

IN THE HIGH COURT OF SINDH, KARACHI
CP No.D-3974 of 2021

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

*BEFORE: Irfan Saadat Khan,
Zulfiqar Ahmed Khan, JJ*

Syed Atif Salman Hashmi,
Petitioner No.1.

I-Lace Fashion (Pvt) Ltd.
Petitioner No.2.

: through M/s.Ovais Ali Shah and
Umer Ilyas Khan, Advocate.

Vs.

Federation of Pakistan
Respondent No.1

:

Federal Board of Revenue,
Respondent No.2

: through Mr. G.M. Bhutto,
Assistant Attorney General for
Respondents No.1 & 2.

Deputy Commissioner Inland Revenue,
Respondent No.3

: through Mr. Shahid Ali Qureshi,
Advocate

Director of Intelligence &
Investigation
Respondent No.4

: Mr. Ghulam Asghar Pathan,
Advocate.

Dates of hearing

: 11.10.2022, 01.11.2022,
23.11.2022, 14.12.2022 &
20.12.2022

Date of decision

: 09.01.2023

JUDGEMENT

Irfan Saadat Khan, J. The instant petition was filed on the ground for declaring the FIR bearing No.03/2021 dated 09.06.2021 (*hereinafter after referred to as “the FIR”*) to be unlawful, unconstitutional, without jurisdiction and void ab-initio and to quash the same and not to take any coercive measure in respect of the said FIR.

2. Briefly stated the facts of the case are that the petitioner No.2 is a private limited company engaged in manufacturing and exporting textile products. The petitioner No.2 claimed tax benefit with regard to sales tax under SORO 1125(1)/2011 (*hereinafter referred to as "the SRO"*) dated 31.12.2011 and filed its sales tax returns accordingly. The Department, however, gathered some information that petitioner No.2 has misused the tax benefit, as provided under the said SRO, of which they were not entitled to, and thus have committed tax fraud by claiming bogus tax refunds which were recoverable from them under Section 3, 3(1A) of the Sales Tax Act, 1990 (*hereinafter referred to as "the Act"*). As per the Department the petitioners were involved in a tax fraud amounting to Rs.18,10,7000/- pertaining to the tax periods February and March, 2010, by claiming inadmissible input / refunds. It is in this background that when the Department has gathered certain evidences against the petitioners that the above referred FIR was lodged, which FIR has been challenged in the instant petition.

3. M/s. Ovais Ali Shah and Umer Ilyas Khan, Advocates have appeared on behalf of the petitioners and stated that the FIR is liable to be quashed as the same was based on incorrect allegations leveled upon the petitioners and are baseless hence it would be a futile exercise to file an application under Section 265-K Cr.P.C. before the trial court or to appear before the said Court in view of the facts obtaining in the instant matter. They stated that the refund claimed by the petitioners was duly approved by the department, which pertained to the periods February and March 2010, and therefore the information given by the Directorate

of Intelligence and Investigation i.e. respondent No.4 was legally and factually incorrect. The learned counsel stated that a Show Cause Notice (*hereinafter referred to as "SCN"*) dated 02.07.2012 was issued to the petitioner with regard to claim of alleged illegal refund claimed by the petitioner which was duly replied by the petitioner. The learned counsel stated that thereafter vide Order-in-Original No.01/2012, dated 06.07.2012 the petitioner was required to pay the disputed amount along with default surcharge. Being aggrieved with the said order appeal was preferred before the concerned Collector (Appeals), who set-aside the Order-in-Original passed by the Additional Collector vide order dated 18.07.2012. As per the learned counsel, an appeal against the said order, bearing STA No.165/KB/2012, was preferred by the department before the Tribunal, which appeal also, vide order dated 03.04.2015, was decided against the department. The learned counsel stated that they are not aware whether any reference application, against the order of the Tribunal, was preferred by the department before this Court.

4. The learned counsel further stated that again a SCN dated June 18, 2016 was issued to the petitioner which was duly replied and then vide letter dated June 28, 2016 the said SCN was also withdrawn unconditionally by the department. As per the learned counsel then on the third time, on 20.12.2019, proceedings against the petitioner were initiated, which were replied and thereafter the present FIR was lodged, against which the present petition has been filed. As per the learned counsel not only the proceedings with regard to previous SCN issued to the petitioners were finalized in their favour but even in respect of the second SCN

also proceedings were culminated in favour of the petitioners. They, therefore, stated that the lodging of the present FIR on the issues which have twice been adjudged in favour of the petitioner is illegal and thus the present FIR needs to be quashed. They stated that in a number of decisions given by the Superior Courts and this Court it has been held that the petitions against quashing of FIR are maintainable and in support thereof have placed reliance on the following decisions:

- i. *Muhammad Measum and others Vs. Federation of Pakistan through Secretary and others (2015 PTD 702).*
- ii. *Decision of the Hon'ble Supreme Court of Pakistan in Civil Appeals No.1475 to 1479 of 2015.*
- iii. *Decision of this Court in the case of Zaheer Ahmed Vs. Directorate General of Intelligence & Investigation-IR & others (C.P. No.D-3337 of 2013).*
- iv. *Decision of this Court in the case of M/s. Popular Juice Industries (Pvt.) Ltd. and others Vs. Federation of Pakistan through Chairman, Federal Board of Revenue and others (2021 PTD 1329).*
- v. *Decision of this Court in the case of Lucky Cement Vs. Federation of Pakistan and others (C.P. No.D-216 of 2013).*
- vi. *Messrs Yasir Enterprises through Ch. Basher Ahmed Vs. Federation of Pakistan through Secretary and 7 others (2013 PTD 821).*
- vii. *Khurram Farooq Siddiqui Vs. Department of Customs and Excise, Collectorate of Customs (Export) and another (2009 PTD 992).*

5. The learned counsel further stated that whatever amount of refund was claimed by the petitioners was in accordance with law and the criminal case lodged against the petitioners is illegal, as even if for arguments' sake it is assumed that the petitioners have claimed illegal refunds, the same is a civil liability and has to be dealt with in accordance with civil laws and the procedures and

the method for recovery of the amount, if any illegally claimed, by way of adopting the procedures as mentioned in the Ordinance and not by way of resorting to criminal procedure by lodging FIR against them, which action, according to the learned counsel, is not in accordance with law. They stated that criminal procedures and civil procedures deal with two different situations and cannot be clubbed together. According to the learned counsel civil assessments and civil adjudications have to be made as per the civil laws and not as per the criminal law. In support thereof they have relied upon the following decisions:

- i. *Taj International (Pvt.) Ltd and others Vs. Federal Board of Revenue and others (2014 PTD 1807)*
- ii. *Decision of this Court in the case of M/s. Popular Juice Industries (Pvt.) Ltd. and others Vs. Federation of Pakistan through Chairman, Federal Board of Revenue and others (2021 PTD 1329)*
- iii. *Waseem Ahmed and another Vs. Federation of Pakistan through Chairman and 4 others (2014 PTD 1733).*

6. The learned counsel further stated that on factual plain also FIR is not maintainable as the same has been lodged after eleven years of the relevant tax period, as the period of adjustment of the input tax was for February and March 2010, whereas the FIR was lodged in June 2021. The learned counsel in this regard have placed reliance on the following decisions:

- i. *Commissioner Inland Revenue, Zone-IV, Lahore Vs. Messrs Panther Sports and Rubber Industries (Pvt.) Ltd. and others (2022 SCMR 1135).*
- ii. *Habib Bank Ltd. Vs. Federation of Pakistan through Secretary, Revenue Division and 5 others (2013 PTD 1659).*

The learned counsel finally stated that in view of the facts and the decisions given above the FIR being illegal and uncalled for may be quashed.

7. Mr. Shahid Ali Qureshi, Advocate has appeared on behalf of the Department and stated that the instant petition is not maintainable as the petitioners were involved in committing tax fraud of a huge amount of Rs.18,10,7000/-. He stated that the petitioner is duly appearing before the Trial Court and has even obtained bail in the instant matter, hence petitioners may be required to join the proceedings before the Trial Court and if they are found innocent by the Trial Court they would be acquitted in accordance with law. The learned counsel stated that interim challan in the instant matter has already been filed by the I.O, which is under consideration. He stated that the instant petition is premature and is liable to be dismissed and the petitioner may be directed to join the trial.

8. The learned counsel further stated that under identical circumstances in the case of *Muhammad Measum Vs. Federation of Pakistan through Secretary and Others (2015 PTD 702)* and *Popular Juice Industries Pvt. Ltd. & others Vs. Federation of Pakistan through Chairman Federal Board of Revenue and Others (2021 PTD 1329)*, which were upheld by the Hon'ble Supreme Court of Pakistan, the request for quashment of FIR was not acceded to and the petitioner was directed to join the proceedings and the request of quashment of FIR without availing alternative remedy of filing application under Section 265-K Cr.P.C was not entertained. He stated the facts of the above referred two decisions

are akin to the facts of the instant matter, hence the petitioner may be required to join the trial and if aggrieved he may file an application under Section 265-K Cr.P.C before the Trial Court, which they have not done so far, hence he prayed that this petition being not maintainable and premature may be dismissed by directing the petitioner to avail the legal remedy as available to them under the law.

9. The learned counsel stated that apart from his above submissions even on facts this petition is not maintainable as the petitioner has illegally claimed tax benefit as provided under SRO 670(1) 2013 dated 18.07.2013, which benefit was not available to them. According to him since petitioner has committed tax fraud and has rendered substantial loss to the exchequer, therefore, petitioners are not entitled for any relief, hence petition is not maintainable and is liable to be dismissed on this score also.

10. The learned counsel further stated that though under Section 561-A Cr.P.C this Court has ample powers to quash the FIR but in exceptional circumstances only, however in the present case those circumstances are not available hence in his view the request of the learned counsel for the petitioner for quashment of the FIR is misplaced and not entertainable. He stated that it is also held in a number of decisions that barring exceptional matters ordinary legal procedure is always to be followed. He stated that in the instant matter the proper procedure, if the petitioners claim themselves to be innocent, is to file an application under Section 265-K Cr.P.C before the Trial Court. In support of his above contention the learned counsel has placed reliance on the decisions reported as *Haji Sardar Khalid Saleem Vs. Muhammad*

Ashraf & others (2006 SCMR 1192), A Habib Ahmed Vs. MKG Scott. Christian & 5 others (PLD 1992 SC 353), Ghulam Muhammad Vs. Mozamil Khan & others (PLD 1967 S8C 317), Muhammad Hassan Nadeem and 2 others Vs. Model Customs Collectorate (Enforcement and Compliance) through Collectors and 4 others (2021 PTD 764) and unreported judgment of this Court in the case of Muhammad Amir Vs. Federation of Pakistan, (C.P No.D-4410/2020).

11. Learned counsel further submitted that filing of the instant petition is nothing but hampering the proceedings before the Special Judge as after filing of the petition Trial Court is not proceeding with the matter since the matter is pending adjudication before this Court. According to the learned counsel substantial time has been wasted in concluding the trial and had the petitioner joined the trial without filing the instant petition the matter would have been concluded longtime ago.

12. Learned counsel next stated that it is also a settled proposition of law Writ is maintainable in exceptional circumstances only whereas in the instant matter the proper procedure available with the petitioners is to appear before the Trial Court and get themselves declared innocent by filing application under Section 265-K Cr.P.C, if they are of the view that there is no probability of conviction and the charges leveled against them were baseless. He invited our attention to the decisions given in the case of *Nagina Daal Factory through Allah Ditta Partner Vs. ITO another reported as (18 TAX 1 SC)* where according to him the Hon'ble Supreme Court has held that bypassing special fora, which are created by special laws, is not permissible under the law. He

stated that similar view was adopted in the case of *Model Customs Collectorate Islamabad Vs. Aamir Mumtaz Qureshi (2022 SCMR 1861)*. He stated that the legislature has categorically provided procedure under Sections 249-A and 265K Cr.P.C where the accused is of the view that there is no probability of conviction and the charges leveled against him are baseless or groundless in such cases the accused could file an application before the concerned Court and bypassing the normal procedures and approaching directly to the High Court for quashment of the FIR amounts to bypassing the proper procedure and thus not entertainable by the High Court, until and unless the circumstances of the case so warrant, which according to him, are not available in the instant matter. The learned counsel also stated that proceedings under Section 154 Cr.P.C. are criminal in nature and whenever the department detects any tax fraud they can lodge the FIR against the petitioner. He stated that though previously some proceedings were initiated which were culminated in favour of the petitioner but when the department came to the conclusion that the petitioner has committed tax fraud by illegally claiming tax refund thereafter the FIR was quite rightly lodged against the petitioner and the petitioner may be required to prove his innocence by furnishing relevant details and documents before the concerned trial Court where proceedings are pending and interim challan also has been submitted. The learned counsel stated that the decisions relied upon by the learned counsel appearing for the petitioners are distinguishable from the facts of the case in hand. He therefore, in the light of what has been submitted above, has prayed that the instant petition being not maintainable may be dismissed by imposing cost on the petitioners and by directing

them to avail the legal remedy of Section 265-K Cr.P.C, in accordance with law.

13. Mr. Ghulam Asghar Pathan, Advocate has appeared on behalf of the Respondent No.4 and has adopted the arguments of Mr. Shahid Ali Qureshi, Advocate and stated that since the petitioners have claimed themselves to be innocent hence they should file application under Section 265-K Cr.P.C before the trial Court and this Court can give only directions to the Trial Court that if such an application is filed the same may be considered and decided within shortest possible time, after giving opportunity of hearing to the petitioner, in accordance with law. He therefore stated that the petition is premature and not maintainable, therefore the same may be dismissed.

14. Mr. G. M. Bhutto, learned Assistant Attorney General appearing for the Federation has also adopted the arguments as advanced by M/s. Shahid Ali Qureshi and Ghulam Asghar Pathan, Advocates.

15. M/s. Ovais Ali Shah and Umer Ilyas Khan, Advocates in their rebuttal stated that the contention of the learned counsel appearing for the department that for proceedings under Section 154 Cr.P.C. no limitation applies is a misconceived notion. They stated that the FIR has to be lodged at the first stage and the Courts have always deprecated the FIRs which are lodged belatedly. They, therefore, stated that since the present FIR has been lodged after a period of eleven years hence the same may be quashed. The learned counsel next submitted that the order of the Tribunal which was given in favour of the petitioner was not challenged by the department by filing a reference application,

hence the matter stood concluded up to the level of the Tribunal and hence the department has no jurisdiction to reopen the same for the third time as all the proceedings previously initiated by the department duly stood merged in the order of the Tribunal and hence as per the doctrine of merger the department has no authority to dilate upon the issue, which stood concluded up to the Tribunal level, being the highest fact finding authority. In support thereof the learned counsel have placed reliance on the following decisions:

- i. *Sahabzadi Maharunnisa and another Vs. Mst. Ghulam Sughran and another (PLD 2016 Supreme Court 358)*
- ii. *Bashir Ahmed Badini, D&SJ, Dera Allah Yar and others Vs. Hon'ble Chairman and Member of Administration Committee and Promotion Committee of Hon'ble High Court of Balochistan and others (2022 SCMR 448)*

The learned counsel next submitted that the decisions relied upon by the learned counsel for the department are distinguishable from the facts obtaining in the instant matter and therefore the instant petition may be allowed by quashing the impugned FIR.

16. We have heard all the learned counsel at length, the facts, record and the decision relied upon by them have also been perused.

17. The record reveals that in respect of the claim of alleged illegal refunds for the period February, 2010 and March, 2010 amounting to Rs.8,141,139/- and Rs.9,966,469/- respectively, a show cause notice was issued by the department, way back in 2012. Due reply of which was furnished by the petitioner. However the Department did not agree with the contention of the petitioner

and thereafter vide Order-in-Original No.01/2012, dated 06.7.2012, required from the petitioner to pay an amount of Rs.18,107,608/- alongwith default surcharge. An appeal thereafter was preferred before the Commissioner (Appeals), who vide order dated 18.07.2012 annulled the proceedings and allowed the appeal. The said order of the Commissioner (Appeals) was assailed before the Tribunal, who endorsed the order of the Commissioner (Appeals), and thereafter the matter stood culminated / finalized. It is apparent from the record that no reference application, against the order of the Tribunal was preferred by the Department. Therefore it is apparent that on the very subject matter on which FIR has been lodged, the matter stood concluded by the Department way back in 2012, when the same was thoroughly thrashed out and the claim of the petitioner with regard to refund was duly examined by the Department and nothing adverse was found against them.

18. Then on the same set of facts, the Department once again started proceedings by issuing a second show cause notice in 2016. Again the petitioner went through the same agony by giving reply to the said show cause notice and furnishing required details etc. Needless to state that the second show cause notice was also based on the alleged claim of refunds for the periods mentioned above, on which the proceedings as stated above already stood culminated / finalized upto the level of the Tribunal. The petitioner however once again joined the proceedings filed a proper reply of the show cause notice and thereafter the Department, after satisfying with the reply, documents, details etc. and the claim of

refunds for the respective periods, dropped the proceedings vide order dated 28.06.2016.

19. It is surprising to note that again on the very allegations, on which the Department twice exonerated the petitioner, initiated civil and criminal proceedings against the petitioner and lodged the present FIR. It may be noted that this is third time when the Department had proceeded on the same set of facts, allegations against the petitioner on which, as stated above, the Department had twice, after initiating the proceedings against the petitioner, had dropped the same. From the various judgments cited by the petitioner, it is evident that in cases where criminal proceedings, which included FIR, is found to be without legal and lawful justification, proceedings have been quashed by this Court. In the case of *Muhammad Measum and other, M/s. Popular Juice Industries (Pvt) Ltd., Zaheer Ahmed*, the said issue has been thoroughly discussed and dilated upon by this Court. Thus it is now a settled proposition of law that in exceptional circumstances this Court has the jurisdiction to quash the proceedings emanated from a FIR, in order to save a person from the agony of facing trial and thereafter getting acquitted on the charges leveled against the person being groundless / baseless and that there is no probability of conviction of the said person. If all the facts of the present case are examined in juxta position, it would reveal that this was the third time when the Department has proposed to initiate civil / criminal proceedings against the petitioner, which twice have been culminated / drooped and finalized in favour of the petitioner. Therefore, on the face of it without, indulging into other factors, it

seems that the proceedings initiated by the Department are not in accordance with the law.

20. It is also a matter of record that the FIR has been lodged after 11 years of the alleged tax default, if any. This in our view speaks volume about the veracity or otherwise of the FIR. The record also reveals that a person is required to maintain accounts, under Section 24 of the Sales Tax Act, for a period of six years only whereas in the instant matter the Department has requisitioned from the petitioner to produce the records which is more than 11 years old. Hence on this aspect also, we are of the view that the Department has no jurisdiction to require from the petitioner to produce the record beyond this mandatory time period. Reference in this regard may be made to the decision given in the case *Unique Engineering Works (Pvt.) Ltd., through Chief Executive ..Vs.. Federation of Pakistan through Secretary of Law Islamabad and three others (2022 PTD 1502)*, wherein the Lahore High Court dealing with somewhat similar circumstances allowed the petition by observing that to call for the record under Section 24 of the Sales Tax Act, the Department should have taken action at the right time and any delayed action means that the burden is on the Revenue to justify the demand raised by way of imposition of any tax liability. In the instant matter also it is an admitted fact that the proceedings of the FIR have been lodged after 11 years of the tax fraud, if any, and the Department has required from the petitioner to submit the accounts details, documents etc., pertaining to that period which is beyond the mandatory period as provided under Section 24 of the Act. Similar view was taken by the Lahore High Court in the case of *Pepsi Cola International*

(Private) Limited through Authorized Representative ..Vs.. Federation of Pakistan through Secretary Revenue Division, Islamabad and another (2022 PTD 51), wherein while dealing with the matter under Section 174 of the Income Tax Ordinance, 2021 which is *pari materia* to Section 24 of the Act, set aside the notice to the extent of production of documents, which was beyond six years' time. In the case of *Maple Leaf Cement Factory Ltd., ..Vs.. Federal Board of Revenue and others (2016 PTD 2074)* again similar view was adopted and it was observed that taxpayer was neither under compulsion nor obligation to maintain the records beyond the period of six years, as specifically provided under Section 174 of the Ordinance. This view of the Lahore High Court was affirmed by the Hon'ble Supreme Court of Pakistan in the decision of *Commissioner Inland Revenue, Zone-IV Lahore ..Vs.. Messrs Panther Sports and Rubber Industries (Pvt.) Ltd. and others (2022 SCMR 1135)*. Similar view was adopted in the case of *D.G. Khan Cement Co. Ltd., through Chief Financial Officer and others ..Vs.. Federal Board of Revenue through Chairman and 5 others (2020 PTD 2111)* that the Department could not compel the taxpayer to maintain record beyond five years (as it then was) by resort to Section 174 of the Ordinance and the petition was allowed under the circumstances.

21. During the course of the arguments, when the counsel appearing for the Department was confronted with the facts emanating in the present matter he candidly conceded that this Court under Article 199 of the Constitution of Islamic Republic of Pakistan read with Section 561-A Cr.P.C has the jurisdiction to quash the proceedings of a FIR in case of exceptional

circumstances. The learned counsel also could not controvert the fact that this is the third time on the same set of facts when the proceedings civil & criminal have been initiated by the Department against the petitioner. Learned counsel appearing for the Department also conceded that the Department has no jurisdiction to require from a person to maintain/keep or produce the record after the expiry of the mandatory period, as provided under Section 24 of the Act, however his contention had remained the same that since the petitioner has the remedy to file application under Section 265-K Cr.P.C before the Trial Court, therefore the instant petition is not maintainable and the petitioner may be required and directed to appear before the concerned Trial Court for redressal of his grievance. We however, disagree with the contention of the learned counsel appearing for the Department. No doubt, when a criminal matter is pending before a Trial Court and interim challan has been submitted, under normal course an application under Section 265-K Cr.P.C is to be filed before the concerned Court in case the accused is of the opinion that the charge is either groundless or there is no probability of conviction. However in exceptional circumstances if the facts of a case so warrants a person/accused can approach the Court for quashment of the FIR, if the action is patently illegal, without jurisdiction, then in such circumstances sending a person to go through the full process of trial and then get himself acquitted, in our view, would be a miscarriage of justice with that person and in such circumstances the Court ought to exercise its powers under Section 561-A Cr.P.C. The decisions relied upon by the counsel for the Respondents are thus found to be distinguishable from the facts obtaining in the instant matter. There is however no hard and

fast rule with regard to this aspect and each case has to be viewed and dealt with by looking to the peculiar facts and circumstances of that very case and in such circumstances the Court upon satisfaction may quash the FIR in those special and exceptional circumstances.

22. In the present case as noted above, it is evident that the present case do fall within those exceptional circumstances and the petitioner is entitled that the FIR lodged against him be quashed. The petition thus stands allowed; FIR lodged against the petitioner is quashed and all the criminal aspects emanating from the said FIR are declared null and void and of no legal effect. The Department however would be at liberty to proceed against the petitioner in respect of its civil tax liability, if any, subject to limitation.

23. With these directions the instant petition stand allowed alongwith the listed and pending applications, if any. There shall however be no order as to costs.

JUDGE

JUDGE

Karachi
Dated: 09.01.2023
SM