SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

Ch. Muhammad Ibrahim Zia, C.J.
Raja Saeed Akram Khan, J.

Civil Appeal No. 32 of 2019
(Filed on 28.11.2018)

Mangla Metals (Private) Limited House No. 148 Sector, F-2 Mirpur through its Chief Executive Mr. Zulfiqar Abbasi.

……APPELLANT

VERSUS

Additional Collector Central Excise & Sales Tax now Additional Commissioner Inland Revenue (PT) Excise Complex Building Mirpur.

…….RESPONDENT

[On appeal from the judgment of the High Court dated 01.10.2018 in appeal No. 15 of 2004]

FOR THE APPELLANT: Mian Sultan Mehmood Advocate.

FOR THE RESPONDENT: Haji M. Afzal Khan, Advocate.

Date of hearing: 29.04.2019

JUDGMENT:

Ch. Muhammad Ibrahim Zia, C.J.– The captioned appeal by leave of the Court has been

filed against the judgment of the High Court dated 01.10.2018, whereby, the appeal filed by the appellant, herein, has been dismissed.

2. The precise facts of the case are that the appellant is a company dealing with the business of steel furnaces and melting, Ignot and Billets manufacturing etc. On 31.07.2002 the Assistant Collector, Central Excise and Sales Tax, Miprur reported to the Additional Collector, Central Excise and Sales Tax, Mirpur that the appellant-company has shown Nil production in its sales tax returns for the months of February/2002 to June/2002 but on scrutiny of the record of Toll and Excise Check Post, it was found that during the aforesaid period the appellant-company has made taxable supplies of the steel billets. It was also reported that the appellant-company issued gate passes while declaring the supplies as "exempted", which were taxable. It was further reported that the evasion of sales tax comes to Rs.22,33,866/-, however, if the record of manufacturing and sale of the iron billets is examined the evasion range may be Rs.25/30

lacs. Resultantly, the Additional Collector Central Excise and Sales Tax, Mirpur, issued a show cause notice to the appellant-company on 07.08.2002. It is alleged that the appellant-company rebutted and denied all the allegations. After necessary proceedings, through order dated 02.10.2002 the respondent imposed sales tax including additional tax and penalty, total amounting to Rs.22,47,871/- on the appellant-company under section 33(2)(cc) and 34 of the Sales Tax Act, 1990. Feeling aggrieved, the appellant-company filed an appeal before the Azad Jammu & Kashmir Sales Tax Appellate Tribunal, Muzaffarabad *(hereinafter to be referred as Appellate Tribunal)* which was dismissed on 22.11.2003. Second appeal filed before the learned High Court was accepted vide judgment dated 25.10.2017, on the ground that the Additional Collector Central Excise and Sales Tax was not competent to initiate proceedings against the appellant-company. This judgment was challenged by the respondent before this Court which was accepted and the case was remanded to

the High Court for fresh decision vide judgment dated 26.04.2018. After remand, the learned High Court, through the impugned judgment, dismissed the appeal, hence, this appeal by leave of the Court.

3. Mian Sultan Mehmood, Advocate, the learned counsel for the appellant argued the case at some length. He discussed the detailed case history and reiterated the grounds taken in the memo of appeal. He forcefully argued that according to the notifications dated 08.02.1995 and 07.01.2004 the appellant-company is exempted from payment of the sales tax. This important legal question has not been resolved or attended by the Appellate Tribunal as well as the High Court. He further argued that the show-cause notice issued by the Additional Collector is without jurisdiction and competence because the matter does not fall within his competence, thus, the whole proceedings are coram-non-judice. He further argued that although the appellant-company initially filed return showing Nil production but subsequently in the revised

return the quantity and number of actual goods manufactured were mentioned, whereas, in the assessment order the fictitious quantity of the production has been shown. He further submitted that neither the learned Appellate Tribunal nor the High Court properly appreciated the material to determine the legal proposition whether the assessment made by the Additional Collector is based upon legally admissible evidence or the same is mere presumptive. He further argued that the Additional Collector, Appellate Tribunal and the High Court have fell in error of misreading of evidence relating to the weight of steel billets. It has been wrongly assessed that the weight of a steel billet is 63 kg, whereas, its weight is less than 30 kg. He further argued that there is no evidence supporting the version of the Additional Collector. The reliance has been wrongly placed on record of Excise Check Post. Neither the Check Post is established under law nor its record is legally admissible in evidence. In support of his arguments he placed reliance on the cases reported as *The Collector of Sales Tax &*

others vs. Messers Super Asia Mohammad Din & others [2017 SCMR 1427], *Caltex Oil Ltd. vs. Collector Central Excise & others* [2005 PTD 480], *Messrs PYLFO Industries Pvt. Lt. vs. Assistant Collector & others* [2011 PTD 2795], 2009 PTD 945, 2015 PTCD 380, 2015 PTD (Tribunal) 1165, 2013 PTD 1536 and 2010 PTD (IRAT) 1687 and submitted that while accepting this appeal, setting-aside the impugned judgment of the High Court as well as the Appellate Tribunal, the assessment order of the Additional Collector be declared illegal and set at naught.

4. Conversely, Haji Muhammad Afzal, Advocate, the learned counsel for the respondent submitted that the arguments of the learned counsel for the appellant are misconceived and beyond the scope of section 47 of the Sales Tax Act, 1990. In appeal before the High Court only the proposition of law can be raised and not the disputed facts. The propositions of law involved in this case have been rightly decided by the High Court. The appellant-company has failed to point

out any legal justification calling for interference. According to the provisions of section 45 (enforced at the relevant time) read with section 11 of the Sales Tax Act, 1990 the Additional Collector is competent to issue show-cause notice. The assessment order has been passed after holding a proper inquiry. The appellant-company has even taken stance against its own produced evidence. It is admitted fact that the appellant-company by attempting to deceive, initially filed return showing Nil production but subsequently when the production was proved from unrebutted evidence it filed revised return in which it admitted the production of goods. As the company has failed to maintain the accounts required under law, thus, the Additional Collector had to determine the question on the basis of other legal evidence. The record of Excise Check Post is basically maintained according to the goods supplied and transported and the invoices issued by the company. The Excise Check post does not itself compiles any record rather it only has to enter the quantity of the goods passing

through the Check Post. So far as the objection relating to the weight of steel billets, is concerned, it is also false because the appellant-company's store keeper clearly deposed in his statement that the weight of a steel billet is 64/65 kg, thus, the appellant-company is bound by its own produced evidence. Same like, the argument claiming the tax holiday is also against law and facts. The sales tax disputed in this case relates to period of February/2002 to June/2002. According to the notification of tax holiday dated 08.02.1995 the appellant-company is excluded from such exemption from payment of tax, whereas, subsequent notification relied upon by the appellant has not been given retrospective effect rather it has been given prospective effect, therefore, the argument is baseless having no substance. He referred to the cases reported as *Commissioner of Sales Tax vs. Messrs Pakistan Machine Tool Factory Ltd.* [2003 PTD 1805], *Muhammad Iqbal vs. Muhammad Shafi* [1989 SCMR 489] and *Commissioner of Income Tax & others vs. M/s.*

Allied Bank of Pakistan Ltd. & another [2001 SCR 453] and further argued that he has also filed the written statement and concise statement along with case law which may also be considered as part of his arguments.

5. We have heard the learned counsel for the parties and examined the record. This case has protracted litigation. The appellant-company has taken some contradictory stands. Initially, it filed the return showing Nil production but in the revised return the company admitted the production and supply of the goods. It is undisputedly proved from the record that the appellant-company manufactured and supplied the goods, thus, the question of Nil production stands rebutted. It is also admitted fact that the appellant-company has failed to maintain proper record, thus, the Additional Collector on the report of the Assistant Collector proceeded against in the matter and issued the show-cause notice, provided proper opportunity of hearing, conducted proper inquiry and thereafter passed order on 02.10.2002. Against this order the

appeal was filed before the Appellate Tribunal in which several objections were raised. The appeal was finally decided on 22.11.2003 through a speaking and well-reasoned judgment. As the question of facts have been properly attended by the Additional Collector and after proper scrutiny the Appellate Tribunal concurred with the findings of the Additional Collector, thus, the factual propositions hardly require further deliberation, however, for our own satisfaction we have also minutely examined the record and found the orders of Additional Collector as well as the judgment of the Appellate Tribunal on factual propositions quite consistent with the evidence and record of the case. The Additional Collector has discussed the facts, figures and evidence in detail, thus, there is no legal justification to depart from the findings.

6. The learned counsel for the respondent has rightly pointed out that the appeal before the High Court under section 47 of the Sales Tax Act, 1990 only lies on the question of law. The questions of law as emerged in this case are; (i) the

competency of the Additional Collector to pass the impugned order; (ii) the claim of the appellant that he is exempted from sales tax; and (iii) the admissibility of the record of Excise Check Post in evidence. Although, all the propositions have been properly attended to in the impugned judgment, however, we deem it proper to further deliberate on these propositions.

7. The first proposition is regarding the competency of the Additional Collector to pass the order. It will be useful to reproduce here sub-section (1) of section 47 of Sales Tax Act, 1990, which reads as follows:-

> "47. Appeal to the High Court.—(1) An appeal shall lie to the High Court in respect of any question of law arising out of an order under section 46……"
>
> (underlining is ours)

The statutory provision clearly qualifies that the legal questions which arise out of an order under section 46, have to be raised and resolved and the Legislature has not left it open that any sort of legal question which has neither been raised

before the adjudicating officer or appellate forum can be raised before the High Court. In this case, neither the appellant raised such objection in response to show-cause notice before the adjudicating officer nor agitated the same in memo of appeal before the Appellate Tribunal or argued, therefore, in our considered view for the first time raising this point before the High Court is unwarranted and a party cannot be allowed to raise such question which amounts to drag the Courts into unnecessary academic discussion. In view of clear statutory provisions of sub-section (1) of section 47 of Sales Tax Act, 1990 it is observed that in the memo of appeal before the High Court only the question of law which arises out of an order of the Tribunal can be agitated and resolved which means the point or question which has been raised, argued, either attended to or not attended to by the Appellate Tribunal. As in this case the legal question of competency of Additional Collector has neither been raised at the time of adjudication or in the appeal before the Appellate Tribunal, therefore,

agitating such point before the High Court is against law, thus, without any further discussion it is declared that such question is out of the scope of provision of sub-section (1) of section 47 of Sales Tax Act, 1990. On this point there is consensus of the superior Courts including the apex Court of Pakistan. This Court in the case reported as *AJ&K Logging and Saw Mills vs. Collector Central Excise and Sales Tax & another* [2005 PTD 1998 (Supreme Court of AJ&K)] while dealing with this proposition has held that:-

> "12. Except the aforementioned point, the appellant-Corporation never disputed the date of enforcement of Sales Tax Act, 1990 either in appeal before the Tribunal or ever pressed such question during the course of arguments before it. Therefore the first two points raised by the learned counsel for the appellants did not arise from the order of the Tribunal, as such appeal before the High Court on these points was not justified in law. Without much discussion this observation finds support from section 47(1) of the Sales Tax Act which reads as follows:--
>
> > '47. Appeal to the High Court.—(1) An appeal shall lie to the High Court in respect of any question of law arising out of an order under section 46.'

Under this provision of law, the scope of appeal before the High Court is limited and dependent upon such questions which arise out of the order of the Tribunal. This Court has time and again repeatedly laid down that when an act is prescribed to be done in a particular way, it must be performed accordingly or not at all. Reference to this effect may be made to the following authorities.

In Habibullah v. Government of Punjab and others (PLD 1980 Lah. 337) it was observed that where law provides for doing of a particular thing in a particular way, all other modes are prohibited.

In "Reference No.1 of 1977 by President, AJ&K" (PLD 1980 Lah. 37) it was observed that this is an elementary principle that if an Act or Rule prescribes a particular method of performance of an act, the act should be performed according to that method alone or not at all."

This principle (supra) has also been reiterated in the latest judgment of the apex Court of Pakistan delivered in the case reported as *Messrs F.M.Y. Industries Ltd. vs. Deputy Commissioner & another* [2014 SCMR 907], wherein it has been held that:-

"10. A perusal of the above extract reveals that the learned High Court only has to give opinion on questions of law raised before, it and not on the grounds mentioned in the appeal. It is now a settled law that only those questions can be raised before the learned High Court

which are questions of law and are arising from the order of the Tribunal. Questions of law have been held to include questions argued before the Tribunal on which finding has been given by the Tribunal or questions argued before the Tribunal but no finding has been given by the Tribunal on such questions and questions which were never argued but had been adjudicated by the Tribunal. The question whether assessment should have been finalized under section 26 or 63 of the Ordinance does not fall under any of these categories. It was not argued before the Tribunal nor adjudicated by the Tribunal. We, therefore, regret that this question do not merit consideration by us at this stage. In this connection we would also refer to the judgment of this Court in the case of Collector of Customs E&ST and Sales Tax v. Pakistan State Oil Company Ltd. (2005 SCMR 1636) where this Court held as under:-

> 'Perusal of section 196 of the Act reveals that High Court can exercise its jurisdiction only in respect or questions of law arising out of order under section 194-B of the Act. It is significant to note that before the Customs hierarchy plea of limitation was not raised. It being so, the High Court was not competent to consider said plea, as it was neither raised, before the Collector Customs, nor before the Tribunal. There is no discussion on the point of limitation in the orders passed by the Collector Customs and the Tribunal. Question of limitation is a mixed question of law and fact and unless it was raised before the forum below, it could not straightway be agitated before the

> High Court. It can be concluded that such question never arose from the order passed by the Tribunal. Factual controversy is sorted out up to the level of the Tribunal. Remedy under section 196 is restricted to legal points only, which was not available to the respondent-Company before the High Court.'
>
> From a perusal of this extract it is clear that a new question of law that has not been agitated before the Tribunal cannot be raised before the High Court or this Court."

In this regard further reliance can be placed on the judgments reported as *Commissioner Inland Revenue vs. Javed Ahmed & another* [2015 PTD 809] and *Haseeb Waqas Sugar Mills Ltd. vs. Government of Pakistan & others* [2015 PTD 1665]. So far as the case law referred to by the learned counsel for the appellant on this proposition i.e. *Messrs PYLFO Industries Pvt. Lt. vs. Assistant Collector & others* [2011 PTD 2795], is concerned, it is distinguishable because in that case the company in response to the show-cause notice raised the question of jurisdiction and competence of the Collector, therefore, the principle of law laid down in the referred case is not applicable. The

point of competence of the Additional Collector to issue show-cause notice, from another angle also, is not of worth consideration. The appellant submitted himself before the jurisdiction of the Additional Collector, now he cannot turn round with a volta face. Reliance in this regard can be placed on the cases reported as *Khan Muhammad Khan vs. Azad Govt. & others* [2004 SCR 348] and *Muhammad Ilyas Khan & others vs. Sardar Muhammad Hafeez Khan & others* [2001 SCR 179].

8. The next question of law relating to the claim of the appellant regarding exemption from tax, also has no substance. According to the notification dated 08.02.1995, the appellant-company is excluded from such tax holiday. For convenience the notification is reproduced as follows:-

> "Notification:
>
> No. FD/Tax 1145-1245/95. In exercise of the powers conferred by Sub section (1) of Section 13 of the Sales Tax Act, 1990, as inforce in Azad Jammu and Kashmir, the Azad Government of the State of Jammu & Kashmir is pleased to direct that all goods produced or manufactured by such industries except

those indicated below at serial number 1 to 5, which are set upon on or after the 1st day of July, 1994, in Azad Jammu and Kashmir shall be exempted from the Tax payable under the said Act for a period of 5 years from the date the Unit starts Commercial production.-

1. Cigerettes manufacturing.
2. Steel-re-rolling & electric furnaces.
3. Flour mills & rise-busking units.
4. Stone-Crushers.
5. Oil blending units.

Explanation:- For the purposes of this notification the expression, the date of Commercial Production shall mean the date intimated in writing by an intending manufacturer to the Assistant Collector of Sales Tax having jurisdiction on the area at least 15 days before commencing such production.

(Abdul Rashid Baig)
Addl. Secretary Finance."

(underlining is ours)

Same like, the other notification dated 07.01.2004 reads as follows:-

"Notification:

No.FD/B/T/107/2003/2004. In exercise of the powers conferred by sub-section (2) (a) of Section 13 of the Sales Tax Act, 1990 as in force in Azad Jammu & Kashmir and in partial modification of Notification No.FD/Tax.1145-1245/95 dated 08.02.1995, the Azad Government of the State of Jammu and Kashmir, on the recommendations of AJ&K Central Board of Revenue, is pleased to grant

> exemption from the payment of Sales Tax to M/s Mangla Metals (Pvt.) Limited for a period of five years w.e.f. the date of issuance of this notification subject to the condition that M/s Mangla Metals (Pvt.) Limited consumes the self generated electricity in their production.
>
> (Mumtaz Ahmed Mir)
> Deputy Secretary (Budget)"

(underlining is ours)

It is clear that this notification has not been applied retrospectively rather its application is prospective from the date of its issuance which is 07.01.2004, whereas, the matter in this case relates to the period commencing from February/2002 to June/2002, thus, at the relevant time this notification was also not in force. The appellant is not only disentitled for such exemption rather it is also proved from the record that it has wrongly stamped the supplied goods as exempted.

9. The other question regarding admissibility of the record of the Excise Check Post in evidence has also been raised. It is worth mentioning that the record maintained by the Check Post falls within the category of the documents forming acts and record of acts of official bodies, thus, such record

has got status of public document according to Article 85 of the Qanoon-e-Shahadat, 1984. Moreover, the perusal of the record reveals that the Excise Check Post has not made or constructed the new record rather it has only made entries of the record basically prepared by the appellant-company containing truck numbers, quantity of the iron billet, gate passes numbers etc. thus, this record has legal value and stood proved as required under the provisions of Qanoon-e-Shahdat, 1984.

10. All the other propositions raised and argued on behalf of the appellant do not fall within the domain of question of law rather they are of factual nature which neither can be agitated in appeal before the High Court nor fall within the scope of section 47(1) of the Sales Tax Act, 1990. Thus, it will be futile exercise to have deliberation on such propositions. So far as the case law referred to by the parties are concerned, according to facts and circumstances of this case the relevant cases have been referred to hereinabove, whereas,

the irrelevant case law does not require specific discussion.

For the above stated reasons, finding no force this appeal is dismissed with no order as to costs.

CHIEF JUSTICE JUDGE

Muzaffarabad,
10.05.2019

Mangla Metals VS Additional Collector
Central Excise

ORDER:

The judgment has been signed. It shall be announced by the Additional Registrar, Mirpur after notifying the learned counsel for the parties.

CHIEF JUSTICE JUDGE

Muzaffarabad,
10.05.2019