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JUDGMENT SHEET
IN THE LAHORE HIGH COURT, BAHAWALPUR
BENCH, BAHAWALPUR.
JUDICIAL DEPARTMENT

PTR No.07 of 2016/BWP.

Commissioner Inland Revenue
Versus
M/s Adeel Brothers

J U D G M E N T

Date of hearing: 31.01.2017.
Applicant by: Ms. Zartaj Naeem, Advocate.
Respondent by: Mr. Muhammad Siddiq Chohan, Advocate.

MUHAMMAD SAJID MEHMOOD SETHI, J.- Through this Reference Application under Section 47 of the Sales Tax Act, 1990 (**"the Act of 1990"**), following questions of law, arising out of impugned order dated 17.03.2016, passed by learned Appellate Tribunal Inland Revenue, Lahore Bench, Lahore **("Appellate Tribunal")**, are proposed for our opinion**:-**

i. "Whether the provisions of Section 33 of the Sales Tax Act, 1990 specifying therein the amounts of penalty according to nature of offence are mandatory or otherwise?

ii. Whether on the facts and in the circumstances of the case the learned Appellate Tribunal Inland Revenue was right in ordering reduction in penalty amount despite the express provisions of Section 33 (1) of the Sales Tax Act, 1990 which provides the charge of penalty mandatorily as per the amount mentioned therein?

iii. Whether the decision of learned ATIR renders Section 33 of the Sales Act, 1990 redundant?"

2. Brief facts of the case are that a Show Cause Notice *(SCN)* dated 27.11.2010 was issued to the respondent taxpayer with the allegation of non-filing of the sales tax return for the tax period July 2007 to June 2008 & July 2008 to June 2009, as a result, imposition of penalty under Section 33 (1) of the Act of 1990 was

proposed, which culminated in passing of order dated 24.03.2011, whereby respondent taxpayer was imposed penalty of Rs.1,20,000/-. Feeling aggrieved, respondent taxpayer preferred appeal before CIR (Appeals), which was accepted vide order dated 08.07.2011 and penalty amount was reduced to Rs.35,000/-. Feeling dissatisfied, applicant department filed appeal before learned Appellate Tribunal, which was dismissed vide order dated 17.03.2016. The applicant department has assailed the aforesaid order through instant Reference Application.

3. Learned counsel for applicant department submits that reduction in penalty amount was against the provisions of Section 33 (1) of the Act of 1990, thus, impugned order is not sustainable in the eye of law. In support of her contentions, she has placed reliance upon *Commissioner Inland Revenue v. Madina Cotton Ginners and Oil Mills* **(2016 PTD 643)**.

4. On the other hand, learned counsel for respondent taxpayer defends the impugned order and submits that learned counsel for petitioner has failed to point out any illegality or legal infirmity in the impugned order. He contends that non-filing of sales tax returns within due date does not always invite imposition of penalty unless it is proved that the said omission was either willful or based on *mala fide*. In the end, he submits that impugned order is liable to be upheld in circumstances.

5. Arguments heard. Available record perused.

6. The operative part of impugned order is reproduced hereunder:-

> "4. We have heard the arguments of the learned DR and perused the record available before us. The learned DR, in support of his contentions, has failed to furnish any case law. Perusal of impugned order reveals that the learned first appellate authority after discussing case law reported as 2004 PTD 1048 reduced the penalty. Therefore, we do not find any reason to interfere in the order passed by the learned first appellate authority

> which is hereby upheld. The departmental appeal being devoid of merit stands dismissed."

7. The above reproduced order shows that learned Appellate Tribunal has upheld the order of learned CIR (Appeals) by observing that the learned DR, in support of his contentions, failed to cite any case law and that the learned first appellate authority, after taking into consideration the principle settled in *Messrs Bhola Weaving Factory v. Customs, Excise and Sales Tax Appellate Tribunal and another* **(2004 PTD 1048)**, reduced the penalty.

In the case of *Messrs Bhola Weaving Factory* supra, this Court has already ruled that levy of penalty should be refused where offence is of technical or venial in nature. *Mens rea* is an essential ingredient while enforcing penalty provisions against assessee and levy of penalty is a matter of discretion which must be exercised by the authorities judiciously. The operative part of the said judgment reads as under:-

> "9. The nature of penalty provisions in taxing statutes and the proceedings held to bring them home are criminal or at least quasi criminal in nature. In such-like proceedings proving of mens rea, in view of their Lordships in re Additional Commissioner of Income-tax v. Narayandas Ramkishan 1994 PTD 199 is an essential ingredient. It was held that the Revenue was under a statutory obligation to prove that the assessee had acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of his obligation. Although the issue before their Lordships was slightly different from the one before us yet the principle laid applies on all four to the facts in hand. Their Lordships were considering the legality of penalty for the late filing of return in the perspective of the legal provisions requiring an assessee to show reasonable cause for such late filing. The principle that was laid down by their Lordships needs to be kept in mind by all Revenue Authorities while enforcing penalty provisions. It is that:
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> > "Levy of penalty is a matter of discretion which must be exercised by the Authorities judiciously on consideration or relevant circumstances. Penalty should not be imposed merely because it is lawful to do so. If the offence is of a technical

> or venial in nature, the Authorities will be justified in refusing to levy penalty."

8. The Hon'ble Supreme Court in *D. G. Khan Cement Company Ltd. and others v. Federation of Pakistan and others* **(2004 SCMR 456)**, has already laid down that each and every case has to be decided on its own merits as to whether the evasion or non-payment of tax is willful or *mala fide*. Where non-payment of the tax within due date is neither willful nor it could be construed to be *mala fide*, imposition of penalty is not justified in law, therefore, learned Appellate Tribunal has rightly upheld the order of reduction of penalty, which in our opinion, is absolutely in consonance with the intent of law.

9. So far as the case of *Madina Cotton Ginners and Oil Mills* supra, referred by learned counsel for applicant, is concerned, we have carefully gone through the said judgment, however, the same is not relevant. Reliance is misconceived inasmuch as the said judgment has been delivered on distinguishable facts and circumstances, which does not apply to the instant case.

10. There is no cavil with the proposition that penalty has to be imposed in compliance with the provisions of law and the quantum must be proportionate to the gravity of default committed by a person. Learned fora below have rightly found that in the given facts and circumstances, levy of extreme amount of penalty was not justified. We find no illegality in the impugned orders. Even otherwise, in the case of *D. G. Khan Cement Company Ltd.* supra, the Hon'ble Supreme Court has already decided the question of law qua imposition of penalty, which is binding on all subordinate Courts and public as well as statutory functionaries.

11. Penalty could be reduced/remitted/waived by the authority in the exercise of jurisdiction conferred upon it by the statute, keeping in view the peculiar facts and circumstances of the case, for various reasons including that there was no *mens rea / mala*

fide or no loss was caused to the Revenue by a taxpayer. Findings based on material available on record that no loss was caused, are essentially findings of facts. The concurrent findings of facts recorded by learned fora below are based upon proper appreciation of facts and correct application of law. No substantial question of law, requiring opinion or interference by this Court in the exercise of reference jurisdiction, had arisen out of the impugned order. The applicant department failed to point out any perversity or bring any material on record that such decision was based on misreading or non-reading of evidence / material. Reference, in this regard, is made to *Century Flour Mills Ltd. v. Commissioner of Income-Tax* **(2001 PTD 2381)**, *Shiv Narayan Shivhare v. Commissioner of Income-Tax* **(1998 PTD 1668)**, *Commissioner of Income-Tax v. Muhammad Ali Ghulam Ali* **(2000 PTD 139)**, *Commissioner of Income-Tax v. P. Joseph Swaminathan* **(2000 PTD 632)**, *Commissioner of Income-Tax v. Best Supply Agency* **(2001 PTD 1741)**, *Commissioner of Income-Tax v. Mrs. Kuku Narang Wealth Tax* **(2001 PTD 1929)**, *Syed Akhtar Ahsan through Legal Heir v. Income Tax Officer, Circle 05, Zone-B, Lahore and 4 others* **(2005 PTD 858)**, *Additional Collector Sales Tax, Collectorate of Sales Tax, Multan v. Messrs Nestle Milk Pak Ltd., Kabirwala* **(2005 PTD 1850)**, *Messrs Gold Trade Impex through partner and another v. Appellate Tribunal of Customs, Excise and Sales Tax through Collector of Customs, and 2 others* **(2012 PTD 377)**, *Collector, Model Customs Collectorate, Hyderabad v. Messrs Khuda Raheem and others* **(2012 PTD 428)**, *Commissioner Inland Revenue, Zone-I, RTO, Karachi v. Messrs Allied Rental Modaraba* **(2014 PTD 593)**, *Commissioner Inland Revenue (Zone-IV) v. Messrs Medicaids Pakistan (Pvt.) Ltd.* **(2015 PTD 2533)** and *Commissioner of Income Tax, Legal Division, R.T.O. v. Messrs Matrix Press (Pvt.) Ltd.* **(2016 PTD 97)**.

12. It is now well-settled that High Court has to decide reference application on facts and circumstances founded by Appellate

Tribunal, in the exercise of advisory jurisdiction, which is the last fact finding forum. High Court cannot change findings of facts arrived at by the Appellate Tribunal unless the same are shown to be perverse and contrary to record. Reference can be made to *Messrs F.M.Y. Industries Ltd. v. Deputy Commissioner Income Tax* **(2014 SCMR 907)**, *Commissioner Inland Revenue, Zone-II Regional Tax Office-II v. Messrs Sony Traders Wine Shop* **(2015 PTD 2287)**, *Messrs Pak Suzuki Motor Company Limited, Karachi v. Collector of Customs, Appraisement Collectorate, Custom House, Karachi* **(2015 PTD 2600)** and *Commissioner of Income Tax, Legal Division, R.T.O. v. Messrs Matrix Press (Pvt.) Ltd.* **(2016 PTD 97)**.

13. Since the decision by learned Appellate Tribunal is based on findings of facts, therefore, we ***decline*** to exercise advisory jurisdiction.

14. This Reference Application is ***decided*** against applicant department.

15. Office shall send a copy of this order under seal of the Court to learned Appellate Tribunal as per Section 47 (5) of the Sales Tax Act, 1990.

(**Tariq Iftikhar Ahmad**)
Judge

(**Muhammad Sajid Mehmood Sethi)**
Judge

APPROVED FOR REPORTING.

Judge **Judge**

Sultan/A.H.S.