

Taxhelpline Case No. 129 of 2013

[INLAND REVENUE APPELLATE TRIBUNAL]

Before Mr. Nazir Ahmad, Judicial Member and Mr. Muhammad Akram Tahir, Accountant Member.

Ms. Fouzia Fakhar, DR for Appellant. Mr. M. M. Akram, Advocate for Respondent

Collector of Sales Tax, Faisalabad

Vs

M/s. S. S. Fabrics, Faisalabad

ORDER---The above titled departmental appeal has been directed against the order-in-appeal No.347/2007 dated 24.09.2007 recorded by Collector Customs, Sales Tax & Federal Excise (Appeals), Faisalabad, whereby setting-aside of the order-in-original (ONO) bearing No.872/2007 dated 22.01.2007 has been agitated.

2. The facts in brief, leading to the instant appeal, as stated, are that during the processing of refund claimed by the registered person, certain discrepancies were observed as detailed in the body of impugned order. Therefore, making it a base, Assistant Collector (PRA) issued show cause notice dated, 03.11.2006 and resultantly adjudication proceedings were culminated by passing ONO bearing No. 872/2007 dated 22.01.2007 wherein refund claimed by the registered person was deferred. Feeling aggrieved, the registered person preferred appeal before Collector Customs, Federal Excise and Sales Tax (Appeals), Faisalabad, who partly accepted the claim and partly set aside the ONO, against which the department has come up in further appeal before this Tribunal on the strength of following grounds:-

i) The order of the learned Collector Customs, Federal: Excise & Sales Tax (Appeals), Faisalabad is contrary to the provisions of section 7, 8(I)(ca), and 10 of the Sales Tax Act, 1990 read with

Refund Rules, 2002 notified vide SRO 574(I)/2002 dated 31.08.2002.

ii) The subject Order-in-Appeal has been : passed without addressing the legal position as well as the facts of the case. Hence the Order-m-Appeal is/ bad in law and is not sustainable in the eye of law.

iii) View point of the appellant Collectorate has not been given due consideration while passing, the order.

iv) The show cause notice was issued to the respondent due to violation of expressed provisions of law. Rule 5 of Sales Tax Refund Rules, 2002 requires necessary examination and scrutiny of refund claim. The worthy Collector (Appeals) has completely ignored the fact that the respondents being refund claimant has also the responsibility u/s 7(1) and 8(1) a of the Sales Tax Act, 1990 to prove that input tax has been claimed in respect of supplies actually received for use in the manufacturing or production of taxable supplies made or to be made by him, whereas, in the instant case, the respondents failed to prove physical transfer of goods, The decision of the Collector (Appeals) therefore, needs to be set-aside to protect the legitimate interest of the public Exchequer.

v) The objections raised by STARR confirmed that tax due in respect of the invoice against which the respondents have claimed refund has not been deposited in the National Exchequer.¹ Neither STARR validated the input tax invoices nor did the respondents provide any clearance certificate.[^] The worthy Collector (Appeals) has not appreciated this aspect of confirmation of deposit of tax due against the claimed invoice.

3. The pleadings made at bar for department by learned DR are in terms of contents of the grounds of appeal.

4. On the other hand, learned counsel in rebuttal, initiating his arguments raised preliminary objection regarding pecuniary

jurisdiction of the Assistant Collector. He has elaborated his view point by maintaining that Assistant Collector was not empowered to issue Show Cause Notice and finally pass the ONO, which is beyond the limit of one million. He contends that as, per show cause notice issued by Assistant Collector showing intention to reject refund amount to Rs.15,75,150/- is beyond his jurisdiction. He, therefore, seeks confirmation of setting aside of the ONO ordered by Collector on this score.

5. In reply, the learned DR has vehemently opposed the arguments by maintaining that respondent cannot take any new ground at this stage, which was not taken at lower appellate forum. The learned counsel was confronted on this objection raised by learned DR, who argued that preliminary objection going to roots of the case can be raised at any stage and in this regard he has placed reliance on a reported judgment of this Tribunal cited as 2011 PTD (Trib.) 2086.

Arguments heard and relevant record perused..First the preliminary objection as to the jurisdiction of the Assistant Collector regarding issuance of Show Cause Notice raised by the learned counsel of the respondent, although the department has assailed the impugned order of Collector (Appeals) but as per Rule 24 of the ATIR Rules, 2010, the respondent is entitle to raise objection. In our considered opinion, the legal objection can be raised at any stage if goes to the roots of the case. Therefore, the objection is allowed. Section 45 deals with the powers of adjudication of Sales Tax Authorities. Said section prevailing at the relevant time is reproduced as under:-

45. Power of Adjudication.- [(1)] In cases involving assessment of tax, charging of [default surcharge] imposition of penalty and recovery of amount erroneously refunded [or any other contravention] under this Act or the rules made thereunder, the jurisdiction and powers of adjudication of the Sales Tax Officers shall be as follows:-

(i) Additional Collector Cases falling under sub-section (2) of section 11 and section 36 without any restriction as to amount of tax

involved or amount erroneously refunded.

(ii) Deputy Collector

(a) Cases falling under sub-section (1) of section 11.

(b) Cases falling under sub-section (2) of section 11 and section 36 provided that the amount of tax involved or the amount erroneously; refunded exceeds one million rupees but does not exceed two and a half million rupees.

(iii) Assistant Collector "Cases falling under sub-section (2) of section 11 and section 36 provided that the amount of tax involved or the amount erroneously refunded exceeds ten thousand rupees, but does not exceed one million rupees."

--- A bare reading of the above clearly transpires that the authorities i.e. Additional Collector, Deputy Collector and Assistant Collector have been assigned a specific power and duties to exercise their jurisdiction. Any deviation from the above prescribed limit would render the entire exercise of such authority as illegal and void ab initio. The learned counsel has relied on a reported judgment of this Tribunal cited as 2011 PTD (Trib.) 1986, which is on all fours with the case in hand. In the impugned order this Tribunal on the strength of two reported judgments of the Apex Court of Pakistan cited as 2001 SCMR 1822 and 2008 SCMR 240 has held that power vested in any authority can only be exercised by the same authority. In default whereof, the entire action would be without jurisdiction void ab initio and of no legal effect.

7. Issuance of Show Cause Notice and passing of ONO by Assistant Collector beyond the prescribed limit of Rs.01 Million, which in the case in hand is Rs.15,75,150/- is clearly beyond his jurisdiction. As per above provisions of Law only the Deputy Collector is empowered to issue Show Cause Notice and to pass adjudication order. On the legal point of jurisdiction, the contention of learned counsel is very clear and forceful being supported by section 45(I)(III) of the Sales Tax Act, 1990.

8. The upshot of the above discussion is that since the show cause

notice and ONO passed by Assistant Collector having was without jurisdiction hence we reject the appeal of the department by declaring the ONO as void ab initio without legal force.

9. As, appeal is decided on legal ground other than the grounds taken by learned CIR(Appeals), therefore, the grounds raised by the appellant/department as per memo of appeal need no adjudication.

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