

IN THE HIGH COURT OF SINDH AT KARACHI

Spl. STRA No. 26 of 2013

Date Order with Signature of Judge

Hearing of case:

1. For orders on CMA No. 236 of 2013.
2. For orders on office objection at flag-A.
3. For hearing of CMA No. 237 of 2013 (Exemption)
4. For hearing of main case.

Present:

**Mr. Justice Aqeel Ahmed Abbasi.
Mr. Justice Arshad Hussain Khan.**

13.01.2017.

Mr. Ammar Yasser, advocate for the applicant.
Mr. Sarfaraz Ali Metlo, advocate for respondent No.1.

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ORDER

Through instant reference application, the applicant department has proposed following questions, which according to learned counsel for the applicant, are questions of law, arising from the impugned order dated 29.08.2012, passed by the Appellate Tribunal Inland Revenue (Pakistan), Karachi in STA No. 153/KB/2011:-

- i) *Whether an order passed under Section 57 of the Sales Tax Act, 1990 by the Commissioner Appeal RTO, can be assailed before Appellate Tribunal Inland Revenue under the Provision of Section 46 of the Sales Tax Act, 1990?*
- ii) *Whether Appellate Tribunal Inland Revenue can set aside an Order of Commissioner Inland Revenue (Appeal), against which no appeal has been preferred with the Appellate Tribunal Inland Revenue by Respondent No.1?*
- iii) *Whether the order of the Respondent No.3 passes the test of judicial scrutiny or it is fraud in law?*

2. Learned counsel for the applicant submits that the Appellate Tribunal was not justified to entertain and decide an appeal against the impugned order passed by the Commissioner (Appeals), while deciding a rectification application under Section 57 of the Sales Tax Act, 1990, as no appeal could be filed against an order passed under Section 57 of the Sales Tax Act, 1990. It has been argued that impugned order may be set-aside and the questions proposed may be answered in favour of the applicant.

3. Conversely, learned counsel for the respondent has raised objection as to the maintainability of the instant reference application on the ground that the questions proposed through instant reference application do not arise from the impugned order, passed by the Appellate Tribunal. It has been contended by the learned counsel for the respondent that there was a mistake in the order, passed by the Commissioner (Appeals) in the instant case with regard to calculating the period of limitation provided under Section 36 of the Sales Tax Act, 1990, therefore, respondent department filed a rectification application under Section 57 of the Sales Tax Act, 1990, which was dismissed, thereafter, the respondent department preferred an appeal before the Appellate Tribunal, which has been allowed through impugned order, after careful perusal of the facts and circumstances of the instant case. Per learned counsel, the decision of the Appellate Tribunal does not suffer from any error or illegality in this regard, whereas, questions proposed through instant reference application do not arise from the order of Appellate Tribunal. It has been prayed that instant reference application may be dismissed.

5. We have heard the learned counsel for the parties, perused the material available on the record and the impugned order passed by the Appellate Tribunal in the instant case, as well as the orders of the two

forums below. From perusal of the impugned order, passed by the Appellate Tribunal in the instant case, it appears that the applicant department has never raised any ground with regard to the jurisdiction of the Appellate Tribunal to entertain and decide an appeal against an order, passed by the Commissioner (Appeals), while dismissing the application filed under Section 57 of the Sales Tax Act, 1990, nor there has been any finding recorded by the Appellate Tribunal in this regard. On the contrary, the issue relating to the limitation available under Section 36 (3) of the Sales Tax Act, 1990 has been decided in the following terms:-

"2. Both the learned representatives appearing at the bar have made their submission and relevant record perused. The taxpayer submitted his written argument dated 28-06-2012 that the impugned order in Appeal No. 163/2011 is valid on the ground that the impugned order was passed after 722 days. Whereas the appellant has argued that the impugned order was passed within the prescribed limit as provided under Section 36 (3) of the Sales Tax Act, 1990. The instant order was passed within 35 days and not 722 days.

3. The main issued involved in the instant appeal is whether the impugned Order in Original No. 18/2007 passed by the learned CIR (A) is hit by limitation or not as provided under Section 36 (3) of the Sales tax Act, 1990.

4. We have heard the arguments advanced by the rival parties and perused the relevant record. During the proceedings before the learned bench, we have noted that the department raised as many as grounds of appeal in the memo of appeal, however at the time of hearing main thrust of the learned DR is with regard to the limitation as provided under Section 36 (3) of Sales Tax Act, 1990 and emphasized that the impugned order in Original No. 6/2005 dated 16-05-2005 was decided in view of the show cause notice issued on 12-04-2005 which is within 35 days of the issue show cause notice within the limitation period prescribed under Section 36 (3) of the Sales Tax Act, 1990. Thereafter the case was re-opened on the recommendation of Federal Tax Ombudsman vide order dated 28-02-2007 and remanded for fresh adjudication. Accordingly notice was issued to the taxpayer on 08-03-2007 and case was adjudicated vide order in Original No. 18/2007 which is also within the time limit prescribed in section 36 (3), the contention of the learned CIR (Appeals-II), Karachi are that the order is passed after 722 days is not correct in the eyes of law. On the other hand learned counsel for the Taxpayer supported the order of the learned CIR (Appeals-II), Karachi with the findings recorded therein.

5. In view of the foregoing arguments and perusal of the statute, we are of the view that the contention put forth by the department has force as both the orders were passed within the prescribed period as laid down under section 36 (3) of the Sales Tax Act, 1990, while the submission

made by the taxpayer does not carry weight. Therefore, it is our considered decision to set aside the impugned order in Appeal No. 163/2011 as well as the impugned order in Appeal No. 17 of 2010 on the grounds that both the order in Original No. 6/2005 dated 16-05-2005 & 18/2007 dated 05-04-2007 were passed within the prescribed time limit provided under Section 36 (3) of the Sales Tax Act, 1990. This would result into the acceptance of departmental appeal."

6. Learned counsel for the applicant was required to assist the Court as to whether the above finding as recorded by the Appellate Tribunal on the point of limitation in terms of Section 36 (3) of the Sales Tax Act, 1990, suffers from any error or illegality, the learned counsel for the applicant in response has candidly submitted that the impugned order does not suffer from any error or illegality in this account. However, it has been argued by the learned counsel for the applicant that Appellate Tribunal was not authorized to hear an appeal against the order passed by the Commissioner (Appeals) on application under Section 57 of the Sales Tax Act, 1990. Attention of the learned counsel for the applicant was drawn to the provision of Section 47 of the Sales Tax Act, 1990, which authorizes an aggrieved person to file a reference against an order of Appellate Tribunal in respect of only such question of law, which may arise from the impugned order, passed by the Appellate Tribunal, whereas, admittedly in the instant case, questions proposed by the applicant department are not arising, from the order, passed by the Appellate Tribunal as the proposed questions were neither raised nor have been decided by the Appellate Tribunal in the instant case. It is well settled legal position that while exercising jurisdiction under Section 47 of the Sales Tax Act, 1990 or for that purpose, under Section 136 of the Income Tax Ordinance, 2001 and Section 196 of the Customs Act, 1969, this Court exercises a limited jurisdiction only to the extent of examination of such question of law, which was arisen and has been decided by the Appellate Tribunal,

whereas, question raised for the first time before this Court, which was neither raised nor has been decided by the Appellate Tribunal cannot be decided by this Court under its reference jurisdiction.

7. In view of hereinabove facts and circumstances of the case, we are of the opinion that instant reference application is mis-conceived, whereas, questions proposed by the applicant department do not arise from the impugned order passed by the Appellate Tribunal.

8. Accordingly, instant reference application is dismissed in limine along with listed applications.

JUDGE

JUDGE