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JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, ABBOTTABAD BENCH.

JUDICIAL DEPARTMENT

Tax Ref No: 01-A of 2013

JUDGMENT

Date of hearing..... 21-11-2013

Appellant(s)/Petitioner (s)..... ~~Commissioner~~ ^{FARAD VEST} T.O by ~~advised~~ ^{st. no. 50/1/2013} advised

Respondent (s) M/s. Zahoor Industries Hattar by ~~ch. Khawaja~~ ^{Mag. Admn Code}

MRS. IRSHAD QAISER, J:-

The

Commissioner (Zone-I) Inland Revenue, petitioner has filed this Sale Tax Reference seeking indulgence of this Court under Section 47 of the Sales Tax Act 1990 requesting therein to decide the question of law emanating from order No. STA No.84 (IB)/2011 dated 04.12.2012 passed by Appellate Tribunal Inland Revenue Islamabad in favour of respondent (Zahoor Industries Private Limited Hattar KPK.

2. The following questions of law have been raised;

1. Whether any judicial proceeding by a Private Limited Company are maintainable if no resolution

of the Board of Directors has been passed authorizing a natural person for conducting the proceedings?

2. Whether the Appellate Tribunal has the jurisdiction to set aside the findings of the lower forum on the question of time barred appeal if it had been decided on merits and facts of the case and not arbitrary?
3. Whether the provisions of an exemption notification are to be construed in favour of the revenue if the conditions are not fulfilled and complied by the registered person?
4. Whether the provisions of section 36(3) of the Sales Tax Act 1990 are directory in nature or otherwise and can it be applied retrospectively?
5. Whether Directorate of Revenue receipt Audit (DRA) can carry out audit of the Sales Tax Collectorate and point out any discrepancies and issue audit observations for recovery of the amount?
6. Whether a notice or an order issued to a registered Company at its registered office would deemed to have been served under the provisions of law or it is mandatory that such order is served on the Chief Executive?
7. Whether the respondent activity was not liable for sales tax after availing the exemption under SRO 580(1)/91 dated

27.06.1991 which the unit availed up to 31.12.1997?

8. Whether the respondent was not liable to be registrant under the provisions of the Sales Tax Act, 1990 after the expiry of the exemption period availed under the SRO 580(1)/91 dated 27.06.1991?
9. Whether the respondent unit was not required under SRO 580(1)/91 dated 27.06.1991 to intimate the Assistant Collector having jurisdiction regarding commencement of production including trial production? And being an exemption notification has to be construed in favour of revenue.

3. The facts of the case are that respondent No.1, claimed and availed exemption from levy of Sale Tax for 5 years since commencement of production under SRO 580(1)/91 dated 27.06.1991 read with SRO 561(1)/94 dated 09.06.1994. That according to the report/certificate dated 28.01.1992 issued by RDFC the unit started production on 31.12.1992 and is therefore liable to get registered and pay sale tax. The Directorate ~~Revenue~~ Revenue Receipts

Audit (DERRA) conducted audit of the record of respondent No.1 vide audit observation No.8 dated 03.06.1999 and reported that respondent No.1 "(a) failed to pay the sale tax due from May 1998 to date. (b) failed to issue sale tax invoice from May 1998 to date. (c) failed to file monthly sale tax return from May 1998 to date. (d) failed to make application for registration upto now. In the circumstances they evaded tax during the period from 5/98 to date to the extent of Rs.1945800/-." On receipt of above mentioned audit observation a show cause notice was issued by Additional Collector Sales Tax dated 22.06.1999 to respondent No.1, confronting with the said audit observation the respondent submitted written reply on 06.08.1999. After hearing the respondent, order in original No.28 of 2002 dated 01.04.2002 was passed by Deputy Collector Sale Tax wherein the following order was passed;

"I have gone through the case record. The respondent has failed to submit any serious submissions before the undersigned. Thus I am inclined to agree with the report of the Senior Auditor. The unit has failed to fulfill the prerequisite of the said SRO and is thus not entitled for availing exemption. The charges leveled in the show-cause notice are thus enforced. The unit is directed to deposit the sales tax due along with additional tax to be calculated till the actual date of deposit. A penalty of 3% of the amount involved is also imposed on the unit under Section 33 of the Sales Tax Act, 1990."

Feeling aggrieved respondent filed Appeal No.485/2005 before the Collector (appeal) which was dismissed being time barred vide order dated ~~25.9.2005~~. Against which he filed appeal before appellate Tribunal Inland Revenue on the ground that order in original was never served on him and on receiving the information he obtained duplicate copies of order in original. The Tribunal remanded the case back to

Collector for denovo consideration to give finding that when the order in original was served on respondent NO.1. The Commissioner Inland Revenue (appeals),) rejected the appeal on the point of limitation vide order dated 27.11.2011 by observing that appellant filed appeal before Collector (appeals) on 14.06.2004 which is barred by time by about two years and one month and 13 days and the plea of appellant that he has not received the order is not correct as service was properly made therefore appeal is time barred. It is further observed "After examination of documents and passport/travel dates it revealed that he went to USA on 20.07.2001 and returned in September 2001. Hence his plea that service due to his absence is incorrect because the order was served on 04.04.2002 when he had returned from USA". Against this order respondent filed appeal before appellate Tribunal Inland Revenue which was accepted vide order

dated 21.11.2011. The commissioner RTO Abbottabad filed Reference NO.01-A of 2012 under Section 47 of Sale Tax Act 1990. This Court vide order dated 07.11.2012 set aside the order of appellate Tribunal and remanded the case back to it for decision afresh on the different legal questions vide order dated 07.11.2012. The relevant portion is reproduced as follows;

- (i) **"The appellate Tribunal Inland Revenue legally erred in its impugned decision by not considering, dilating or passing any findings on the issue of limitation, which was in fact the main reason or ground taken by the Commissioner (Appeals) in its decision which was challenged before it.**
- (ii) **The Appellate Tribunal Inland Revenue was legally bound to first decide the issue of limitation and thereafter move on to other grounds taken up by the appellate/Revenue in its memo of appeal before it."**

4. After remand the appellate Tribunal Inland Revenue Islamabad vide order dated 04.12.2012 upheld its earlier judgment.

Feeling aggrieved the appellant filed the present reference and challenged the impugned order.

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

6. After hearing both the side in detail and examination of the record it is observed that order in original No.28 of 2002 dated 01.04.2002 was sent to the registered person i.e. M/S Zahoor Industries (PVT) Limited Hattar on the mailing address of the Company through registered post vide letter C No.ST (Audit)/71/99/839 dated 01.04.2002, vide Postal receipt No.808 as required under Section 56 (a) of the Sale Tax Act 1990 but the same was returned undelivered, therefore, it was served under Section 56 (b) by affixing the same on the notice Board of the Sale Tax Office at Haripur. Under the enforced Law it is a proper service. It has been mentioned in the impugned judgment dated 04.12.2012

that "copies of the passport shows that he left Pakistan on 27.06.2001 and returned to Pakistan on 05.11.2006. In this light we find that order in original was not properly served on the registered person who was out of country." In the impugned order the appellate Tribunal erred by holding that the registered person was abroad during service of order in original. Actually one of the director of the respondent Company i.e. M/S Zahoor Industry was abroad but not the Company i.e. respondent NO.1. In this case the order in original was to be served under Section 56 of the Sale Tax Act 1990 through registered Post on the given address and in case of non delivering it was required to be affixed on the notice Board of the Local Sale Tax Office. In this case, as required under the law, order in original has been properly served in accordance with relevant provision of law i.e. Section 56 of Sale Tax Act. Moreover there are also factual controversy in respect of stay of the

respondent in USA. It is pointed out by Collector appeal that according to passport and travelling documents Zahoor was in Pakistan on 04.04.2002, while this observation is negated by Appellate Tribunal and held that he remained in USA from 27.06.2001 to 05.11.2006. It was the duty of respondent to produce the passport to confirm the date of his stay in USA, but he failed.

7. It is also important to note that in this case ~~the~~ registered person is a company, which is a judicial person, and the said Company did not leave the country for USA and company has been served properly as required under Section 56 of Sales Tax Act. Therefore, appeal filed before competent forum is barred by time of more than two years. It is also important to note that all proceedings were conducted by respondent without fulfilling the legal formalities because no resolution of the Board of

Directors have been passed authorizing a neutral person for conducting proceeding. It is settled law that in such like cases the proceeding without passing of resolution has no legal value.

8. The petitioner has also raised a question "Whether Directorate of Revenue Receipts Audit (DRRA) can carry out audit of the Sales Tax Collectorate and point out any discrepancies and issue audit observation for recovery of amount?" The respondent relied on judgment of Peshawar High Court, PTCL 2010 C.L 393 wherein it is held;

"It becomes from the perusal of above notification that President of Pakistan has required the Auditor General of Pakistan to audit the receipt of Federal Government and not the record of the Private Enterprises/Industrial unit licensed/registered under the Sale Tax/Central Excise Law. Thus the whole exercise in this particular case is quorum non iudice."

9. From the perusal of above order it is clear that DRRA cannot conduct audit or raid at the Tax Payer's business premises but in this very case the DRRA has neither entered in the premises of registered person nor conducted its audit over there. Hence, in this case the audit has been conducted in the Sale Tax Department and audit observation was raised against the respondents that Sale Tax amounting to Rs. 19,45,800/- has not been paid by respondent No. 1 and appellant/department was requested to realize the amount of said tax alongwith additional tax and penalties. In the present case DRRA has neither violated nor proceeded against the above judgment of this Court.

10. In this case on receipt of audit observation made on the record of Sale Tax Department in the office premises of the said department, the Additional Collector served a show cause notice on respondent

Company and thereafter while passing the order in original after receipt of definite information from DRRA, the Deputy Collector even then relied on the audit report of a Senior Auditor of the Sale Tax Department and passed the order in original. The august Supreme Court in case "M/S Colony Industries (Pvt:) Limited versus Federation of Pakistan and other in Civil Petition No. 1774-2 of 2009 has held;-

"There is no bar or strict rule that second audit cannot be ordered. In any case where the foundation of the re-audit is based upon fraud undoubtedly re-audit can be ordered. In this case the order of the Collector reproduced above postulate the elements of fraud and it is settled law that fraud vitiates most solemn proceeding and any order procured through fraud cannot be projected."

11. The order in original was correctly passed by the Deputy Collector Sale Tax on the basis of definite information received

from DRRRA, that the tax has been evaded by M/S Zahoor Industries (Pvt:) Limited respondent No. 1.

12. As far limitation for passing order in original under section 36(3) of Sale Tax Act, 1990 is concerned it was required by the respondent No. 1 to challenge the order in original before the Collector appeal within stipulated time of 30-days as detailed in section 45 of the Act *ibid*. As mentioned above the respondent filed the appeal which was badly barred by time. The Supreme Court of Pakistan in case reported in case reported in (2013 SCMR 587) titled "Messrs Blue Star Spinning Mills Ltd versus Collector of Sales Tax and others" has held;-

"Rule that no limitation ran against a void order was not an inflexible rule--- Party could not sleep over to challenge the void order and it was bound to challenge the same within the stipulated/prescribed time period of limitation from the date of knowledge before the

proper forum in appropriate proceedings”.

13. Keeping in view the above facts and discussion, we hold that the appeal filed by respondent before Collector Appeal was time barred and it has rightly been dismissed by the competent authority. Thus the impugned order of Appellate Tribunal Inland Revenue Islamabad dated 04.12.2002 being without any force is set aside and the order of Commissioner Inland Revenue Appeal, Peshawar, dated 27.01.2011 and order in original No. 28 of 2002, dated 02.03.2002 are upheld and maintained.

BA
28/11/13
True Copy

Announced.
21.11.2013.