

IN THE HIGH COURT OF SINDH AT KARACHI
(Extraordinary Reference Jurisdiction)

Special F.E.R.A. No. 311 of 2018

Date	Order with signature of Judge
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Present:

Mr. Justice Aqeel Ahmed Abbasi
Justice Mrs. Rashida Asad

Fresh Case

- 1 For orders on office objection No. 20.
2 For hearing of Main Case.

18.02.2021:

Mr. S. Mohsin Imam, advocate for the applicant.

ORDER

1. Through instant Reference Application, the applicant department has proposed following questions, which according to learned counsel for the applicant, are questions of law, arising from the impugned order dated 26.03.2018 passed by the Appellate Tribunal Inland Revenue of Pakistan Karachi in FEA No.04/KB/2016 [Tax Year 2015], for opinion of this Court: -

“A. Whether under the facts and circumstances of the case, the learned Tribunal Inland Revenue was justified in upholding that the mens rea is a prerequisite for imposition of civil penalties under Federal Excise Act, 2005 and Sales Tax Act, 1990?

B. Whether under the facts and circumstances of the case, the learned Tribunal Inland Revenue was justified by deleting the demand of default surcharge and penalty under Section 34 & 33 of the Sales Tax Act, 1990 read with Section 8 & 19(1) of Federal Excise Act, 2005 despite the fact that the registered person has deliberately and willfully not paid the due

tax in time which they already collected earlier from customers as custodian?

C. Whether learned Tribunal was justified in the instant case to hold that the penalty order should have been passed under section 19 of the Federal Excise Act, 2005 instead of under section 33(5) of the Sales Tax Act, 1990 despite the fact that Section 7 and Second Schedule of the Federal Excise Act, 2005 has made duty on sugar to be collected in sales tax mode?"

2. After having read out the proposed questions and the impugned order passed by the Appellate Tribunal Inland Revenue, learned counsel for the applicant has submitted that the aforesaid questions are questions of law, arising from the impugned order passed by the Appellate Tribunal Inland Revenue, which may be answered in "Negative" against the respondent, as according to learned counsel for the applicant, since there was default on the part of the respondent, the imposition of penalty was justified.

3. We have heard the learned counsel for the applicant, perused the record and the impugned order passed by the Appellate Tribunal Inland Revenue in the instant case, and have also gone through with the relevant provision of law applicable in the instant case. From perusal of the orders passed by the two authorities below and the finding as recorded by the Appellate Tribunal Inland Revenue in the instant case, particularly, in Para: 8 of the impugned order, it transpires that for the alleged default in payment of Federal Excise Duty, provisions of Sales Tax Act, 1990 have been invoked, instead of invoking the provision of Section 19 of the Federal Excise Act, 2005. It will be advantageous to reproduce the relevant finding of the Appellate Tribunal Inland Revenue to this effect as contained in Para: 8 of the impugned order, which reads as follows:-

“8. We have also observed another glaring discrepancy in the penalty proceedings. The penalty has been levied u/s. 33(5) of the Sales Tax Act, 1990. There is specific section for levying penalty in Federal Excise Act, 2005 if the duty is not paid which is section 19 of the Federal Excise Act, 2005. We could not understand why the section which is for Federal Excise Duty has not been invoked and why penalty was levied u/s. 33(5) of Sales Tax Act, 1990. We find the orders of the two below officers not maintainable in view of this glaring discrepancy also.”

4. While confronted with hereinabove factual legal position, learned counsel for the applicant could not submit any explanation, nor could assist the Court that how the proposed questions are otherwise relevant for the purposes deciding the instant Reference Application. More particularly, when no question is proposed with regard to finding of the Appellate Tribunal Inland Revenue, which goes from route the proceedings.

5. Accordingly, we do not find any substance in the instant Reference Application is dismissed in limine alongwith listed application. Consequently, the questions proposed through instant Reference Application are answered in “**AFFIRMATIVE**” against the applicant and in favour of the respondent.

Instant Special Federal Excise Reference Application stands dismissed in the above terms alongwith listed application.

JUDGE

JUDGE

A.S.