

IN THE HIGH COURT OF SINDH AT KARACHI

(Extraordinary Reference Jurisdiction)

Spl. Federal Excise Reference Application No. 257 of 2018

Date	Order with signature of Judge
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Present:

**Mr. Justice Aqeel Ahmed Abbasi
Justice Mrs. Rashida Asad**

Fresh Case

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| 1 | <u>For orders on office objections no. 2 & 18.</u> |
| 2 | <u>For orders on Misc. No. 2259/2018.</u> |
| 3 | <u>For hearing of Main Case.</u> |

15.03.2021:

Mr. Ameer Baksh Metlo, advocate for the applicant.

ORDER

1. In the instant Special Federal Excise Reference Application seven (7) questions were proposed initially by the department, however, later on, three amended questions have been proposed by the applicant through a statement, which according to learned counsel for the applicant are questions of law, arising from the impugned order dated 14.02.2018 passed by the Appellate Tribunal Inland Revenue of Pakistan at Karachi in STA No.178/KB/2017 [Tax Period 2013 – 2014 & 2014 - 2105] and require an opinion of this Court under its reference jurisdiction. Proposed questions read as follows:-

“1. Whether the findings of the Appellate Tribunal on facts arrived at without exercising powers of causing further inquiry to be made by the Commissioner under Section 132 of the Income Tax Ordinance, 2001 can be considered as correct determination of facts?”

2. Whether the findings of the facts arrived at on the basis of random examination of data is a correct finding of the facts by the Tribunal?

3. Whether the Appellate Tribunal was justified in arriving at finding of the facts without cross verification of the date furnished by the registered person?”

2. Learned counsel for the applicant, after having read out the proposed questions and the impugned order passed by the Appellate Tribunal Inland Revenue, Karachi, in the instant case, submits that Appellate Tribunal Inland Revenue has erred in law and fact while deciding the appeal in favour of the respondent, as according to learned counsel, the facts of the case have not been properly examined. It has been prayed that impugned order may be set-aside and the questions proposed hereinabove may be answered in favour of the applicant and against the respondent.

3. We have heard the learned counsel for the applicant, perused the record, impugned order passed by the Appellate Tribunal as well as the orders of the two authorities below. From perusal of the questions proposed hereinabove, it transpires that the proposed questions, besides being generalized in nature, are questions of facts, whereas, learned counsel for the applicant while confronted to point out any error or perversity in the findings as recorded by the Appellate Tribunal, could not submit any reasonable explanation, nor could assist as to how proposed questions can be regarded as questions of law. It has been further observed that various defects have been pointed out by the Appellate Tribunal Inland Revenue as contained in Paras 23 to 27 of the Impugned Order, and thereafter, according to the facts and on examination of record, findings have been recorded by the Appellate Tribunal, which prima-facie does not suffer from any factual error. It will be advantageous to reproduce here the relevant findings of the Appellate Tribunal, as contained in the following paras of the Impugned Order.

“23. We have observed another glaring discrepancy in this case. The figure of bank statements of Syed Tahir Mehmood confronted were for the financial year July 2013 to June 2014 and July 2014 to June 2015 as is evident from the table reproduced by officer in his show cause notice being number 125 dated 28.09.2016 which is at page 3 of the order. This is a case of Sugar Mills which has special year and is related to the crushing season of sugar cane. The period statutorily prescribed is from October to September as is also evident from the copies of audited accounts of the two periods ending 30th September 2014 and 30th September 2015. The figure of concealed sales worked out by officer to the tune of

Rs.4,14,66,95,609/= is therefore not sustainable in view of this serious irregularity also.

24. On the basis of above discussion and examination of bank statements of the company and bank statements of Syed Tahir Mehmood, reconciliation of bank statements of Syed Tahir Mehmood and bank statement of the company examination of accounting record presented before us, reconciliation of contra entries, certificate of the auditor and arguments with respect to production capacity alongwith the reconciliation, we have come to the following conclusions:-

- i) The departmental officer and CIR(A) has not gone into the fact finding exercise as conducted by us.
- ii) The appellant has highlighted the sales entries of Kiran Sugar Mills Ltd. and those related to other Sugar Mills.
- iii) The major sales have been recorded from the bank statements of Syed Tahir Mehmood.
- iv) The examination of Bank statement of appellant company show nominal sales and a reconciliation was also submitted which was also checked randomly.
- v) The random checking of contra bank entries was also done by us in the presence of concerned DR. The contra entries on random checking has led us to believe that these are transfer of funds from one bank account to another and the DR attending the hearing could not rebut the same.
- vi) The random checking of accounting record of one month i.e. December 2013 picked by us with the bank statements of Syed Tahir Mehmood goes to prove that recording of sales entries in books are majority from the bank statements of Syed Tahir Mehmood and some portion is from bank statements of the appellant company.
- vii) The department has over looked the production capacity and actual utilization as argued by the AR.

25. After careful perusal of reconciliation of sales and on the basis of random check there arose a difference of Rs.5,48,36,638/= and Rs.4,21,58,466/= total being Rs.9,69,95,104/= for the two tax periods which in our opinion is liable for payment of Federal Excise Duty which works out to Rs.77,59,608/= of the total excess sales which emerged due to lengthy and cumbersome exercise conducted by us. Here we would like to clarify that the excess sales of Rs.9,69,95,104/= if compared with the amount of Rs.3,56,44,45,496/= being total receipts appearing in reconciliation as A+B+C comes to 2.72%.

26. Before concluding we should like to record our observations with respect to presence of DRs. This case was based on verification of factual controversy and three DRs attended different hearings. The verification of facts on random basis done by us was also long and cumbersome exercise. The facts which were discussed in earlier hearings were repeated by us to be new DR as the new DR was not aware about the pending verification instructions issued to both the parties. Unfortunately the practice in the department is that DRs are posted for 15 days period and as soon as this period is over next DR appears who had no knowledge

about the verification process done by us in previous hearings. The new DR had no knowledge of exercise of verification concluded earlier or further queries and verification to be done in the present hearing. As a result defence of the department was not upto the mark and DRs were not in a position to offer plausible explanations. We are of the view that superior hierarchy of FBR needs to look into these aspects and give serious considerations to our observations.

27. Considering the above stated facts we are of the view that orders of the two below officers are not sustainable, these are, therefore annulled. The only total amount which is found excessive is Rs.9,69,95,104/= for both the periods where upon 8% Federal Excise Duty is leviable.”

4. Learned counsel for the applicant while confronted that in view of above finding of the Appellate Tribunal based on finding of peculiar facts of the instant case, how the questions proposed are questions of law, which may require any interference by this Court while exercising its reference jurisdiction under section 34-A of the Federal Excise Act, 2005. Learned counsel was also required to point out any perversity or error in the findings of the facts recorded by the Appellate Tribunal in the instant case, however, learned counsel for the applicant could not submit any reasonable explanation and candidly stated that the impugned order passed by the Appellate Tribunal Inland Revenue in the instant case is based on findings of facts.

5. In view of hereinabove facts and circumstances of this case, we are of the opinion that the impugned order passed by the Appellate Tribunal Inland Revenue in the instant case does not suffer from any factual error or legal infirmity, whereas, the questions proposed in the instant reference are questions of facts, therefore, beyond the scope of reference jurisdiction of this Court, which is restricted only to examine the questions of law. Accordingly, instant Spl. Federal Excise Reference Application is mis-conceived and is therefore, dismissed in limine alongwith listed applications.

JUDGE

JUDGE