IN THE HIGH COURT OF SINDH, AT KARACHI

Present:
Irfan Saadat Khan and
Yousuf Ali Sayeed, JJ

Special Federal Excise Reference
Application No. 159 of 2012

Applicant	:	Commissioner of Inland Revenue, Zone-1, LTU, Karachi, through Ameer Bux Metlo, Advocate.
Respondent	:	M/s. Industrial Development Bank of Pakistan, through Atif Aqeel Ansari, Advocate.
Date of hearing	:	29.10.2020

ORDER

YOUSUF ALI SAYEED, J - This Application under Section 34 of the Federal Excise Act 2005 has been preferred on behalf of the Revenue, and was admitted to regular hearing for determination of four questions of law, said to arise from the Order made by the learned Appellate Tribunal, Inland Revenue, Karachi (the "**Tribunal**") on 10.08.2011 in Federal Excise Appeal No. ST. 35/KB-2009 (the "**Appellate Order**"), being as follows:

(a) *Whether under the facts and circumstance of the case the learned Tribunal was justified to invoke Section 33 of Central Excise Act 1944, whereas no adjudication was carried out under Section 33 of the Central Excise Act 1944?*

(b) *Whether on the facts and circumstances of the case, the learned Tribunal was justified to invoke the monetary limits on the exercise of adjudication authorities, as provided under Section 33 of Central Excise Act, 1944, which deals with the adjudication in respect of confiscated goods whereas the present case relate to recovery of Central Excise Duty not levied on services?*

(c) *Whether on the facts and circumstances of the case, the Assistant Collector had the lawful authority to adjudicate the cases relating to non/short payment of Central Excise Duty on services under Rule 10 of the Central Excise Rules 1944?*

(d) Whether under the facts and circumstance of the case the learned Tribunal was justified to hold that the case was time barred?

2. Briefly stated, the preceding facts underpinning the matter are as follows:

(i) A Show-Cause Notice dated 29.09.1998, bearing C. No. 16(329)CONT/98/1767 (the "**SCN**") was issued to the Respondent by the Assistant Collector, Central Excise, alleging a violation of Section 3(1) of the erstwhile Central Excise Act, 1944 (the "**1944 Act**"), read with Rule 96ZZI made thereunder, wherein arrears of Central Excise Duty along with additional duty were alleged to reportedly be recoverable on various counts over different period spanning from May 1991 to September 1996.

(ii) Apparently, prior to issuance of the SCN, in the month of November 1997, the record of the Respondent had been audited by a team from the Revenue during the course of which the Respondent had produced all relevant documents/record and the audit was completed without any irregularity or default under the 1944 Act being brought to the fore, however, the SCN nonetheless came to be issued after the laps of 9 months.

(iii) The proceedings that then commenced on the basis of the SCN before the Assistant Collector, Central Excise, culminated in Order-in-Original No.444 of 1998 (the "**OIO**"), with liability thereby being brought to bear against the Respondent, and the ensuing appeal before the Collectorate of Customs, Central Excise & Sales Tax (Appeals), South Zone, Karachi, also came to be decided against the Respondent vide Order-in Appeal No. 328/99.

(iv) However, on appeal to the Tribunal, the OIO was set aside on the ground that the SCN had been barred under Rule 10(1) of the Federal Excise Rules, 1944, and as the Assistant Collector lacked competence to make an assessment in the matter, as the same was beyond his pecuniary jurisdiction under Section 33 of the 1944 Act, hence the present Application by the Revenue for determination of the questions reproduced herein above.

3. Learned counsel for the Applicant contended that questions of limitation and pecuniary jurisdiction had not been raised before the lower fora in the statutory hierarchy, hence could not have been agitated before and/or considered by the Tribunal. He sought to rely on the judgments in the cases reported as Collector of Customs, E. & S.T. and Sales Tax v. Pakistan State Oil Company Ltd 2005 PTD 2446 ("**PSO's Case**"), Muhammad Hussain and another v. Muhammad Shafi and others 2004 SCMR 1947, and Malik Khan Muhammad Tareeen v. Messrs Nasir and Brother Coal Company through Proprietor and others 2018 SCMR 2121.

4. Conversely, learned counsel for the Respondent submitted that the question of limitation which arose in this case was purely one of law, and could accordingly be raised at any stage. Furthermore, as to the aspect of pecuniary jurisdiction, he placed reliance on the judgment of a learned Division Bench of this Court in the case reported as Collector of Customs, Model Customs Collectorate of PaCCS, Karachi versus Messrs. Kapron Overseas Supplies Co., (Pvt.) Limited, Karachi 2010 PTD 465 (authored by one of us, namely Irfan Saadat Khan, J).

5. Having considered the arguments advanced at the bar, we would firstly address the question of limitation, which, is circumscribed in the instant case by Rule 10(1) of the Federal Excise Rules, 1944, in as much the Respondent had been subjected to an audit about 9 months prior to issuance of the SCN, hence the case is admittedly one of alleged inadvertence/error/oversight on the part of the Revenue rather than collusion or any misdeclaration on the part of the Respondent, as could otherwise have brought the matter within the ambit and purview of Rule 10(2). That being said, it falls to be considered that Rule 10(1) reads as follows:

> "**Recovery of duty short-levied or erroneously refunded, etc,--(1)** Where by reason of any inadvertence, error or misconstruction, any duty or charge has not been levied or has been short-levied or has been erroneously refunded, the person liable to pay any amount on that account shall be served with a notice within one year of the relevant date by an officer not below the rank of Superintendent requiring him to show cause why he should not pay the amount specified in the notice."
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> [emphasis supplied]

6. As is apparent from the face of the record, and noted by the Appellate Order, the SCN was issued on 29.09.1998 in relation to the period 1991 to September, 1996, whereas the period prescribed for such purpose under Rule (10)(1) is confined to one year from the 'relevant date'. Reliance by learned counsel for the Applicant on PSO's Case (supra) in an endeavour to circumvent application of the aforementioned time period is misplaced, as in that case the Honourable Supreme Court was seized of a matter where a case of limitation had not been set up at any level of the statutory hierarchy, but had been taken up and determined by the High Court in a reference. In that context, the Apex Court had held that within the scope of Section 196(1) of the Customs Act, 1969, a High Court lacked the capacity to determine a matter that did not arise from the order passed by the tribunal under Section 194-B thereof, and could not stretch its jurisdiction to address a legal ground that had not been raised before the forum below. That principle is inapplicable in the instant case, as the the point of limitation had apparently been raised before the Collector (Appeals) without a finding being rendered, but had then been addressed and decided by the Tribunal. Even otherwise, reliance by learned counsel on PSO's Case is wholly counterproductive, as in the instant case the Revenue is actively seeking that this Court exercise jurisdiction to set aside the finding of the Tribunal, which is the mirror image of the argument that had been raised before the Apex Court in that decided matter.

7. In the present case, the SCN had evidently been issued after the lapse of one year, even if the last day of the period sought to be addressed in terms of the SCN is to be considered as the 'relevant date' for purpose of reckoning limitation. We are fortified in this view by the judgment of the Honourable Supreme Court in the case reported as Messrs Dewan Cement Ltd. V. Collector of Customs and Sales Tax and another 2009 PTD 1247. Under such circumstances, it is apparent that the SCN was barred by limitation and was correctly held as being so by the Tribunal, as was within the competence of that statutory forum.

8. Turning to the questions raised as to jurisdiction of the assessing officer, viz – the Assistant Collector, who had issued the SCN and made the OIO, it merits consideration that under the 1944 Act, in terms of Section 33, a framework had been laid down structuring the power of adjudication at first instance on a pecuniary basis. The Tribunal had found the OIO to have been passed without jurisdiction, as on the relevant date the power of adjudication conferred upon the Assistant Collector was only to the extent of cases involving the confiscation of goods or imposition of a penaltywhich did not exceed Rs.2,50,000/-, excluding the value of conveyance and the value of non-dutiable goods and imposition of penalty under the rules, whereas in the present case a much larger sum was involved, thus bringing the matter within the jurisdiction of the Collector or Additional Collector. The objection raised by the Respondent before the Tribunal as to the competence of the Assistant Collector to act in the matter had been opposed by the Revenue on the ground that such an objection had not been raised before lower fora, but it had been held that a question of law could be raised at any stage of the proceedings, though not raised before the subordinate authorities.

9. While assailing the Appellate Order, the same line of argument was pressed before us by learned counsel for the Applicant, with reference to the case of Muhammad Hussain (Supra) as well as Malik Khan Muhammad Tareeen (Supra). However, on examination, it transpires that neither of those judgments pertained to proceedings before a statutory functionary acting in a judicial or quasi-judicial capacity and are readily distinguishable on the facts.

10. Indeed, the former case concerned the scope of Section 11 of the Suits Valuation Act, where the Honourable Supreme Court *inter alia* held that:

> "10. True, that when a Court suffers from want of inherent jurisdiction, no amount consent or acquiescence in the proceedings can invest such Court with such jurisdiction. Question of waiver or estoppel in that case would not arise and where a Court does not lack in its inherent jurisdiction but the procedure or mode of hearing, it adopts, is defective or irregular and in such a position a party joins issues and participates in the proceedings without raising any objection of such defect or irregularity touching upon jurisdiction; later on, it cannot be allowed to challenge the jurisdiction when the result of the proceedings) goes against it. In the first case, order of the Court will be a nullity in the eye of law but not so in the second case. In view of section 11 (ibid), a decree passed by the Court, whose jurisdiction is assailed, is not void: The defect of jurisdiction contemplated by the section is not of a fundamental character as it is no more than an irregularity in the exercise of jurisdiction."

Even if the aforementioned principle were to be applied to the matter at hand, the same only serves to undermine the argument of the Applicant.

11. Similarly, the case of Malik Khan Muhammad Tareeen (Supra) gravitated around Section 21 CPC and the question of territorial jurisdiction of a Civil Court, with it being observed by the Apex Court in that specific context that:

> "13. On the bare reading of section 21 ibid; it is manifestly clear that the objections as to territorial jurisdiction unless raised before the Court of first instance "at the earliest possible opportunity" are not even considered by the appellate or Revisional Court. The Appellate or Revisional Court would only consider such objections provided all three conditions as set down in section 21, C.P.C. are met viz firstly, objection as to territorial jurisdiction was raised in the Court of first instance, secondly such objection is raised at the earliest opportunity and in case the issues are settled, before settlement of issue and most importantly and thirdly, there has been consequent failure of justice."

12. By contrast, although the judgment of the learned Division Bench in Kapron's case (Supra) pertained to the powers of adjudication under Section 179 of the Customs Act, 1969, that provision and Section 33 of the 1944 Act are *in pari materia*, hence the same is decidedly of relevance and squarely applicable to the matter at hand. The relevant excerpt from that judgment with holding as follows:

> "9. Before dilating upon the issue that whether the Deputy Collector was the competent person to have adjudicated upon the issue or not, it would be pertinent if the relevant provisions of the Customs Act be first thrashed out.
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> "179. Power of adjudication.---(1) Subject to subsection (2), in cases involving confiscation of goods or imposition of penalty under this Act or the rules made thereunder, the jurisdiction and powers of the. Officers of Customs in terms of amount of duties and other taxes involved, excluding the conveyance, shall be as follows: --

(i)	Additional Collector	Without limit
(ii)	Deputy Collector	Not exceeding [eight] Hundred thousand rupees.
(iii)	Assistant Collector	Not exceeding [three hundred] thousand rupees.

> 10. A perusal of the above referred section would reveal that each authority working under the hierarchy of the Customs Department has been assigned a job to perform his duty/official responsibility within the parameters as specifically provided under the law. Any transgression to the above responsibility would render the entire exercise of authority to be ab initio void and illegal."

[emphasis supplied]

> "The learned counsel appearing on behalf of the department has also frankly conceded about the legal lacuna that the assessment in the instant reference application has been made by the Deputy Collector whereas according to section 179 of the Act the same should have been carried out by the Additional Collector, however he has submitted that the same is only a technical defect. We do not subscribe to this view adopted by the learned counsel appearing on behalf of the appellant. It is a trite law that the exercise of jurisdiction by an authority is mandatory requirement and its non-fulfilment would entail the entire proceedings to be coram non judice."
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> [emphasis supplied]

13. As such, under the given circumstances, we are of the view that the Tribunal has also ruled competently and properly on the point of jurisdiction.

14. It is for these reasons that vide a short Order made in Court upon culmination of the hearing on 29.10.2020, questions (a), (b) and (d), as aforementioned, were answered in the affirmative, whereas question (c) was answered in the negative, thus all being decided against the Applicant and in favour of the Respondent, with the captioned Reference being disposed of accordingly.

JUDGE

JUDGE