order shall dispose of the titled miscellaneous application for taking additional grounds as well as appeal, which have been filed at the instance of the taxpayer.

Miscellaneous Applications (Additional Grounds)

2. Through miscellaneous application, the learned AR of the registered person/applicant seeks permission to take the following grounds for adjudication, which according to him go to the roots of the case. In order to lend credence he has placed on a reported judgment of Apex Court of Pakistan cited as 2006 (S.C) 1599.

- i) The learned Commissioner of Inland Revenue (Appeals)-II has erred in ignoring the illegal assumption of jurisdiction by the officers of the Directorate General (Intelligence and Investigation) Inland Revenue to initiate proceedings against the Appellant.

- ii) The learned Commissioner of Inland Revenue (Appeals)-II has erred in ignoring the failure of the officers of the Directorate General (Intelligence and Investigation) Inland Revenue to follow the law in conducting the audit of the Appellant.
 - iii) The learned Commissioner of Inland Revenue (Appeals)-II has erred by holding that the SCN was validly/legally issued.
 - iv) The learned Commissioner of Inland Revenue (Appeals)-II has erred in ignoring the excessive/illegal assumption of jurisdiction by the learned Deputy Commissioner Inland Revenue, Audit-10, Regional Tax Office, Lahore, to proceed against the Appellant.
-  v) The learned Commissioner of Inland Revenue (Appeals)-II has erred in not following the binding precedents.
- vi) The learned Commissioner of Inland Revenue (Appeals)-II has erred in passing a conflicting order against the Appellant.

3. On the other hand, the learned DR has opposed the learned counsel and prays for rejection of the instant miscellaneous application.


4. Arguments heard and record perused. We find force in the stance taken by learned counsel that the above mentioned grounds due to going to roots of the case need adjudication at our end. Therefore, the same are accepted for adjudication.

STA No.121/LB/2011

5. Through this appeal, the Registered Person has assailed the appellate order dated 22.12.2010 recorded by CIR(Appeals-II), Lahore.

6. The facts in brief leading to the instant appeal are that on the basis of an information received from the Directorate of Intelligence & Investigation, Lahore that the registered person of the case in hand was involved in tax fraud by claiming illegal sales tax input tax of Rs.1,419,581/-. A show cause notice dated 27.05.2010 was issued, against which reply tendered by the registered person was treated unsatisfactory. Resultantly, order

u/s 11(2) and 36(1) of the Sales Tax Act, 1990 was passed directing the registered person to pay principal amount of sales tax of Rs.619,503/- out of Rs.1,419,581/- including default surcharge for jRs.757,795/4 and penalties for Rs.1,533,147/- u/s 33 of the Act. Feeling aggrieved, the registered person preferred appeal before CIR(Appeals-II) Lahore, which was rejected. Still discontented, the registered person has come up in appeal before this Tribunal.

 We have heard the arguments advanced by the representatives of both the parties and also carefully gone through the relevant record available on file. The issues raised as per miscellaneous applications as well as grounds taken as per memo of appeal are disposed of as under:-

JURISDICTION

8. Learned counsel appearing on behalf of the registered person has assailed the impugned ONO on the point of jurisdiction and submits that Directorate of Intelligence and Investigation has traveled beyond its jurisdiction by conducting audit of the registered person/appellant. Explaining his view point, he submits that as per section 30A of the Act, Board has not yet notified in official Gazette the said Directorate, which renders its action as illegal. According to him, as per Section 30A of the Act, the Gazette notification is the condition precedent for the constitution of the Directorate in the light of provisions contained in Section 30A of the Act. Reliance is placed on the following case laws:-

- a) STA No.55/LB/2012 case titled as M/s. Ibrahim Steel Casting vs. CIR(A).
- b) 2013 PTD (Trib.) 1189 and
- c) Writ Petition No.8695 of 2011 titled as Plum Qingqi (Private) Limited vs. Federation of Pakistan, before the Lahore High Court, Lahore.

9. Arguments heard and record perused. We find ourselves in agreement with the assertions made by learned counsel,

which are forceful being supported by the following provisions of section 30A:-

30A. Directorate General, (Intelligence and Investigation) Inland Revenue. – The Directorate General (Intelligence and Investigation) Inland Revenue shall consist of a Director General ... as the Board, may by notification in the official Gazette, appoint ... (emphasis added).

10. The plain reading of the above provision is very much unambiguous and clear. It follows that Directorate of Intelligence and Investigation cannot assume jurisdiction until or unless notified in the official Gazette. The reliance on the case laws by the learned counsel is worth consideration. The ratio settled in these judgments is reproduced hereunder:-

- i) **Ibrahim Steel Casting vs. CIR(A), S.T.A. No. 55/LB/2012**, dated 6 April 2012, wherein on the basis of the authorization of the Board, the Directorate initiated investigative audit against the appellant in November 2011. The appellant contended that in the absence of the Gazette notification under Section 30A of the Act, the assumption of jurisdiction by the Directorate is illegal. The division bench of this honorable Tribunal accepted the appeal as per finding given below:-

... we are of the opinion that unless a notification under section 30A of the Sales Tax Act is issued, the officials of the said Directorate General cannot exercise jurisdiction, powers and function of a notification issued under section 30E

- ii) **Malik Enterprises vs. CIR(A)-III, 2013 PTD (Trib.) 1189**, the taxpayer was proceeded against on receiving sales tax refund allegedly on the basis of the fake invoices. The division bench of this honorable Tribunal accepted the appeal in terms of the following:

... the nut shell of above discussion is that the investigation audit conducted by the officials of the Directorate General Intelligence and Investigation was without jurisdiction, in defiance of Board's instructions issued vide

letter dated 15-11-2010; the officials of the Directorate General Intelligence and Investigation cannot exercise powers of Inland Revenue Officers unless notification under section 30A of the Sales Tax Act, 1990 is issued appointing such officers (p. 1218)

11. In view of the above discussion, we are also of the considered opinion that Gazette Notification is the mandatory requirement of law, which has not been fulfilled before proceeding in the case in hand. Furthermore, the issue under consideration already stands resolved at the level of Honourable High Court as well as by this Tribunal in favour of the registered person as per above referred judgments of this Tribunal.

AUDIT

12. While challenging the audit conducted in the case in hand, the learned counsel has vehemently argued that under Customs Act, 1969, Section 3, 3D and 3E are pari materia with Sections 30, 30D and 30E. The Board issued Gazette notification Nos. 494(I)/2007 and 495(I)/2007 both dated 9 June 2007. SRO 494(I)/2007 dated 9 June 2007 first created DG Valuation under Section 3D and SRO 495(I)/2007 dated 9 June 2007 vested powers in the appointed officers under Section 3E.

13. Learned counsel submits that Section 38 enables an officer authorized in this behalf by the Board to inspect the records, data, documents, correspondence related to the business and to take into his custody such records as are required to be maintained under any law:

38. Authorized officers to have access to premises, stocks, accounts and records. - (1) Any officer authorized in this behalf by the Board ... shall have free access to business or manufacturing premises ... and such officer may, at any time, inspect ... records, data ... information ... regarding nature and sources of funds or assets with which the business is financed, and any other records or documents, including those which are required under any of the Federal, provincial or local laws maintained in any form or mode and may take into his custody such records

--- Hence, there is no provision for conducting an audit of a taxpayer is made in the above Section. The authority to conduct an audit by an authorized officer is provided under Section 25(3) of the Act, read with General Order No. 3 of 2004.

14. He asserts that condition precedent for conducting an audit under Section 38, read with Section 25 of the Act, is that the person conducting the audit is specifically authorized in that behalf. The approval of the Board dated 2 December 2009 was never confronted to the Appellant to ascertain the parameters of the authorization of the officers conducting the investigative audit. As per paragraph No. 42(b) of the Sales Tax General Order No. 3 of 2004 dated 12 June 2004, the person whose audit is to be conducted should be informed about the audit and the details of the records to be audited at least fifteen (15) days before the scheduled date of audit:

42(b) The registered person should be informed about the audit and details of record to be audited at least 15 days before the scheduled date of audit

--- He asserts that no prescribed notice was issued to the Appellant. Since the officers of the Directorate have asserted a fact that it has the requisite authorization in this behalf, as per Article 117 of the Qanun-i-Shahadat order, 1984, therefore, the officers of the Directorate are under burden to prove the fact. In order to lend support to his stance, he has placed reliance on a reported judgment of Honourable Sindh High Court cited as PTCL 2009 CL 671.

15. On the other hand, the learned DR appearing on behalf of the department has fully supported the orders passed by both Authorities below simply by terming the audit conducted in the case in hand to be legally justified.

16. The assertions made at bar have been carefully scrutinized in the light of provisions contained in section 38 of the Act, 42(b) of STGO and 117 of the Qanun-i-Shahadat order, and found forceful being self-explanatory. We are also of the considered

opinion that audit conducted in the case in hand is not on legal footing in the light of ratio settled in the case law of M/s. A.M.Z. Spinning & Weaving Mills (Private) Limited vs. FOP, PTCL 2009 CL 671 (Karachi High Court) where the business premises of the appellant was raided and certain record was impounded by the respondent under Section 38 of the Act. The Honorable Karachi High Court held the proceedings as illegal by observing that:

"Before embarking on section 38 visit to any premises the department must have reasonable cause to believe that such a visit is warranted. This has to be more than a mere hunch or suspicion and must also be recorded in writing. Since the purpose of a section 38 visit is to see that proper records under the Act, Rules, and Regulations are maintained, reasonable cause for a visit could, for, example, arise in a situation where a registered person has filed documents, in the normal course which indicate that a particular record is not being maintained or that it is not being maintained in the required manner. The basis for the visit need not be shared with the person whose premises are to be visited but must be on the department's files for production in proceedings that must be instituted by the said person. The officer designated to conduct the visit must be authorized in that regard by the Board or the Collector and must produce a copy of the authorization before commencing the inspection. The visit must be confined to inspecting the record and documents that are in plain sight or those that are voluntarily made available for inspection by the person(s) present at the premises on request. Consequently, custody within the meaning of section 38 can only be taken of such record and documents that are in plain sight or those that have voluntarily been made available for inspection on request. The record and documents taken into custody must be against a receipt signed by the officer. The officer has not power under section 8 to compel the production of any record or document that is not in plain sight or that has not been voluntarily made available as above. Any record or document taken into custody under compulsion cannot be used for any purpose whatsoever by the department against the person from whose custody the record or document has been taken by an officer into his possession."

IDITY OF SHOW CAUSE NOTICE.

17. While challenging the validity of show cause notice, learned counsel has vehemently argued that the same is defective as it does not specify the sub-Section of Section 36 of

the Act. As per learned counsel different time limits are prescribed under sub-Section 36(1) and 36(2), therefore, mentioning of sub-section is mandatory. The said section reads as under:-:

36. Recovery of tax not levied or short-levied or erroneously refunded.--

(1) Where by reason of some collusion or a deliberate act any tax or charge has not been levied or made or has been short-levied or has been erroneously refunded, the person liable to pay any amount of tax or charge or the amount of refund erroneously made shall be served with a notice, within five years of the relevant date, requiring him to show cause for payment of the amount specified in the notice.

(2) Where, by reason of any inadvertence, error or misconstruction, any tax or charge has not been levied or made or has been short-levied or has been erroneously refunded, the person liable to pay the amount of tax or charge or the amount of refund erroneously made shall be served with a notice within three years of the relevant date, requiring him to show cause for payment of the amount specified in the notice ...

--- He explains that if the show cause notice was issued under Section 36(1), then burden was on the Revenue to establish "collusion" or "deliberate act" on part of the Appellant. However, the Deputy Commissioner never even used the expression "collusion" or "deliberate act" in SCN lest to support it with reasons or evidence. According to him, the investigative audit was conducted for the period July 2005 to November 2009. If SCN issued was under 36(2), investigative audit could not have been conducted beyond May 2007 in view of the limitation of three (3) years. Additionally, no evidence/documents/information/record identified in SCN by the Deputy Commissioner leading the Revenue to conclusion that the refund is illegally claimed. In order to lend credence to his submissions, reliance has placed on a case law of Assistant Collector vs. Khyber Electronics, 2001 SCMR 838 (Supreme Court), wherein the respondent was manufacturer of electric bulbs. The Government allowed reduced rates of customs duty on raw material vide certain SRO. Subsequently, the department issued

show cause notice to the respondent under Section 32 of the Customs Act, 1969 (parallel to Section 36 of the Act) to pay customs duty at the enhanced rate. The show cause notice, however, did not mention whether it was issued under Section 32(1) (where collusion or deliberate act is made basis) or 32(2) (where inadvertence is made basis). The full bench of the honorable Supreme Court held that the show cause notice was illegal and void.

18. On the contrary, the learned DR has termed the show cause notice as valid simply by defending the orders passed by both authorities below.


19. After hearing the arguments from both sides, it has been gathered by us that allegations of collusion and deliberate act should be specific and particularized and must contain allegation of collusion and deliberate act otherwise SCN is void and illegal. Reliance is placed on case law of M/s. Caltex Oil (Pakistan) Limited vs. Collector, 2006 SCMR 1519 (Caltex), the petitioner was engaged in sale of petroleum products. The sales tax on the petroleum products was exempt which exemption was subsequently withdrawn. The petitioner, however, continued to sell petroleum products without levy of sales tax. The Revenue served the petitioner with the show cause notice. The petitioner contended that the grounds and reasons for the action proposed in the show cause notice were not disclosed. The division bench of the Supreme Court set aside the order of the Sindh High Court as per finding given below:-

It is settled principle of law that without completion of pre-requisite of show cause notice and supply of grounds/reasons in clear and explicit words to ascertain that under which sub-section of section 36 of Sales Tax Act, 1990, the case would fall, the demand notice may have no legal consequences and thus the failure of the authorities issuing show cause notice to disclose such grounds and reasons may render the notice invalid. In the instant case, it is not clear that under which subsection of section 36 *ibid*, the show-cause notice was issued and whether the non-payment of tax was due to the collusion or deliberate act of tax payer or it was the result of

inadvertence error or misconstruction. The show-cause notice carrying the defect of vagueness, may not stand to the test of judicial scrutiny.

20. In our considered opinion, the Revenue should be seized of sufficient and tangible evidence to assume jurisdiction under Section 36. SCN should be comprehensive to make out a case with facts, reasons and evidence. Collusion requires more than one person, a predetermined/preplanned scheme to defraud. In view of above, reasons/causes for alleging evasion must be stated in SCN and validity of SCN is fundamental to assume jurisdiction u/s 36.

21. In view of the above discussion and case laws relied upon, we are inclined to hold the show cause notice as null and void. Consequently, the impugned orders passed by both authorities below are annulled being not maintainable in the eye of law. Appeal of the registered person succeeds in the above manner. Since, the appeal is decided on legal plane, therefore, other grounds taken as per memo of appeal need no adjudication.


(FIZA MUZAFFAR)
Accountant Member


(NAZIR AHMAD)
Judicial Member