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

**STA No.136/MB/2022**

**M/s. Allah Khair Industries, Multan.** **...Appellant**

**Versus**

**The CIR, RTO, Multan.** **...Respondent**

**Appellant by:** **Mr. Muhammad Saeed, Advocate.**
**Respondent by:** **Mr. Muhammad Amjad, DR.**

**Date of Hearing:** **15.07.2022**
**Date of Order:** **06.10.2022**

**O R D E R**

**DR. MUHAMMAD NAEEM (Accountant Member)**: The titled further appeal filed at the instance of the registered person has been directed against the order-in-appeal No. (ST)148 dated 18.04.2022 recorded by CIR(Appeals-I), Multan.

The facts in brief leading to the instant appeal are that the department had information that M/s. Allah Khair Industries (AK) (the "registered person") was involved in sales tax evasion by way of concealment of production/taxable supplies, issuance of fake/flying invoices and evasion of further tax during the tax period July-2017 to June-2020. It was therefore the tax department obtained the search warrant from magistrate in terms of section 40 of Sales Tax Act, 1990 and raided the premises of the appellant. As per the tax department, some documents and record were impounded from the business premises of the appellant. The tax authorities scrutinized the record, detained during the raid and search operation, and noted the following discrepancies:-

i) Non-Declaration of Bank Accounts
ii) Concealment of Production & Supplies
iii) Concealment of Supplies amounting to Rs.15,533,306/-
iv) Concealment of Supplies amounting to Rs.8,670,824/-
v) Issuance of Fake/Flying invoices to the registered person evading further tax amounting to Rs.4,234,125/-
vi) Late filing/late payments

3. Based on the above discrepancies, proceedings were initiated on the following dates:-

| | | |
|---|---|---|
| 1. | 20.07.2021 | No compliance was made |
| 2. | 10.08.2021 | Adjournment request for 15 days |
| 3. | 27.08.2021 | No compliance was made |
| 4. | 17.09.2021 | Written reply was submitted |
| 5. | 20.01.2011 | Adjournment request for 07 days |
| 6. | 26.01.2022 | No one appeared nor any reply/adjournment request was made |

4. Resultantly, the proceedings culminated in passing of Order-in-Original No.03/2021-22 dated 26.01.2022 creating a tax demand of Rs.88,848,411/- alongwith default surcharge and penalty as per break up given below:-

| Ser. | Description | Sales Tax | Further Tax | Total |
|---|---|---|---|---|
| 1. | Concealment of production and supplies which is clear from trial balance for the Tax Periods Jul-19 to Jun-20 | 66,107,441 | 11,666,019 | 77,773,460 |
| 2. | Concealment of supplies made to the un-registered persons during mar-18 but did not declare in its Sales Tax Returns for Mar-18 amounting to Rs.15,533,306/- | 2,640,662 | 465,999 | 3,106,661 |
| 3. | Concealment of supplies amounting to Rs.8,670,824/- obvious from Comparison of Supplies declared in the Sales Tax Returns vis-à-vis Income Tax Returns for the Tax year 2018, 2019, 2020 | 1,474,040 | 260,125 | 1,734,165 |
| 4. | Issuance of fake/flying invoices to the registered persons and evading further tax. | - | 4,234,125 | 4,234,125 |
| 5. | Penalty/default surcharge for Late Filing/Late Payments | - | - | 101,645 |
| | **Total** | **70,222,143** | **16,626,268** | **86,950,056** |

5. Feeling aggrieved by the above treatment, the registered person went in appeal before CIR(Appeals-I) Multan, who also upheld the impugned Order-in-Original in toto by way of rejection of the appeal. Still discontented, the registered person has come up in appeal before this Tribunal.

6. The learned counsel appearing on behalf of the registered person argued that the orders passed by the authorities below are bad in law and not according to the facts of the case hence created the illegal tax demand. He apprised the court that show cause notice in the case in hand was issued on 05.07.2021, against which ONO passed on 26.01.2022 is hit by limitation being contrary to the provision contained in section 11(5) of the Sales Tax Act, 1990 (hereinafter called 'the Act'). It has been

contended that the mandatory requirements of section 40 of the Act were not complied with, which made the whole proceedings as illegal. The learned AR submitted that the raiding officer did not prepare the recovery memo and even no acknowledgment of the impounding of record was given to the appellant. It has been pleaded that there was no difference in the declarations made in tax returns and the record of the appellant, and the record and documents of the appellant was exactly tally with the declaration made in tax returns of the appellant. The record documents / record relied upon by the learned assessing officer was not belonged to the appellant. He has further contended that the learned CIR(Appeals) has erred in confirming the order passed by the taxation officer without providing opportunity of personal hearing as notice issued was never served on the registered person, which is against the principle of natural justice audi alteram partem. On the strength of these assertions, he seeks vacation of the orders passed by both the authorities below.

7. On the other hand, the learned DR appearing on behalf of the department has fully supported the impugned order on the issue regarding opportunity of being heard. He has contended that prior to passing of impugned ONO, the case was fixed for hearing on three dates and notices in this regard were properly served on the registered person, which justifies that the registered person of the case in hand was not condemned unheard but he failed to substantiate his stance with documentary evidence.

8. Arguments heard and relevant record available on file carefully perused. The careful perusal of the impugned ONO reveals the fixation of case on several occasions but regarding issuance and service of notices in this regard, the same is silent. The ONO shows that the appellant submitted the reply and raised legal as well as factual objections which was not attended by the assessing officer. The learned CIR(A) while deciding the appeal did not give finding on the legal objections. It has been

argued that the order was passed after the time provided in section 11(5) of the Act. The record show that the show cause notice was issued on 05.07.2021. The appellant sought adjournment of fifteen days and after excluding the time of adjournment the order was required to be passed on 17.11.2021. The order was passed on 26.01.2022 wherein it was mentioned that the time to pass the order was extended by the commissioner vide letter dated 09.12.2021. Now the question arises that whether the commissioner could extend the time to pass an order when the period to pass an order had already expired. The time to pass an order was expired on 17.11.2021 and the extension was granted on 09.12.2021 which to our mind is not extension rather it was a condonation of time limit which was in negation to clear language of section 11(5), because the time limit cannot be condoned under section 11(5). We are of the candid view that there is no scope to condone the time in section 11(5) of the Act, 1990 hence no condonation of time can be granted under the said provision of law which renders the act of learned commissioner as illegal. This view is fortified by the judgement of the honorable High court reported as 2016 PTD 358. The other aspect of the case is that the commissioner Inland Revenue did not give any reason for extension in time to pass the order in his letter dated 09.12.2021. It is clear form reading of section 11(5) that any extension granted by the commissioner should be based on reasons and such reasons have to be mentioned for extending the time to pass an order. Whereas no reasons have been referred in the order for extending the time to pass an order and the learned DR

appearing on behalf of the respondent tax department could also not bring on record the reasons recorded by the learned Commissioner while extending the time to pass an order. the honorable Supreme court of Pakistan in a case reported as The Collector Of Sales Tax, Gujranwala And Others Vs Messrs Super Asia Mohammad Din And Sons And Others **(2017 SCMR 1427)** has articulated the principle that order to extend the time to pass an order must contain the reasons for such extension. The relevant excerpt of the judgment supra is reproduced hereunder;


*"From the plain language of the first proviso, it is clear that the officer was bound to pass an order within the stipulated time period of forty-five days, and any extension of time by the Collector could not in any case exceed ninety days. The Collector could not extend the time according to his own choice and whim, as a matter of course, routine or right, without any limit or constraint; he could only do so by applying his mind and after recording reasons for such extension in writing. Thus the language of the first proviso was meant to restrict the officer from passing an order under section 36(3) supra whenever he wanted. It also restricted the Collector from granting unlimited extension. The curtailing of the powers of the officer and the Collector and the negative character of the language employed in the first proviso point towards its mandatory nature. This is further supported by the fact that the first proviso was inserted into section 36(3) supra through an amendment (note:- the current section 11 of the Act, on the other hand, was enacted with the proviso from its very inception in 2012). Prior to such insertion, undoubtedly there was no time limit within which the officer was required to pass orders under the said section. The insertion of the first proviso reflects the clear intention of the legislature to curb this*

*earlier latitude conferred on the officer for passing an order under the section supra. When the legislature makes an amendment in an existing law by providing a specific procedure or time frame for performing a certain act, such provision cannot be interpreted in a way which would render it redundant or nugatory. Thus, we hold that the first proviso to section 36(3) of the Act [and the first proviso to the erstwhile section 11(4) and the current section 11(5) of the Act] is/was mandatory in nature.*

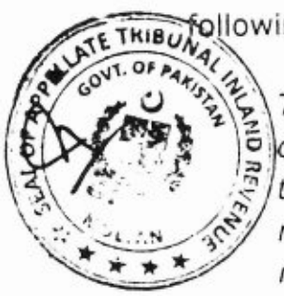
This view has further been strengthened by another judgment of August Supreme Court of Pakistan in case reported as Abbasi Enterprises Unilever Distributor, Haripur and others Vs Collector of Sales Tax and Federal Excise, Peshawar and others **(219 SCMR 1989)**. As per the observation of the august supreme court of Pakistan recording of reasons for extending the time is mandatory condition and no extension can be granted as a matter of routine or right. It is therefore we respectfully following the law laid down in the judgment supra conclude that the condonation (the extension as per the assessing officer) granted by the commissioner without referring any reason, was illegal, corollarial conclusion of which is that the order was passed after the time given in section 11(5) of the Act, and hence have no legal effect.

9. The second legal issue raised by the appellant is about non preparing of the recovery memo at the time of raid and search conducted under section 40 of the Act. Section 40 of the Act is being reproduced hereunder;

> ***40. Searches under warrant***– *(1) Where any officer of Inland Revenue has reason to believe that any documents or things which in his opinion, may be useful for,* ***or relevant to, any proceedings under this Act are kept in any place****, he may after obtaining a warrant from the magistrate, enter that place and cause a search to be made at any time.*
>
> *(2) The search made in his presence under sub-section (1)* ***shall be carried out in accordance with the relevant provisions of the Code of Criminal Procedure, 1898 (V of 1898).***

The above provision clearly speaks that the search shall be made in accordance with the provisions of the Code of Criminal Procedure, 1898 (V of 1898). Subsection 1 of section 40 clarifies that the search under section 40 can only be conducted in the case when any proceedings is pending under the Act. But contrarily, there was admittedly no proceeding was pending in the case of appellant at the time of conducting the raid and search under section 40 of the Act. Hence conducting the raid in absence of pending proceedings is violative to the statutory provision of the Act. The subsection 2 of section 40 further provides the safeguard to the person who is searched, in a way that the search shall be conducted in accordance with the provisions of the Code of Criminal Procedure, 1898 (V of 1898). Section 96 to section 105 of Code of Criminal Procedure, 1898 deals with the procedure how to make a search the premises of a person. Section 103 of the Code of Criminal Procedure, 1898 is of significant importance, subsection 1 thereof requires that two or more respectable inhabitants of the locality in which the place to searched, be associated at the time of search. Subsection 2 mandates that the search shall be made in the presence of such persons and list of all things seized shall be prepared by searching officer and signed by inhabitants of the locality. Subsection 4 of section 103 further emphasized that a list of all the things taken into possession shall be prepared and copy thereof shall be provided to the occupant of premises on his request. But we have noted in this case that the searching officer neither associated the two witnesses of the locality in which the search was made nor did the searching officer prepare the list of documents / record taken into possession / custody. The learned DR, during the hearing proceeding was asked to provide the recovery memo / list of the record seized during the search of appellant's premises but the learned DR was failed to provide the list of record and documents seized during the search under section 40 of the Act. The show cause notice and the order in original also does not reflect the preparation of list of the documents and record taken into custody. The case was founded on some trail balance, but the appellant denied such trail

balance, hence in absence of list of the documents taken into custody it cannot be ascertained whether the said trail balance belong to the appellant or not. We are therefore of the view that the whole search was conducted in sheer violation to the provisions of section 103 of the Code of Criminal Procedure 1898, hence as an ultimate corollary the whole edifice of the case falls on to ground being founded on illegal act. It is an admitted position of the case that no witness was present during the search of the premises of the appellant and moreover the searching officer did not prepare the list of documents / articles impounded during the search conducted under section 40 of the Act, 1990. It is also admitted by the learned DR that no proceedings against the appellant was pending under the Act, 1990 at the time of search which establishes that the whole case was erected on illegal foundation. This very issue has been articulated by the honorable Lahore High Court in case reported as Pakistan Chipboard (Pvt.) LTD VS Federation of Pakistan through revenue division and 5 others (**2015 PTD 1520**) in the following words:




*The basic requirement of Section 40 of the Act is that an officer of Inland Revenue must have reasons to believe that a search is necessary to obtain document or things relevant in a pending proceeding. The Respondents have relied upon letters dated 2.10.2007 issued by the Collector, Sales Tax and Federal Excise, Gujranwala and letter dated 11-10-2007 issued by Aftab Ahmad Bhatti, Second Secretary (STM), Government of Pakistan, Revenue Division, Central Board of Revenue, Islamabad to show that the Respondents had reason to believe that the search was necessary. After going through the record, it appears that earlier the record of Arshad Traders, Sialkot was taken into custody under Section 38 of the Act and from that record the Respondents claim that they suspected tax fraud has been committed by other registered suppliers in the same business, including the Petitioner. Subsequent thereof a letter was issued on 11-10-2007 granting approval on behalf of the board to conduct an investigation against suppliers located outside the jurisdiction of the Sialkot Collectorate. Subsequently the Respondents Went to the Magistrate at Sheikhupura, on 3.12.2007 who then issued the search warrant under Section 84 of the Cr.PC on 11.12.2007. The letters relied*

*upon by the Respondents do not satisfy the specific conditions of Section 40 of the Act. Admittedly at the time there were no proceedings pending under the Act against the Petitioner. Admittedly there is no order explaining and detailing what documents or things were required from the Petitioner for which a search under Section 40 of the Act was necessary. In the case titled as Collector of Sales Tax and others v. Messrs Food Consultants (Pvt.) Ltd. and another (2007) 96 Tax 259 (S.C. Pak.)=(2007 PTD 2356), the Honble Supreme Court of Pakistan has held that where an officer of sales tax has reason to believe that any document or things, which, in his opinion, may be relevant to any proceedings under the Act, are concealed or kept in any place and there is a danger of removal of such documents or records, he may, after obtaining a warrant from the Magistrate, enter that place and cause a search to be made at any time. The Respondents have not complied with the requirements of Section 40 of the Act because firstly there are no proceedings pending against the Petitioner and the letters on the basis of which search warrant was obtained suggest that the Respondents are still at an inquiry phase, trying to ascertain whether or not the Petitioner is an evader of sales tax. Section 40 of the Act can only be invoked when there are proceedings pending under the Act for which a document or other material is necessary. Secondly it has been held in (2007) 96 Tax 259 (S.C. Pak.)=2007 PTD 2356 (supra) that the mandate of law as enunciated in subsection (2) seems to be that search authorized under the above provision of law shall be carried out strictly in accordance with relevant provisions of the Code of Criminal Procedure, 1898. Such provisions are contained in sections 96 to 105 of the Code and need not be dilated upon as admittedly the petitioner did not invoke these important provisions of law while seizing the records of the respondent company. In this case, even the requirements of the Cr.PC for issuance of search warrant have not been complied with. The search warrant was issued by Civil Judge/Magistrate 1st Class, Sheikhupura on 11.12.2007 whereas the search was carried out one year later on 2.12.2008 and more importantly the search warrant was issued in favour of Respondent No.4 who on his own endorsed the search warrant in favour of Respondent No.3. The procedure regarding issuance of search warrant is provided for in Sections 96, 98 and 103 of the Cr.PC whereby firstly the search warrant is to be obtained from Illaqa Magistrate where search of the premises is to be made. Under Section 103 of the Cr.PC before making a search, the officer or*

*other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search, which are taken into possession.*

*6. In view of the aforesaid, this petition is allowed. The search warrant dated 11.12.2007 issued by Civil Judge/Magistrate 1st Class, Sheikhupura is set aside. The Respondents are directed to return all the records, documents and computers confiscated by the Respondents during search on 2-12-2008 to the Petitioner immediately.*

It is therefore very much obvious from the above judgment of honorable Lahore high court that any search made in violation to the provision of section 40 of the Act read with sections 96 to 105 of the Code of Criminal Procedure 1898 does not have any legal force, and the order passed on the basis of such illegal search cannot be let to hold the field.

10. For the forgoing reasons and judgments referred above, it is held that the order in original and the appellate order are without legal force, which are accordingly annulled.

11. The appeal of the appellant succeeds.

Sd/-
**(DR. MUHAMMAD NAEEM)**
**Accountant Member**

Sd/-
**(MIAN ABDUL BASIT)**
**Judicial Member**

**Copy of the bench order forwarded to**
1. **The Appellant** M/s. Allah Khair Inds, NTN
2. **The Respondent**

**BY ORDER**

08/12/2022
**ASSISTANT REGISTRAR**
**Appellate Tribunal Inland Revenue**
**Multan**