

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No. **D - 168** of 2015

Date	Order with signature of Judge
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Present:

**Mr. Justice Aqeel Ahmed Abbasi
Mr. Justice Zulfiqar Ahmed Khan.**

*For orders as to maintainability
of instant petition.*

25.04.2019

Mr. Sameer Ghazanfar, advocate for petitioners.

Mr. Muhammad Aqeel Qureshi, advocate for respondents

Ms. Lubna Perwez, Deputy Attorney General.

ORDER

1. Through instant petition, petitioners being aggrieved by an Assessment Order No. 01/2014 dated 12.11.2014 passed by the Deputy Commissioner Inland Revenue, E&C Unit – 08, Zone-II, RTO-II, Karachi/respondent No.3, and the subsequent recovery proceedings initiated against the petitioner pursuant to said assessment order, have impugned the same for being illegal and without lawful authority, whereas, following relief has been sought:-

“I. Declare that Sub-Section “9” to Section “3” of the Sales Tax Act, 1990, any and all proceedings initiated thereunder, including but not limited to, orders, notification, rules, regulations are illegal, discriminatory, unlawful, unjust and unconstitutional and liable to be struck down.

II. Permanently restrain and prohibit the respondents, their officers, any and every person working through or under them on their behalf or in their name from acting upon and/or implementing the Sub-Section “9” to Section “3” of the Sales Tax Act, 1990.”

2. Record shows that after filing instant petition on 09.01.2015, petitioners and their counsel did not remain vigilant to pursue the matter, whereas, except issuance of Notices to the respondents in the instant case, neither any restraining order has been passed against recovery proceedings, nor the operation of the impugned assessment order has been suspended. Whereas, on 17.01.2017, when the matter was taken up for hearing, learned counsel for petitioners was directed to satisfy the Court as to maintainability of instant petition, in view of preliminary objections raised by the respondents, while filing comments in the instant matter. During the course of proceedings in the instant case, it transpired that petitioners, in addition to filing instant petition, have also availed the remedy of appeal against the impugned assessment order, however, on 26.10.2017, when the matter was fixed in Court, learned counsel for petitioners argued that since the SRO No. 608(I)/2014 dated 02.07.2014 has been declared to be ultra vires by the learned Single Judge of the Lahore High Court in the case of ***M/s. H. Karim Buksh v. ACIR E&C Unit 04 Zone IV, Lahore & others*** in ***Writ Petition No. 26772/2016***, therefore, keeping in view the judgment of Lahore High Court in the above case, impugned order may be set-aside and the recovery proceedings against the petitioners in the instant matter may be declared to be illegal without lawful authority.

3. On the other hand, learned counsel for respondents has vehemently opposed the maintainability of constitutional petition and also disputed the above contention of learned counsel for petitioners, and submitted that neither the vires of SRO No. 608(I)/2014 dated 02.07.2014 has been challenged by the petitioners through instant petition, nor the provisions of sub-section 9 of Section 3 of the Sales Tax Act, 1990 have been declared to be ultra vires by the Lahore High Court in the aforesaid petition. It has been argued that an appealable order cannot be

challenged before two forums simultaneously, whereas, in cases where alternate remedy is available, and has been also availed, then constitutional petition cannot be filed.

4. While confronted with hereinabove submissions of learned counsel for respondents, learned counsel for the petitioners could not deny the fact that in addition to instant, petitioner has also availed the statutory remedy against the impugned assessment order by filing statutory appeal, nor could deny the fact that in the instant petition vires of SRO No.608(1)/2014 has not been challenged. However, it has been submitted that SRO No. 608(I)/2014 dated 02.07.2014 was issued pursuant to sub-section 9 of Section 3 of the Sales Tax Act, 1990, whereby, certain amendments were introduced under Sales Tax Special Procedure Rules, 2007, whereafter, impugned assessment order was passed, therefore, according to learned counsel, case of the petitioners is covered by the decision of learned Single Judge of the Lahore High Court in the aforesaid petition, whereby, said SRO has been declared as ultra vires to Constitution. Learned counsel for the petitioners was inquired as to whether, the order of assessment, which has been impugned through instant petition, has been set-aside or modified in appeal or not, in response to such query, learned counsel for the petitioners pleaded no instructions. Learned counsel for petitioners was further inquired as to whether provisions of sub-section 9 of Section 3 of the Sales Tax Act, 1990 were challenged before the learned Single Bench of the Lahore High Court in the aforesaid petition, and as to whether, there has been any declaration with regard to legality or otherwise of such provisions. In response to such query, learned counsel for petitioners has candidly stated that there has been no such declaration by the learned Single Judge of the Lahore High Court, however, submitted that since, SRO No. 608(I)/2014f dated 02.07.2014, which according to learned counsel, has been applied in the case of the

petitioners also, has been declared to be ultra vires, therefore, the impugned assessment order may also be set-aside, and similar declaration in terms of the decision of the Lahore High Court, shall be made, and the recovery proceedings in the instant case may be declared to be without jurisdiction and lawful authority.

5. We have heard the learned counsel for the parties, perused the record with their assistance, which reflects that in the instant petition, the petitioners have not challenged the vires of SRO No. 608(I)/2014 dated 02.07.2014, on the contrary, a declaration in respect of sub-section 9 of Section 3 of the Sales Tax Act, 1990, has been sought, however, on vague grounds, whereas, the cause of grievance in the instant matter i.e. Assessment Order No. 01/2014 dated 12.11.2014 and the recovery proceedings thereto, has already been impugned by the petitioners, by filing statutory appeal under the Sales Tax Act, 1990. It appears that instant petition has been filed with an intention to seek some restraining order against the recovery proceedings initiated by the respondent No.3, pursuant to Assessment Order No. 01/2014 dated 12.11.2014, whereas, provisions of sub-section 9 of Section 3 of the Sales Tax Act, 1990 were challenged merely, to justify the filing of instant petition under Article 199 of the Constitution without any valid reasons. However, record shows that petitioner could not succeed to obtain any restraining orders against recovery of impugned demand from the Court, nor did pursue instant petition with due diligence, which is pending since 2014, however, without any useful progress. Accordingly, in view of above facts and circumstances of instant case, we are not inclined to examine the vires of sub-section 9 of Section 3 of the Sales Tax Act, 1990 or the SRO 608(I)/2014 dated 02.07.2014 in the instant proceedings, and may examine the same in some appropriate case as and when challenged on the constitutional touch stone of Article 199 of the Constitution. More

particularly, when alternate remedy of appeal has already been availed, therefore, keeping in view the facts and circumstances in the instant case, such declaration would be an academic discourse only, and would also effect the decisions by the appellate forums in the instant case. Whereas, parties cannot be allowed to abandon the statutory forum provided for redressal of grievance without any lawful justification.

6. Accordingly, we do not find any substance in the instant petition, which is misconceived and not maintainable, hence the same stands dismissed alongwith listed application. Petitioners, however, would be at liberty to continue to seek appropriate remedy before the statutory forums in accordance with law.

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A.S.