

IN THE HIGH COURT OF SINDH, KARACHI

C. P. No. D – 5066 of 2017

Date	Order with signature of Judge
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Before:
Mr. Justice Aqeel Ahmed Abbasi.
Mr. Justice Arshad Hussain Khan.

Karachi International Container Terminal

Vs.

Sindh and others

Petitioner: *Mr. Ali Almani, Advocate.*

Respondents: *Malik Naeem Iqbal, Advocate alongwith
M/s.Ghulam Murtaza Korai, Law Officer,
Syed Zainul Abdin Shah, D.C, Ms.Anum
Shaikh, A.C. .
Mr. Saifullah, AAG.*

Date of Hearing: 14.12.2017.

Date of Order: 14.12.2017.

JUDGMENT

Aqeel Ahmed Abbasi, J: Through instant petition, the petitioner has impugned a notice of recovery/attachment dated 01.08.2017 issued under Section 47-A of the Sindh Sales Tax on Services Act, 2011, by the respondent No.3 to the petitioner and has sought following relief(s):-

- (i) Declare that the impugned Notice is illegal and without lawful authority.
 - (ii) Direct the respondents not to encash the pay order No.11026393 dated 01.08.2017 for an amount of Rs.160,588,416 and direct the Respondent No.4 to cancel the pay order.
- OR
- (iii) In the alternative, direct the Respondent No.1 to 3 to refund the amount of Rs.160,588,416 to the Petitioner.
 - (iv) Prohibit the respondents from taking encashing the pay order No.11026393 dated 01.08.2017 for an amount of Rs.160,588,416/- and suspend the impugned Notice.
 - (v) Grant such other relief as may be deemed necessary in the circumstances of the case.
 - (vi) Grant costs.

2. Briefly the facts as stated in the instant petition are that petitioner is a Container Terminal Operating at Karachi Port, who provides services for the purposes of operating the terminal including technical services from foreign companies. The petitioner claims to make payment of sales tax on the technical services (as input tax) provided by the petitioner under the Sindh Sales Tax on Services Act, 2011, and also pay sales tax on terminal operating services (as output tax). On 25.07.2017, petitioner received a notice from respondent No.3 under Section 52 of the Act, 2011, require the petitioner to provide information and to explain as to how the services received have been used or consumed in providing or rendering terminal operating services. Per learned counsel, petitioner requested for time to submit reply to such notice, however, instead of providing opportunity to the petitioner the impugned notice under Section 47-A of the Sindh Sales Tax Act on Services, 2011, was issued to the petitioner, whereby, the petitioner's bank accounts were attached, and a pay order of an amount of Rs.160 million was obtained from the bank of petitioner, which according to respondent, amount was allegedly wrongfully adjusted as input tax.

3. Learned counsel for the petitioner has vehemently argued that in the garb of notice under Section 47-A of the Act, 2011, the respondents without creating any demand in accordance with law, have recovered an amount of Rs.160,588,416/- through coercion, whereas, no opportunity whatsoever has been provided to the petitioner to explain its position. It has been further contended by the learned counsel that respondents had no material whatsoever to issue the impugned recovery notice of attachment of bank account of the petitioner as neither any lawful demand has been created against the petitioner after providing any opportunity of being heard under the Sindh Sales Tax on Services Act, 2011, nor under Section 47-A of the Act, 2011, such demand can be recovered as the same is not the admitted liability of the petitioner as per return. Learned counsel for the petitioner further argued that respondents have failed to appreciate that in case of any dispute with regard to the tax liability of the petitioner, which is otherwise not admitted by the petitioner, the respondents were required to issue a proper Show Cause Notice for the purposes of assessment of the tax liability in accordance with law after providing opportunity of being heard, and thereafter a lawful demand could have been created through the assessment order in terms of Section 23 of the Sindh Sales Tax on Services

Act, 2011. Per learned counsel, as per return filed by the petitioner for the relevant tax period June, 2017, an amount of Rs.667,782/- has been shown as total tax liability of the petitioner towards sales tax on services, which amount has already been paid by the petitioner, therefore, the recovery of the impugned demand through impugned notice under Section 47-A is without lawful authority and of no legal effect. Learned counsel for the petitioner further submits that under similar circumstances a Divisional Bench of this Court in the case of ***Messrs Advance Telecom vs. Federation of Pakistan and 3 others [2015 PTD 462]*** and ***Messrs Lahore Electric Supply Company Ltd through Director Legal vs. Federal Board of Revenue through Chairman and 2 others [2015 PTD 1]*** has declared the similar notice for recovery of alleged amount of sales tax under Section 11-A of the Sales Tax Act, 1990, as without lawful authority, hence prayed that the impugned recovery proceedings may be declared to be illegal and without lawful authority and respondents may be directed not to encash the pay order No.11026393 dated 01.08.2017 for an amount of Rs.160,588,416/- drawn from Habib Metropolitan Bank Ltd. Clifton Branch, Karachi, which shall be directed to be deposited in Bank of petitioner, if said amount has already been encashed by respondents.

4. Conversely, learned counsel for the respondents has argued that the impugned recovery/attachment notice under Section 47-A of the Sindh Sales Tax on Services Act, 2011, was issued pursuant to earlier Notice under Section 52 of Sindh Sales Tax on Services Act, 2011, whereby, the petitioner was required to submit certain details. However, per learned counsel, since no reasonable explanation was offered by the petitioner nor any detail was provided by petitioner, therefore, Notice under Section 47-A of the Act, 2011, for the recovery of sales tax liability and attachment of bank account of the petitioner was issued. It has been further argued by the learned counsel for the respondents that impugned action has been taken against the petitioner on the basis of information available in the sales tax return filed by the petitioner for the tax period June, 2017, whereas, the respondents have a prima-facie case for the recovery of Rs.160,588,416/- as the petitioner could not explain as to how the aforesaid amount has been claimed as input adjustment against "Franchise Services", which amount was not admissible towards input adjustment under the law. Per learned counsel, petitioner is liable to make payment of the aforesaid

amount in accordance with law as per information provided in the sales tax return for the tax period June, 2017, therefore, the proceedings under Section 47-A of the Sindh Sales Tax on Services Act, 2011 are lawful and do not require any interference by this Court.

5. We have heard the learned counsel for the parties, perused the record with their assistance as well as case law relied upon by the learned counsel for the parties in support of their contentions. It will be advantageous to examine the provision of Section 47-A of the Sindh Sales Tax on Services Act, 2011, which require interpretation by this Court, and reads as follows:-

[(47A) 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 due as indicated in his return, the short-paid amount of tax along with default surcharge shall be recovered from such person by attaching his bank accounts, without giving him a show cause notice and without prejudice to any other action prescribed under section 66 of this Act or the rules made under this Act:

Provided that no penalty under section 43 of this Act shall be imposed unless a show cause notice is given to such person.”

6. Since reliance has been placed on the two reported judgments one of this Court and the other of the Lahore High Court as referred to hereinabove in respect of proceedings under Section 11-A of the Sales Tax Act, 1990, which according to learned counsel for the petitioner, are peri-materia to the provisions of Section 47-A of the Sindh Sales Tax on Services Act, 2011, therefore, it will be advantageous to compare both the provisions of law, and also to examine the applicability of the ratio of the cited judgments to the facts of the instant case. Provisions of Section 11-A of Sales Tax Act, 1990 read as follows:-

“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 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 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 a show cause notice is given to such person.”

7. From perusal of hereinabove provisions of Section 11A of the Sales Tax Act, 1990 and Section 47A of the Sindh Sales Tax on Services Act, 2011, it is clear that both the provisions are identical in nature and effect, whereby, the tax authorities have been given powers to recover the amount of tax from the person, less than the tax due as indicated in his return, the short paid amount of tax alongwith default surcharge through attachment of bank accounts, without giving a Show Cause Notice. However, it is pertinent to note that under the aforesaid provisions of law, the tax authorities are only authorized to make recovery of the short paid amount of tax, which was due as indicated in his return, whereas, the aforesaid provisions of law cannot be invoked to make assessment, create liability of tax and to recover the same without issuing any Show Cause Notice to the taxpayer, and that too, in the absence of any lawful assessment proceedings in accordance with law. In the aforesaid decision of the Divisional Bench of this Court as well as of the Lahore High Court, under similar facts and circumstances as of the instant case, the recovery Notices under Section 11A of the Sales Tax Act, 1990, have been declared to be illegal and without lawful authority. It will be advantageous to reproduce herein under the relevant finding of Divisional Bench of this Court in case of *Messrs Advance Telecom v. Federation of Pakistan and 3 others* [2015 PTD 462] as contained in Para 10 and 11 of the said judgment, which reads as follows:-

“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.”

8. Learned counsel for the respondent was confronted to assist this Court as to whether the ratio of the aforesaid judgment is applicable to the facts of the instant case keeping in view the fact that provisions of Section 11A of the Sales Tax Act, 1990 and Section 47A of the Sindh Sales Tax on Services Act, 2011, are *peri-meteria* in nature, in response to which, learned counsel for the respondents has candidly submitted that the ratio of the cited judgments is equally applicable to the facts of the instant case.

9. In view of hereinabove facts and circumstances of the case and by respectfully following the judgment of this Court, and by placing reliance in the

judgment of the Lahore High Court on the subject controversy, instant petition was allowed vide our short order dated 14.12.2017, in the following terms:-

“14.12.2017.

*Mr. Hussain Ali Almani, Advocate for the petitioner.
Mr. Malik Naeem Iqbal, Advocate for the respondent.
Syed Zainul Abdin Shah, Deputy Commissioner, SRB.
Ms. Anum Shaikh, Assistant Commissioner SRB
Mr. Ghulam Murtaza Korae, Law Officer SRB.
Mr. Saifullah, AAG.*

For the reasons to be recorded later on, instant petition is allowed in terms of reported judgments of this Court as well as of the Lahore High Court in the case of Messrs Advance Telecom vs. Federation of Pakistan and 3 others [2015 PTD 462] and Messrs Lahore Electric Supply Company Ltd through Director Legal vs. Federal Board of Revenue through Chairman and 2 others [2015 PTD 1]. Respondents are directed to deposit the amount, which they have collected from the Bank of petitioner in the shape of pay order in the sum of Rs.160,588,416/= with the Nazir of this Court within 02 days from the date of this order, who shall invest the same in some profit bearing Scheme of the Government.”

The above are the reasons of our short order.

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