

IN THE HIGH COURT OF SINDH, KARACHI

Const. Petition No. D – 6900 of 2018

PRESENT:

MR. JUSTICE AQEEL AHMED ABBASI.
JUSTICE MRS. ASHRAF JEHAN.

M/s S. P. (Private) Limited

Vs.

The Federation of Pakistan & others

Petitioner: through Mr. Mushtaque Hussain Qazi,
advocate a/w Ms. Ghazala Rafiq,
advocate.

Date of Hearing: 03.10.2018.

Date of Order: 03.10.2018.

ORDER

Aqeel Ahmed Abbasi, J:- Through instant petition, petitioner has impugned the order dated 12.09.2018 passed by the Appellate Tribunal Inland Revenue on stay application i.e. MA (Stay) No.511/KB/2018 filed by the petitioner seeking interim relief(s) during pendency of the appeal being STA No.521/KB-2018, whereas, following relief(s) has been sought:-

- i) *declare that impugned order 12.09.2018 passed by the learned Appellate Tribunal Inland Revenue is arbitrary, contrary to law, illegal, mala fide, unconstitutional and of no legal effect;*
- ii) *declare that the order-in-original No.01 of 2017 dated 09.08.2017 has merged with the order in Appeal dated 25.09.2017 passed by the learned Commissioner Inland Revenue (Appeals-III), Karachi;*
- iii) *declare and direct that during the pendency of appeal filed by the petitioner before the learned Appellate Tribunal the Respondents cannot frame second assessment and again levy sales tax for the same period being double jeopardy under Article 13(1) of the Constitution, 1973;*
- iv) *declare and direct that since the earlier assessment made by the Respondent No.4, which has merged with the order of the learned Commissioner Inland Revenue (appeals) which is subject matter of appeal pending before the*

learned Tribunal, therefore, the second assessment intended to be made by the Respondent No.4 would render the said appeal infructuous depriving the Petitioner of fair trial in terms of Article 10A of the Constitution, 1973;

- v) quash and set aside permanently impugned notice 09.08.2018 issued by the Respondent No.4 and the impugned order dated 12.09.2018 passed by the learned Appellate Tribunal Inland Revenue;*
- vi) prohibit and restrain the respondents and their officers / subordinates, cronies or any other person from taking any adverse action against the petitioners pursuant to impugned order of the learned Appellate Tribunal Inland Revenue;*
- vii) grant any other relief deemed just and appropriate in the circumstances of the case; and*
- viii) grant costs of the petition.*

2. Learned counsel for the petitioner, while giving the brief background of the case, has submitted that Order-in-Original No. 01 of 2017 dated 09.08.2017 was passed by the respondent against which, petitioner filed an appeal before Commissioner (Appeals-III), Inland Revenue, Karachi under Section 45-B of the Sales Tax Act, 1990, which appeal of the petitioner was decided against the petitioner vide order dated 25.09.2017. However, according to learned counsel, the order passed by the Commissioner (Appeals-III) Inland Revenue, Karachi, has also been assailed by the petitioner while filing an appeal alongwith stay application before Appellate Tribunal Inland Revenue (Pakistan) Karachi, whereas, no order has been passed by the Appellate Tribunal so far on the main appeal. According to learned counsel, during pendency of the main appeal before Appellate Tribunal, impugned order dated 12.09.2018 has been passed on stay application of the petitioner i.e. *MA (Stay) No. 511/KB/2018 [STA No.521/KB/2018]*, whereby, it has been held that stay application filed by the taxpayer is without cause of action and merits, hence the same has been dismissed. Per learned counsel, the impugned order has been passed on the basis of misreading and non-reading of facts

as according to learned counsel, the petitioner through stay application did not seek any relief against recovery of demand and tax, on the contrary, a request for an ad-interim order was made to the effect that respondents may be restrained from proceeding further pursuant to order of the Commissioner (Appeals-III) Inland Revenue, Karachi, whereby Order-in-Original No.1/2017 dated 09.08.2017 has been set-aside and matter has been remanded back to the Taxation Officer with directions. Per learned counsel, restraining order from passing any order after remand of the case by the Commissioner (Appeals) was also sought till final decision of the appeal of the petitioner pending before the Appellate Tribunal. It has been further contended by the learned counsel for the petitioner that respondents have issued a Notice to the petitioner for the purposes of re-assessment inspite of the fact that appeal has already been filed by the petitioner before the Appellate Tribunal Inland Revenue against the order passed by the Commissioner (Appeals) in the instant case, whereby, the matter has been remanded back to the Officer with directions to approach the Directorate of I&I, Karachi, for "provision of records to the appellant and then seek explanation of the appellant on issues confronted". Learned counsel further submits that response to aforesaid Notice has been furnished by the petitioner in writing through his counsel, wherein, it has been stated that since an appeal has been filed against order of remand against Commissioner (Appeals), therefore, impugned Show Cause Notice may be either withdrawn, or the proceedings of re-assessment may be kept in abeyance, till final decision of the appeal by the Appellate Tribunal Inland Revenue, Karachi in the aforesaid appeal. It has been prayed that the impugned order passed by the Appellate Tribunal on stay application, may be set-aside, whereas, respondents may be

restrained for proceedings further against the petitioner in the instant case till final decision of the appeal by the Appellate Tribunal Inland Revenue.

3. We have heard the learned counsel for the petitioner, perused the record and have also gone through the impugned order passed by the Appellate Tribunal Inland Revenue Karachi on 12.09.2018 in *MA (Stay) No. 511/KB/2018 [STA No.521/KB/2018]*. From perusal of the order passed by the Appellate Tribunal Inland Revenue in the instant case, it appears that whatever has been argued before us by the learned counsel for the petitioner regarding restraining order sought by the petitioner before the Appellate Tribunal through stay application filed on behalf of petitioner, nothing has been incorporated in the impugned order passed by the Appellate Tribunal. On the contrary, through impugned order, it has been held that *“taxpayer’s apprehension and concerns have been mitigated and they have been given fresh opportunity to plead their case before the department with specific directions to the concerned officer to ensure due process of law before passing any order, therefore, stay application filed by the taxpayer is without any cause of action and merit. The same is therefore dismissed”*. Whereas, there seems no arguments on behalf of the petitioner nor any finding has been recorded by the Appellate Tribunal Inland Revenue, to the effect that respondents may be restrained from proceeding further in the instant case till decision of appeal by the Appellate Tribunal.

4. Under the Sales Tax Act, 1990, any adverse can be assailed before the Commissioner (Appeals), by filing an Appeal under Section 45-B of the Sales Tax Act, 1990, which, remedy in the instant case has already been availed by the petitioner, whereas, the Commissioner (Appeals-III) Inland Revenue, Karachi, vide order dated

30.09.2017, has set-aside the Order-in-Original No.01/2017 dated 09.08.2017 and has been pleased to disposed of the appeal in the following terms:-

“Perusal of above shows that in support of serious allegations of tax fraud credible evidences as required by the learned Magistrate-XIV were produced before the court. On examination of which such order for search and seizer of record was issued by the learned court. But since the officer did not consider the most vital aspect of the case, i.e. non-availability of case record with the appellant, in the interest of justice, the impugned order is set-aside and this case is remanded back to the officer with directions to approach the Directorate I&I Karachi for provision of record to the appellant and then seek explanation of the appellant on issues confronted and pass a speaking order after affording adequate opportunity of being heard to the appellant.”

Aforesaid finding by Commissioner (Appeals) reflects that the impugned Order-in-Original has been set-aside, and the matter has been remanded back to the officer with certain directions and currently, there is no adverse order against the petitioner on merits of the case. However, petitioner has chosen to file an appeal against an order of remand, instead of getting the matter duly re-assessed in accordance with law, and as per directions of Commissioner (Appeals), whereas, instant petition has been filed under Article 199 of the Constitution challenging the order dated 12.09.2018 passed by the Appellate Tribunal in MA (Stay) No.511/KB/2018 (STA No.521/KB/2018) with a prayer that respondents may be restrained from re-assessment proceedings pursuant to order of remand passed by the Commissioner (Appeals).

5. Presently, there is no adverse order against the petitioner, nor there seems any proceedings initiated by the respondents for the recovery of the disputed amount of tax, for the reasons that impugned Order-in-Original has already been set-aside by the Commissioner (Appeals), whereas, the matter has been remanded

back for re-assessment in accordance with law. From perusal of the impugned order passed by the Appellate Tribunal on the stay application in the instant case, there seems to be no error in law, whereas, the reasons disclosed in the impugned order for rejecting stay application also appears to be correct. However, it appears that the grievance of the petitioner is based on the allegation that the impugned order passed by the Appellate Tribunal on the stay application is contrary to the facts of the case, as stated by the petitioner in the stay application, wherein, according to the learned counsel, a restraining order was solicited against the respondents not to proceed against the petitioner pursuant to order of remand passed by the Commissioner (Appeals) in the instant case till final decision of the appeal filed by the petitioner before the Appellate Tribunal Inland Revenue. We are of the view that instead of approaching this Court against the impugned order, which according to learned counsel for the petitioner, has been passed on the basis on incorrect facts, non-reading or misreading of the facts as stated in the stay application filed by the petitioner before the Appellate Tribunal Inland Revenue. The proper course, which could have been adopted by the petitioner, was to file a rectification application under Section 221 of the Income Tax Ordinance, 2001, before the Appellate Tribunal against the impugned order with a prayer to re-call the impugned order and to pass appropriate restraining order on the basis of relevant facts and circumstances of the case, as according to petitioner, such facts as stated in the stay application have been ignored by the Appellate Tribunal, while passing the impugned order.

6. Learned counsel for the petitioner was confronted with above factual and legal position as emerged in the instant case, and was

also confronted, whereas, an option was also given to the learned counsel not to press instant petition and to seek appropriate remedy by approaching the Appellate Tribunal seeking rectification in terms of Section 221 of the Income Tax Ordinance, 2001, in accordance with law. However, learned counsel insisted to pursue the Constitutional Petition in the above format, while submitting that it was the fundamental right of the petitioner to file appeal against the order of remand passed by the Commissioner (Appeals) in the instant case, whereas, it is also the fundamental right of the petitioner to file a Constitutional Petition against the impugned order passed by the Appellate Tribunal Inland Revenue on the stay application and prayed that impugned order may be set-aside and respondents may be restrained from proceedings against petitioner, pursuant to order of remand passed by the Commissioner (Appeals) till final decision of the appeal by the Appellate Tribunal Inland Revenue.

7. As we have already observed that the order passed by the Appellate Tribunal on the stay application on the basis of facts and submissions of the learned counsel, as recorded therein, prima facie does not suffer from any illegality, therefore, we are not inclined to interfere in the impugned order, unless the petitioner brings undisputed facts to this Court and can demonstrate that the order passed by the Appellate Tribunal Inland Revenue on a interlocutory application is perverse, and without lawful authority. Accordingly, having found no substance in the instant petition, the same was dismissed in limine alongwith listed applications with the cost of Rs.10,000/- to be paid to the High Court Library Fund vide our short order dated 03.10.2018 and above are the reasons for such short order.

8. However before parting with the order, we may observe that petitioner is at liberty to approach the concerned Bench of the Appellate Tribunal by filing an application of rectification in terms of Section 221 of the Income Tax Ordinance, 2001, while stating the correct facts and the grounds as agitated before this Court, whereas, it is expected that application of the petitioner may be decided at an early date in accordance with law.

JUDGE

JUDGE

A.S.