

[Peshawar High Court]

Before Mazhar Alam Khan Miankhel and
Yahya Afridi, JJ

Messrs ASSOCIATED INDUSTRIES LTD,

versus

FEDERATION OF PAKISTAN
through Secretary Economic Affairs, and 2 others

Writ Petition No.2412-P of 2013, decided on 24th October, 2013.

Ishtiaq Ahmad for Appellant.

Nemo for Respondents.

Date of hearing: 24th October, 2013.

JUDGMENT

YAHYA AFRIDI, J.---Messrs Associated Industries Ltd, Amangarh, Nowshera, petitioner herein, through the instant writ petition, seeks the constitutional jurisdiction of this Court praying that:-

- (i) *the order of the FBR is of no legal effect as the decision of one of the Member of the Committee, who happens to be Commissioner of Inland Revenue, cannot prevail over the majority decision of the two other members of the Committee;*
- (ii) *the FBR is required to consider the order of this Honorable Court as well as recommendations of the majority members of the Committee while passing the final order under section 47-A of Sales Tax Act, 1990; and*
- (iii) *the Direct the FBR to amend its final order and make it according to the judgment of majority member of the Committee.*

2. The brief and essential facts leading to the institution of this constitutional petition are that Messrs Associated Industries Ltd., Amangarh, Industrial Area, Nowshera ("petitioner") having sales tax Registration No.50-04-1522-001-64, filed refund claim for the tax period of January, 2006 amounting to Rs.13,931,912 under section 10 of the Sales Tax Act, 1990 ('Act') and that out of the aforesaid total refund, an amount of Rs.3,350,846 had been claimed on the basis of supplies made to ICRC; that since the petitioner did not fulfill the requirements of item 4 of Fifth Schedule to the Act, the claim of refund amounting to Rs.5,079,849 and Rs.3,350,846 was declared inadmissible and rejected, vide Orders-in-Original Nos.161/2006 and 162/2006; that being aggrieved with the above orders, the petitioner filed an appeal before the Collector Appeals, Peshawar, who while dealing with the matter allowed the appeal of the petitioner and set aside the orders-in-original; that dissatisfied with the order of Collector Appeals, the respondents filed appeal before the learned Appellate Tribunal, which was allowed and the petitioner moved a Reference before this Court and during its pendency, the present petitioner also moved the Alternative Dispute Resolution Committee ("ADRC") under section 47(A)(4A) of the Act; that the ADRC vide its majority view recommended to the Board, the refund in favour of the petitioner; that this Court, vide order dated 19-2-2013 disposed of the Reference in the following observations:--

"We, therefore, direct the FBR to decide the matter in light of recommendations of A.D.R.C. positively within a period of thirty days. The petitioner, however, would be at liberty to question the same, if feels aggrieved".

Thereafter, in the light of the direction of this Court, the FBR disposed of the matter, vide its order as reads as under:--

"In view of the stated facts, the Board in exercise of the powers conferred under section 47-A, read with section 74 of the Sales Tax Act, 1990 rejects the recommendation of the ADRC in the instant case, directing that the taxpayer may consider to continue to take up the matter at the appropriate forum for decision."

Hence, this writ petition.

3. Valuable arguments of the learned counsel for the petitioner heard and the available record of the case thoroughly considered.

4. Without passing any findings on the merit of the claim of refund made by the petitioner, which may prejudice the case of the parties, suffice it to state that all the issues raised in the present petition can well be urged before and decided the Chairman or Member of the FBR under the provision of section 47(A)(4A) of the Act, which provides that:--

"(4A) Notwithstanding anything contained in subsection (4), the Chairman FBR and a Member nominated by him may, on the application of an aggrieved person, for reasons to be recorded in writing, and on being satisfied that there is an error in order or decision, pass such order as may be deemed just and equitable".

5. In view of the appropriate forum provided in the aforementioned provision of the Act, this Court in its constitutional jurisdiction does not consider it appropriate to examine the merits of the controversy in the present case and render its finding thereon, at least at this premature stage. This Court finds that the alternate remedy available to the petitioner under section 47(A)(4A) of the Act, being 'adequate' and 'efficacious', by all means, can serve the purpose of the petitioner, which it has sought in the instant writ petition.

6. In this regard, it is noted that by now it is well settled that where a particular statute provides a self-contained mechanism and well defined forum of redressal for the determination of questions of law or fact by way of appeal or revision or representation to another Tribunal or Committee or authority or officer, the petitioner without exhausting the said remedy cannot be allowed to invoke the constitutional jurisdiction of this Court.

7. In the case of Adam Jee Insurance Company Ltd. v. Pakistan (1993 SCMR 1978), the Hon'ble Supreme Court after referring to a string of judgments and the relevant provisions of the "in house"

determination of matters of fiscal nature, which once opted for, cannot be abandoned without any reasonable or just cause, as in the present case, deprecated such practice of filing constitutional petition in the following words:--

"Before parting with the judgment we may observe that in cases where any party resorts to a statutory remedy against an order he cannot abandon or bypass it without any valid and reasonable cause and file Constitutional petition challenging the same order. Such practice, in cases where statute provides alternate and efficacious remedy up to High Court, cannot be approved or encouraged."

8. The judicial consensus that has evolved on the aforementioned jurisdictional restraint on a constitutional Court to take cognizance of a matter, when there is an alternative remedy provided under a statute, is that the said restraint is not an absolute bar to be applied to all cases. In fact, the general principle of restraint is to guide the constitutional Court in exercising its jurisdiction in deciding matters. In this regard, some of the circumstances where despite there being alternative remedy available, constitutional Courts have assumed jurisdiction and entertained matters are as follows:-

- (i) The impugned order is totally beyond the jurisdiction of its "maker" (Ali Muhammad's case PLD 1996 SC 37, Ali Abbas's case PLD 1967 SC 294, Khalid Mehmood's case 1999 SCMR 1881 and Amanullah's case PLD 1990 SC 1092);
- (ii) The impugned decision has been passed by an authority, which cannot be dissented or is based on a policy beyond the domain of the alternative forum of redressal (Nizamuddin's case 1999 SCMR 467);
- (iii) The alternative forum provided under the statute has already rendered its opinion in an other identical case. (Abdullah Muhammad Peer's case PLD 1971 SC 130);
- (iv) The alternative forum provided under the statute is not "efficacious", as the alternative forum of redressal provides a lengthy and cumbersome procedure, which would defeat the very purpose of seeking any resolution of a grievance (Tariq Transport Company's case PLD 1958 SC 437).

9. As far as the submission of the learned counsel for the petitioner regarding 'mala fide' on the part of the respondents is concerned, that too, has not impressed us, which being a mixed question of law and fact cannot be dealt with at this stage, when no concrete evidence has been brought on record, so as to justify interference by this Court

under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973.

10. More importantly, the allegation of 'mala fide' asserted by the present petitioner has not been narrated with particularity, expressly specifying the 'maker, the mode and manner of the alleged tainted action. The essential requirements for this constitutional Court to take cognizance of a plea of 'mala fide' are as follows:-

- (i) The person who has acted with 'mala fide' against the interest of the petitioner has to be impleaded in person as a party to the petition; Muhammad Umar Khan's case (1992 SCMR 4554);
- (ii) The 'mala fide' act has to be Expressly stated with particulars; (Subedar Muhammad Ashraf's case PLD 2002 SC 706 and Lanvin Traders' case (2013 SCMR 1419);
- (iii) The onus of proof lies on the person who makes the said assertion of being aggrieved person; (Oazi Hussain Ahmed's case PLD 2002 SC 583);
- (iv) The said 'mala fide' actions have to be born out from the record and which does not require any detail examination or is admitted by the other side; (Israrul Haq's case 2005 SCMR 558 and Mst. Qaisra Elahi's case 2005 SCMR 678).

11. In a more recent case, the apex Court in its judgment rendered in the case of Dr. Akhtar Hussain Khan and others v. Federation of Pakistan and others (2012 SCMR 455), relying Saeed Ahmad Khan's case (PLD 1974 SC 151) and Begum Agha Abdul Karim Shorish Kashmiri (PLD 1969 SC 14) has observed:-

"Mala fides is one of the most difficult things to prove and the onus is entirely upon the person alleging mala fides to establish it, because, there is, to start with, a presumption of regularity with regard to all official acts, and until that presumption is rebutted, the action cannot be challenged merely upon a vague allegation of mala fides. As has been pointed out by this Court in the case of the Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri (PLD 1969 SC 14), mala fides must be pleaded with particularity, and once one kind of mala fides is alleged, no one should be allowed to adduce proof of any other kind of mala fides nor should any enquiry be launched upon merely on the basis of vague and indefinite allegations, nor should the person alleging mala fides be allowed a roving enquiry into the files of the Government for the purposes of fishing out some kind of a case.

"Mala fides" literally means "in bad faith". Action taken in bad faith is usually action taken maliciously in fact, that is to say, in which the person taking the action does so out of personal motives".

Keeping in view the 'ratio decedenti' of the aforementioned judgments as our guiding principle, it can safely be stated that the present petition cannot be maintained on the ground that the petitioner has not only an alternative efficacious remedy available under the Act but also that the assertion of 'mala fide' alleged by the petitioner lacks essential attributes, which are required under the law for the Constitutional court to take cognizance thereof.

12. Accordingly, for the reasons stated hereinabove, this writ petition is dismissed. However, the petitioner may, if so advised, approach the appropriate forum provided under the Act.