IN THE HIGH COURT OF SINDH AT KARACHI

(Extraordinary Reference Jurisdiction)

Special S.T.R.A No. 365 of 2019

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Date	*Order with signature of Judge*

Present:

Mr. Justice Aqeel Ahmed Abbasi
Mr. Justice Mahmood A. Khan.

Fresh Case

28.10.2019:

Mr. Muhammad Zubair, advocate for the applicant(s).

O R D E R

1. Following common Questions have been proposed in both the Reference Applications, said to have arisen from the combined impugned Order dated 11.03.2019 passed by the Appellate Tribunal, Inland Revenue of Pakistan, Karachi in STA No. 23/KB/2015 [Tax Period January to December 2010] & STA No. 59/KB/2015 [Tax Period January to December 2011]:-

> *"A. Whether on the facts and circumstances of the case, the learned Appellate Tribunal Inland Revenue was justified to allow taxpayer's appeal against demand created on account of non withholding of Sales tax and FED in sales tax mode @ 1% on local purchase and 16% on advertisement services?*
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> *B. Whether on the facts and circumstances of the case, the learned Appellate Tribunal Inland Revenue was justified to allow taxpayer's appeal mere on technical ground without considering the merit of the case despite the fact that it is settled principle of law that revenue cannot be compromised on the alter of technicalities?"*

After having read out proposed questions and the order passed by the Customs Appellate Tribunal, learned counsel for the applicant(s) has argued that the appeal of the department has been dismissed by the Tribunal on technical grounds, whereas, according to learned counsel, there was default on the part of the respondent bank, which failed to withhold tax on several payments made during the financial year(s) under consideration, in terms of SRO 660(I)/2007 dated 30.06.2007. It has been prayed that questions proposed in the instant References are questions of law arising from the impugned order passed by the Appellate Tribunal, which may be answered in favour of the applicant(s) and against the respondent and the impugned order passed by the Appellate Tribunal may be set-aside.

2. We have heard the learned counsel for applicant(s), perused the record with his assistance and also gone through the impugned order passed the Appellate Tribunal Inland Revenue in the instant cases. It will be advantageous to reproduce the relevant finding of the Appellate Tribunal in respect of the proposed questions, which is self-explanatory and reads as follows:-

> *"28. This issue also stands settled by the judgment of the Appellate Tribunal Lahore whereby it is held that the relevant provisions to make assessment for any default of withholding tax were not provided in the statute in the relevant period; hence the adverse inference drawn on that account is not sustainable. Reliance in placed on the decision in the case of* **M/s. United Industries Ltd. Faisalabad reported as STA No. 130/LB/2013.**
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> *The relevant extract from the judgment of the Division Bench is reproduced hereunder:*
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> > "After hearing the parties and going through the record as well as case law cited at bar we are of the view that submissions made by

learned AR carry force. However the case is disposed on the legal issue because we have observed that the office Inland Revenue has invoked jurisdiction under section 11(2) of the Sales Tax Act which covers the following situations only

Where a person has not paid the tax due on supplies made by him where a person has made short payment where a person has claimed input tax credit / refund which is not admissible under the Act.

And learned Counsel has rightly pointed out that failure to withhold is not covered in section 11(2) and the short payment of tax mentioned in section 11(2) is with reference to short payment on supplies made by the person as is evident from the wording used in first situation. The case cited as 2002 PTD 1 SC relied by the appellate authority covers different situation of section 52/86 of Income Tax Ordinance 1979 pertaining to assess in default. Whereas there is no parallel provision in the Sales Tax Act 1990 to declare an assesse in default and the language of section 11(2) does not cover this situation. Similarly any default has not been covered in section 11(2) and arguments by learned counsel on this point are also convincing. The adjudicating authority has invoked section 11(2) of the Sales Tax Act which was not applicable at all the adjudication under wrong provision of law is not sustainable in eye of law.'"

3. From perusal of hereinabove finding, as recorded by the Appellate Tribunal, while placing reliance on the decision of a Divisional Bench of Appellate Tribunal Lahore in the case of ***M/s. United Industries Ltd. Faisalabad in STA No.130/LB/2013,*** it appears

that default surcharge imposed by the Deputy Commissioner Inland Revenue through Order in Original Nos. 21/2012-13 & 22/2012-13 dated 30.06.2013, has no legal basis, whereas, reference to SRO No.660(1)/2007 dated 30.06.2007 is also misconceived for the reason that there is no consequence or penal provision provided in case of any default towards withholding sales tax on payments made by the taxpayer. Similarly, the provision of Section 33A or Section 11 of the Sales Tax Act, 1990, as referred in the Order-in-Original are also not attracted in the instant case(s). However, the relevant provision, which could have been attracted in the instant cases, is Section 11(4A), which provides that "*where any person, required to withhold sales tax under the provisions of this Act or the rules made thereunder, fails to withhold the tax or withholds the same but fails to deposit the same in the prescribed manner, an officer of Inland Revenue shall after a notice to such person to show cause, determine the amount in default in this regard, can be calculated by the concerned officer Inland Revenue after notice to the taxpayer."* Admittedly, in the instant case(s), the taxpayer was never confronted with any Show Cause Notice in terms of Section 11(4A), nor such provision of the Sales Tax Act, 1990 has been invoked in the instant case(s). Moreover, sub-section (4A) of Section 11 of the Sales Tax was introduced through **Finance Act, 2016**, whereas, the tax period in both the References pertains to the period from **January to December 2010, and January to December 2011** respectively, therefore, it could not, otherwise, be applied retrospectively to the disadvantage of a taxpayer, for the reason that such provisions are penal in nature. Reliance in this regard can be placed upon reported judgments in the case of ***Army Welfare Sugar Mills Ltd. and others v. Federation of Pakistan and others (1992 SCMR 1652) and***

Messrs Polyron Ltd. v. Government of Pakistan and other (PLD 1999 Karachi 238).

3. In view of above facts and circumstances of the case, we do not find any factual error or legal infirmity in the impugned order passed by the Appellate Tribunal Inland Revenue in the instant Reference Application(s), which otherwise is based upon an earlier decision of the Divisional Bench of Appellate Tribunal Lahore in the case of United Industries Ltd. Faisalabad, in STA No.130/LU/2013 on the subject controversy and also supported by judgment of the Hon'ble Supreme Court as well as by Divisional Bench of this Court as referred to hereinabove. Accordingly, instant Reference Applications being devoid of any merits are hereby dismissed in limine and the proposed common questions are answered in "***AFFIRMATIVE***" against the applicant and in favour of the respondent.

4. Instant Reference Applications stand disposed of in the above terms alongwith listed application(s).

J U D G E

J U D G E

Nadeem/A.S.