

**ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI**

Present:-

**Mr. Justice Muhammad Iqbal Kalhoro.
Mr. Justice Abdul Mobin Lakho.**

C.P. No.D-91 of 2022

Yaseer-ul-Haq Effendi & another

Versus

Pakistan & others

For date of hearing : 07.02.2022.

Date of order : 11.02.2022.

Mr. Makhdoom Ali Khan, advocate for petitioner.
Mr. Shahbaz Sahotra, Special Prosecutor, NAB.
Mr. Irfan Ahmed Memon, DAG.

ORDER

Muhammad Iqbal Kalhoro, J:- Petitioners accused in reference No.16/2018 pending before learned Accountability Court at Karachi filed an application for transfer of the case under Ordinance XXVII of 2019 to the Special Judge Customs & Taxation having jurisdiction to try the cases of taxation, levies or imposts, dismissed vide impugned order 27.11.2021 have filed instant petition, among others, for the same relief.

2. As per allegations, petitioners, employees of Shell Pakistan Limited (SPL), sold illegally aviation fuel also known as Aviation Turbine Fuel (Jet Propulsion JP-1), which is although the same kind of product as Super Kerosene Oil (SKO) but is exempted from certain duties and taxes due to its exclusive use for defense and aviation purpose, in open market to the companies not authorized and registered to deal with such product causing a loss of Rs.2.37 billion to the national exchequer.

3. Learned defense counsel has argued that petitioners are not public servants and therefore cannot be subjected to provisions of National Accountability Ordinance, 1999; that impugned order is illegal and not sustainable in law; after second amendment, in terms of section 4 NAO, 1999, jurisdiction of the accountability court in the matters of taxation, levies etc. has been ousted; that case against the petitioners is evasion of taxes and duties, evident from allegation that they supplied subsidized JP-1 to non-aviation costumers at higher price

causing loss to the national exchequer through non-payment of such duties and taxes; because otherwise its sale in the open market is not forbidden under any law as confirmed by Oil & Gas Regulatory Authority (OGRA) in relevant correspondence; this kind of allegation i.e. not paying duties and taxes squarely falls within the ambit of amended section 4(2)(a) of NAO, 1999 and hence is to be tried by either appropriate authority of Federal Board of Revenue (FBR) or Special Judge Customs & Taxation. Learned counsel lastly read out section 4 of the NAO, 1999 and relied upon the case reported in PLD 1991 SC 344 to emphasize merit of his case.

4. On the other hand learned Special Prosecutor NAB and Deputy Attorney General both have opposed this petition stating that this is not the case of tax evasion but breach of trust which is punishable under section 9 (x) (xi) of NAO, 1999.

5. We have considered respective stances of the parties over the issue and perused material including the case law cited in defense. The reference against the petitioners and others is a result of a complaint lodged by the Pakistan State Oil (PSO) with NAB alleging illegal sale of aviation fuel JP-1 by the Management of SPL to unauthorized customers. In the enquiry and investigation *prima facie* it was found that SPL instead of supplying JP-1 to original customers: defense and aviation authorities on subsidized price as required sold the same as SKO at much higher price to the companies such as M/s Aerolube Pvt. Ltd., M/s Lucky Oil, etc. not authorized and registered to deal with POL products especially JP-1 or SKO, and thus earned huge profits. PSO and SPL are the only two Oil Marketing Companies authorized to supply JP-1 to different Airports. And because of such limited and specified use JP-1 is subsidized by the government, whereas SKO is a deregulated product can be sold in open market unlike the former.

6. These allegations as they are in our humble view do not allude to tax evasion on the part of petitioners and *prima facie* point out to breach of trust: selling a subsidized item meant for specified customers at higher price to non-authorized companies against the terms of relevant agreements and making illegal profits in the course. It is ostensibly misuse of authority on the part of

relevant officials entrusting subsidized fuel (JP-1) to the petitioners for supply to specified customers: defense and aviation and them (Petitioners) breaching such trust by selling it in open market at higher price and making gains therefrom. Tax evasion in simple parlance would mean using illegal means to avoid paying taxes; an illegal action by an individual or a company to avoid paying tax liability; misrepresentation in the form of either underreporting income, inflating deductions or hiding money and its interest in offshore accounts, etc. None of such incident of tax evasion seems attracted in the case of the petitioners as they are not alleged to have avoided paying tax liability, etc. on earnings. When section 4 (2) (a) of NAO, 1999 says that the provisions of this law shall not be applicable to persons or transactions, namely: all matters pertaining to federal, provincial or local taxation, other levies or imposts, including refunds, or loss of exchequer pertaining to taxation. It essentially and exclusively refers to an action or omission carried on with a view to evade paying taxes, duties etc. on earnings, or to commit tax fraud for the same purpose upon which the relevant tax authority can competently exercise its jurisdiction and decide. Whether or not certain tax frauds could be or are amenable to penal laws is altogether a different subject is not required to be dilated upon here. But in any case, the case in hand has evidently no overtones of tax evasion or tax fraud to avoid paying tax liability to justify invoking of section 4 of this law. Just because it is said that on JP-1 the government, keeping in view its use for defense and aviation purpose, has not levied certain duties and taxes would not mean that the case involves issue of taxation. The petitioners by their alleged act are not stated to have evaded tax liability by concealing their incomes etc. but are said to have exploited state of affairs i.e. fuel subsidized due to its only use for defense and aviation purpose by selling it as unsubsidized fuel in open market at a higher price to unauthorized entities and raking in thus the illegal profits: breach of trust which is an offence *inter alia* u/s 9 (x) (xi) of NAO, 1999.

7. Even when we see at the matter from a different angle and take into account the original complaint lodged by PSO with NAB against SPL, we cannot but come to a same conclusion that this is not the case of tax evasion in essence but of breach of trust. PSO has not complained of tax fraud or evasion on the part of

accused in the complaint but has alleged that SPL in active connivance with management of unauthorized companies has illegally sold huge volume of aviation fuel JP-1 in open market instead of supplying the same to original customers i.e. defense authorities of Pakistan and aviation customers. Then the companies which got supply of such fuel thus further sold it as SKO at much higher price than ex-refinery price even at double rates and pulled in illegal gains. Evidently, nature of the complaint and the consequences it is going to yield, if any, are not tax-evasion related ostensibly to warrant transfer of the case from the Accountability Court to the Special Judge Customs & Taxation.

8. Whether such sale in fact constitutes an offense under NAO, 1999 or not is not the issue before us. The issue is whether after amendments in the said law the jurisdiction of Accountability Court over the matter has ceased to exist. The former has relevancy with merit of the case and if proved would obviate any justification to keep the proceedings alive. While the latter would merely impinge on jurisdiction of the Accountability Court and entail transfer of the case to the court competent to hear it. Therefore the argument of learned defense counsel that sale of such product in the open market is not illegal is not relevant for current discussion. The fact that the petitioners or any of the accused are not public servants in view of manifest phraseology of sections 4 and 9 of NAO, 1999 stipulating holder of a public office besides any other person to be within its purview likewise is sufficient to cast off any misgivings about its applicability to the petitioners. Even otherwise, its consequence, if any, is not likely to stoke transfer of the case from one court to the other and therefore is not helpful to the petitioners' case either on the issue in hand.

For foregoing discussion, we do not find merit in the petitioner and dismiss it accordingly along with all pending applications.

JUDGE
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