IN THE HIGH COURT OF SINDH AT KARACHI

(Extraordinary Reference Jurisdiction)

Special S.T.R.A. No. 75 of 2018

Date	*Order with signature of Judge*

Present:

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

Fresh Case

1. *For orders on Misc. No. 3347/2018.*
2. *For hearing of Main case.*

19.08.2019:

Mr. Shakeel Ahmed, advocate for the applicant.

O R D E R

1. Through instant Reference Application, following two questions have been proposed by the applicant, which according to learned counsel for the applicant, are questions of law, arising from the impugned order dated 26.10.2017 passed by the Appellate Tribunal Inland Revenue (Pakistan) Karachi in STAs No. 135/KB/2014 for Tax Period July 2012 to June 2013 and require opinion of this Court:-

> *"i) Whether under the facts and circumstances of the case, the learned ATIR was justified to uphold the order of the learned Commissioner (Appeals-I) deleting the demand of Sales Tax of Rs.4,658,762/- under the law prescribed under Chapter XIII of Sales Tax Special Procedure Rules, 2007 read with Value of supply specified under Section 2(46)(ii) of the Sales Tax Act, 1990.*
>
> *ii) Whether under the facts and circumstances of the case, the learned ATIR was justified to uphold the order of the learned Commissioner (Appeals) under which the Commissioner (Appeals-I) had deleted the demand of default surcharge & penalty under the law prescribed under Section 34 & 33 of the Sales Tax Act, 1990 for violation of clause a(ii) of sub-section 46 of Section 2 of the Sales Tax Act, 1990.*

2. Learned counsel for the applicant, after having read out the proposed questions and the impugned order passed by the Appellate Tribunal as well as the orders passed by the two Authorities below, has submitted that the learned Appellate Tribunal was not justified to confirm the order passed by the Commissioner (Appeals) Inland Revenue in the instant case, without examining the merits for case independently, whereas, no separate reasons have been recorded. It has been prayed that the questions proposed through instant Reference are questions of law, and the same may be answered in "NEGATIVE' in favour of the applicant and against the respondent.

3. We have heard the learned counsel for the applicant, perused the record and the impugned order passed by the Appellate Tribunal, as well as the orders passed by the two Authorities below, with his assistance. From perusal of the Order-in-Original passed by the Deputy Commissioner Inland Revenue in the instant case, it appears that the value of supplies made by the distributer, has been presumed to be at 10%, therefore, amount exceeding 10% has not been allowed to be deducted input tax from the output tax under Section 7 of the Sales Tax Act, 1990. However, record shows that respondent has not been confronted with any material or evidence to justify such treatment by the Deputy Commissioner Inland Revenue i.e. application of standard rate of 10% being margin profit in the instant case. This aspect has been dealt with by both the Appellate Forums in the instant case independently. It will be advantageous to reproduce the relevant finding of the Commissioner (Appeals) on the subject controversy, which reads as follows:-

> *" I have perused the impugned order and noted that the officer has not shown faith on the value of supply on very nominal turnover of Rs.278 million against the total turnover of Rs.6700 million. The contention of the AR that risks and rewards are transferred to the distributor and*

thus distributor is not influenced how much margin/profit ha has to keep. Since, market forces are playing role for the determination of market value, therefore, it is incorrect to say that the value of supply was less than open market price. So far standard of 10% margin is concerned it is not supported by the paraliel cases so as to understand for the determination of said standard and appreciate the basis for creation of Sales Tax demand. When the officer has not given the basis of arriving at such 10% standard, then action of the officer for determining the open market price is found without foundation and thus not sustainable in the eyes of law and the impugned demand therefore, deleted."

4. The Appellate Tribunal Inland Revenue, after having examined the entire facts of the case and the relevant law relating to subject controversy, has been pleased to hold as under:

"11. I have heard the parties at length and have perused the facts and legal side of the case. We find great force in the arguments advanced by the learned counsel of the Respondent that the Respondent has been wrongly burdened for a presumed tax liability of his distributor. Since both the parties are separately registered under the sales tax law, the department could have or should have proceeded against the distributor instead of wrongly dragging the Resp9ondent into this unwarranted hassle of assessment and consequent litigation.

12. Secondly, it is equally important to note that market forces play their role for the determination of market values of any commodity. We find strength in contention of the learned counsel that after transfer of risks and rewards to the distributor, the Respondent could not influence how much margin/profit it should be kept by the Distributor. So far assumption of 10% profit margin is concerned, the DR could not produce relevant legal support for such an assumption and for creation of Sales Tax demand against the Respondent.

13. Lastly, it is also beyond comprehension why the department has not shown faith only on very nominal turnover of Rs.278 million against the total turnover of Rs.6,700 million when the business practice between the parties was the same. This cast a serious doubt on the

> *entire exercise and leads us to conclude that the purpose of instituting this case against the Respondent was sheer misuse of powers on the part of the appellant department.*
> *14. The upshot of the foregoing surmises is that actions of the tax department are found without foundation and thus are not sustainable in the eyes of law. Consequently, the order-in-original is confirmed and the impugned demand is deleted. The appeal of the department fails."*

5. Learned counsel for the applicant was specifically asked to refer to any material or evidence to justify disallowance of input tax adjustment against output tax in the instant case, however, he could not refer to any material or evidence, nor could refer to any provision of law, according to which, input tax adjustment could be disallowed on mere presumption relating to profit margin @ 10%. Learned counsel was also confronted to point out any error or discrepancy in the orders passed by both the Appellate Forums either on facts or in law, relating to the subject controversy, however, he could not refer to any error in law, nor could point out any discrepancy in the record. Learned counsel was also directed to assist this Court as to whether the proposed questions can be termed as a questions of law, as prima facie, neither any substantial question has been proposed, nor through proposed question any interpretation of the provisions of law is to be decided, whereas, both the orders of the Appellate Forums are based on concurrent findings on facts. In response to such query of the Court, learned counsel for the applicant has not been able to assist this Court as to how the orders passed by two Appellate Forums in the instant case require any interference by this Court, while exercising its reference jurisdiction under Section 47 of the Sales Tax Act, 1990.

6. In view of hereinabove facts and circumstances of the case, we do not find any substance in the instant Reference Applications, which is, accordingly dismissed in limine alongwith listed application.

Consequently, questions proposed hereinabove are answered in ‘AFFIRMATIRE’ against the applicant and in favour of respondent.

J U D G E

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A.S.