

# IN THE HIGH COURT OF SINDH AT KARACHI

Constitutional Petition No.D- 3730 of 2016

Present:

Mr. Justice Aqeel Ahmed Abbasi.

Mr. Justice Khadim Hussain M. Shaikh.

Sheikh Wajahat .----- Petitioner

Versus

Federation of Pakistan & others ----- Respondents

Date of hearing: 29.11.2016

Date of order: 29.11.2016

Petitioner: Through Mr. Muhammad Kaukab Sabahuddin,  
advocate

Respondents: Through Mr. Sarfaraz Ali Metlo & Mr. Mir  
Hussain, Standing Counsel.

## O R D E R

**Aqeel Ahmed Abbasi, J:-** Through instant petition, the petitioner has expressed his grievance against the impugned recovery notice issued by the respondent, under Section 11-A of the Sales Tax Act, 1990, and has sought following reliefs:

- i) Declare that the impugned recovery Order is illegal and without jurisdiction and thereby quash the same.
- ii) Restrain the Respondents from encashing the Pay Orders obtained illegally from the Bank Account of the Petitioner till the decision of this Petition.
- iii) Direct the Respondent to refund the amount illegally withdrawn from the Petitioner's bank accounts in case the Pay Orders has been encashed.
- iv) Direct the Respondent to De-freeze the bank Accounts of the Petitioner.
- v) Prohibit and restrain the Respondents and their officers including the Respondent No.4 from taking any action against the Petitioner on the basis of impugned recovery Order issued by Respondent No.4 or taking any other adverse action or criminal proceedings, including attachment/withdrawal of alleged amount from the bank account of the Petitioner or from interfering with the liberty or business operations of the petitioner.

- vi) Grant such further relief which this Honourable Court may deem fit and proper in the circumstances of the case including the cost of petition.

2. Notices were issued to the respondents as well as the learned DAG, pursuant to which, the respondents have filed their comments wherein the relief sought by the petitioner in the instant petition has been disputed, as according to the respondents, the impugned demand of sales tax has been rightly recovered from petitioner in terms of authority as vested in the respondents in terms of Section 11-A of the Sales Tax Act, 1990.

3. However, on 08.11.2016 learned counsel for petitioner submitted that the subject controversy agitated through instant petition, has already been decided by a Division Bench of this Court, and requested for time to place on record the copy of such reported decision. Today, learned counsel for the petitioner has placed on record copies of two reported decisions on the subject controversy, one passed by a Division Bench of this Court in the case of Messrs Advance Telecom vs. Federation of Pakistan and 3 others (2015 PTD 462) in which, one of us, namely, Aqeel Ahmed Abbasi, J, was a member of the Bench, whereas, copy of another reported decision passed by the learned Lahore High Court in the case of Messrs Lahore Electric Supply Company Ltd through Director Legal vs. Federal Board of Revenue through Chairman and 2 others (2015 PTD 1), has also been placed on record. Learned counsel for the petitioner has read out the relevant findings of both the above reported decisions on the subject controversy, and submits that the impugned recovery Notice issued under Section 11-A of the Sales Tax Act, 1990, by the respondent in the instant matter, may be declared to be illegal and the petition may be disposed of in terms of the aforesaid decisions on the same subject controversy by applying the law of precedence. While confronted with above factual position, learned counsel for the respondent could not dispute the same and submitted that petition can be disposed of in terms of above two decisions of this Court as well as the decision by Lahore High Court.

4. We have heard the learned counsel for both the parties, perused the record and the cited decisions of this Court as well as the learned Lahore High Court.

5. It will be appropriate to reproduce the relevant finding of the Division Bench of this Court in the case of M/s. Advance Telecom (supra) which reads as follows:-

“9. Though, we have held that the impugned action was without any lawful authority and jurisdiction, however, we may further observe that even otherwise the action which was taken purportedly in terms of section 11-A read with section 48(1) of the Sales Tax Act, 1990 is also misconceived and without any lawful authority, as the instant matter on its facts and circumstances do not attract the provisions of section 11-A of the Sales Tax Act, 1990. It would be advantageous to refer to the said provision which reads as under:--

[11A. Short paid amounts recoverable without notice.--- Notwithstanding any of the provisions of this Act, where a registered person pays the amount of tax less than the tax dues as indicated in his return, the short paid amount of tax along with default surcharge shall be recovered from such person by stopping removal of any goods from his business premises and through attachment of his business bank accounts, without giving him a show-cause notice and without prejudice to any other action prescribed under section 48 of this Act or the rules made thereunder:

Provided that no penalty under section 33 of this Act shall be imposed unless as show cause notice is given to such person.]”

10. From perusal of the above provision it appears that where a registered person pays the amount of tax less than the tax due as indicated in his return, the short paid amount of tax along with default, surcharge shall be recovered from such person by stopping removal of goods from his business premises and through attachment of his business bank account without giving him a show-cause notice and without prejudice to any other action prescribed under section 48 of the Act or the rules made thereunder. The respondents Nos. 3 and 4 have tried to take shelter under this provision of the Sales Tax Act, however, we are of the view that such stance of respondents Nos. 3 and 4 is entirely misconceived, as this provision relates to a situation when a registered person has paid the amount of tax, which is other than the tax due as indicated in his return. This would mean that if a registered person files its return and indicates any amount in the said return as payable, and fails to pay the said amount of tax which is due on the basis of the return itself, an action under section 11-A of the Sales Tax Act, 1990, can be initiated by the respondent department, whereas in the instant matter the petitioner is disputing the amount being claimed by the respondents as due, as according to the petitioner they have already paid and discharged the liability of the tax due at the time of import in terms of S.R.O. 460(I)/2013 dated 30-5-2013 and are not required to pay any further tax at the stage of sale and supply of the mobile phones imported by them. The petitioners return of Sales Tax do not disclose any amount which is due, and has not been paid, hence the case of the petitioner does not fall within the ambit of section 11-A of the Sales Tax Act, 1990, as erroneously claimed by respondents Nos. 3 and 4. If the interpretation placed by respondents Nos. 3 and 4 is accepted, then the provision of section 11 of the Sales Tax Act, 1990, which provides for assessment and recovery of tax not levied or short levied or erroneously refunded, would become redundant and such redundancy cannot be attributed to the legislature which again is a settled principle of law.

11. In view of herein above facts and circumstances of the case, we are of the view that the impugned action taken by respondents Nos. 3 and 4 by issuing attachment notice under section 48(1) of the Sales Tax Act, 1990 and the recovery of the amount of Rs. 34,78,9711 is illegal and without any lawful authority and jurisdiction. Consequently, we had allowed instant petition vide short order dated 22-9-2014, whereby we had directed the respondents to refund the said amount recovered unlawfully, within three days from the order of this Court. These are the reasons of the short order.”

6. It will be equally relevant to reproduce the finding of the Division Bench of Lahore High Court in the case of M/s. Lahore Electric Supply Company (supra) which read as follows:

“12. We are afraid, the view expressed in the impugned judgment that verification of electricity bills, placed on the website of the appellant, is permissible and reliance can be placed on any other extraneous information other than the amount of tax due indicated in the sales tax return under section 11A, is not the correct legal position. For section 11A to come into operation, only the amount of tax due indicated by the taxpayer in the sales tax return is to be considered. We may add for the sake of completeness that even though the taxpayer is under a legal obligation to file a true and correct return, any alleged violation of the same can only be resolved through adjudicatory process provided under section 11 of the Act subject to the selection of the case of the taxpayer under the Act and not through the mechanism of section 11A which is purely a recovery provision.

15. For the above reasons instant appeal, as well as, connected appeals and writ petitions are allowed and impugned Notices dated 28-10-2013 issued under section 11A of the Act and subsequent recovery thereunder are declared illegal and without lawful authority and are, therefore, set aside.”

7. Since the subject controversy agitated through instant petition is identical to the one as referred in the above reported decisions, whereas, learned counsel for the respondent has also conceded the fact that the legal controversy relating to scope of the provisions of Section 11-A of the Sales Tax Act, 1990, has already been decided in the above reported cases, therefore, we hold that the impugned recovery Notice dated 13.06.2016 issued by the Deputy Commissioner-IR, E & C Unit-4, Zone-I, Large Taxpayers Unit-II, Karachi, under Section 11-A of the Sales Tax Act, 1990, is illegal and has been issued without lawful authority, hence it is hereby set-aside. Instant petition is disposed of in terms of the aforesaid decisions alongwith listed applications. Consequently, the respondents shall refund the amount of the sales tax recovered pursuant to impugned recovery notice, preferably, within a period of two weeks from the date of this order. However, dismissal of instant petition in the above terms will not prevent the respondent department from initiating any lawful proceedings under the Sales Tax Act, 1990, for proper assessment and recovery of sales tax liability from the petitioner, however, subject to observing all the codal formalities.

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