IN THE HIGH COURT OF SINDH AT KARACHI

SPL. S.T. REF. APPLICATION NO.82/2003

PRESENT: MR. JUSTICE NADEEM AKHTAR, &
MR. JUSTICE MUHAMMAD IQBAL KALHORO,

Appellant : The Additional Collector,
Collectorate of Sales Tax,
Through Mr. Abdul Mujeeb Pirzada, advocate.

Respondent : M/s. Silver Corporation,
None for respondent.

Date of hearing : 26.11.2014.

O R D E R

MUHAMMAD IQBAL KALHORO, J: By this judgment we intend to dispose of present reference application preferred by the applicant against the order of the Appellate Tribunal dated 20.08.2003 in Sales Tax Appeal No.K-106/03 whereby the appeal of the respondent was allowed and the order dated 25.03.2003 passed by the Additional Collector of Sales Tax (Adjudication), Karachi was set aside.

2. As per relevant facts of the case, M/s. Silver Corporation situated at 25/A, 4th Floor, Arkay Square, Shahrah-e-Liaquat, Karachi, obtained refund during the month of September, October and November, 1999 on the basis of bogus and invalid Sales tax invoices, in which the description of the goods purchased did not match with the goods actually exported. Thus, M/s. Silver Corporation unlawfully and fraudulently obtained refund amounting to Rs.46,24,121/- which was recoverable from them under section 36 of the Sales Tax Act 1990 (hereinafter referred as the Act, 1990)

alongwith additional tax under section 34 ibid and it also attracted the penal action under section 33 of Sales Tax Act, 1990 for violation of sections 2(37), 3, 6, 10, 22 and 23 of the Act 1990. M/s. Silver Corporation were accordingly served with a show cause notice C.No.16(33) Cont/Tech/STE/SC/2000/14333 dated 193.04.2000 as to why sales tax amounting to Rs.46,24,121/- should not be recovered from them under section 36 of the Act, 1990 alongwith additional tax (which would be re-calculated upto the actual date of payment) under section 34 and as to why other penal action might not be taken against them under section 33 of the Act, 1990.

3. The respondent submitted an interim reply to the show cause notice through their consultant on 03.05.2000; thereafter they were accordingly provided the copies of invoices considered by the department to be the invoices not relevant to the export against which sales tax refund was claimed.

4. After hearing the parties, the appellant passed the order in original, wherein he in the concluding para held as under:-

> "18. In view of the foregoing observations, I tend to agree with the departmental contention. Thus the charges stated in the show cause notice stand established. I, therefore, hold that the amount of Rs.46,24,121/= be recovered from the respondents alongwith additional tax (exact amount to be calculated at the time of payment) under sections 36 and 34 of the Sales Tax Act, 1990. A penalty equivalent to thirty percent of the tax involved is also imposed upon them under section 33(4)(f) ibid."

5. The respondent filed an appeal against that order before the learned Appellate Tribunal, which was allowed, vide impugned order. The appellant being discontent with the impugned order filed

the instant Reference Application. At preliminary stage, after hearing the learned counsel for the applicant, this Court framed the following questions of law for consideration vide order dated 4.12.2003.

(i) Whether the authority who issued the show cause notice was competent to issue the same under section 36 of the Sales Tax Act, 1990?

(ii) Whether order dated 25.03.2003 passed by the Additional Collector of Sales Tax is without jurisdiction and coram-non-judice?

(iii) Whether the provisions of section 34, 36 and 45(A) of the Sales Tax Act, 1990, have been correctly interpreted by the Appellate Tribunal?

6. On 21.10.2010 when the matter in hand came up for hearing, this Court heard the counsel for the applicant at some length and observed as under:-

> "The learned counsel has taken us through the provisions of the Tribunal's order and also the order-in-original and has submitted that sections 36 and 45(A) of the Sales Tax Act, 1990 cater to two different situations, the first one where it is evident that a refund has been erroneously made then notice may be issued to the taxpayer to show cause why such refund order may not be withdrawn and when FBR or the Collector is of the opinion after examination of any proceedings under the Act that correction action has to be taken, he may take such action. We find ourselves inclined to agree with the contention of the learned counsel that the Tribunal has completely ignored the provisions of section 36 by holding that action could have only been taken in such a case under section 45(A). However, in the interest of justice, the office is directed to issue notice to respondents through substituted service by publication in vernacular newspaper being published from Karachi for 11.11.2010."

7. Despite the publication in daily Jang Karachi dated 30.11.2010, the respondent did not appear to contest the present

case hence the service against them was held good vide order dated 19.11.2014.

8. Mr. Abdul Majeed Pirzada advocate for the applicant argued that learned Appellate Tribunal failed to apply its mind to the provisions of section 34 and 36 which are totally independent of section 45(A) of the Act, 1990. According to him section 45(A) of the Act, 1990 provides revisional power to the Federal Board of Revenue and the Collector Sales Tax whereas the powers under section 36 of the Act, 1990 are powers of review that could not be intertwined or mixed with each other. He also contended that the learned Appellate Tribunal did not discuss section 36 of the Act, 1990 which was relevant to the proceedings in hand, as such the impugned order had resulted into miscarriage of justice. He did not forget to point out that the show cause notice was issued under section 34 and 36 of the Act, 1990 therefore the said provisions of law ought to have been properly attended to and interpreted by the learned Appellate Tribunal and its failure left much to be desired concerning the relevancy in its findings on the contentious issue. During the arguments, he, however, candidly conceded to a suggestion that since the learned Appellate Tribunal had not discussed either section 34 or 36 of the Act 1990 and their implications in the given situation in the impugned order and there were no findings at all recorded by the learned Appellate Tribunal on the aforementioned provisions of law to be either upheld or reversed in the instant reference application, it would be appropriate and just to remand the case to the learned Appellate Tribunal for deciding the questions involved

afresh after taking into consideration section 25, 34 and 36 of the Act, 1990.

9. We heard the learned counsel for the applicant and with his assistance went through the entire material available on the record. The respondent was served with a show cause notice dated 19.04.2000 containing the allegations that it had obtained refund unlawfully and fraudulently during the month of September, October and November 1990 on the basis of bogus and invalid sales tax invoices wherein the description of the purchased invoices did not match with the goods actually exported; and the refund so obtained by the respondent was recoverable from them under section 36, alongwith additional tax under section 34 of the Act, 1990. It also attracted penal provisions provided under section 33 of the Act 1990 for violation of section 2(33), 3, 6, 10, 22 and 23 of the Act, 1990. In view of above, the respondent were called upon in the said notice to show cause in writing within seven days of its receipt as to why the recoverable tax might not be recovered from them under section 34 and 36 of the Act, 1990 and why an action for contravention of the said provisions of law should not be taken against them under section 33 of the Act, 1990. The show cause notice was contested by the respondent before the appellant who after examining every thread of evidence produced before him passed the order in original dated 24.03.2003, whereby he has held, after a thorough and detailed discussion into the facts prevalent in the case and the laws applicable thereon, that on account of the charges in show cause notice, which stood established, a certain amount viz. Rs.46,24,121/- be recovered from the respondent. On the contrary the learned

Appellate Tribunal while reversing the findings of the appellant has heavily lent itself towards the import inherent in section 45(A) of the Act 1990, which caters to an entirely different situation as observed by this Court in the order dated 21.10.2010 without having a recourse to the provisions under section 34 and 36 of the Act, 1990 to arrive at a conclusion duly sustainable under the law. The impugned order is completely silent with regard to the applicability of section 36 of the Act, 1990 in the given situation, which in view of the subject matter of the show cause notice was most relevant to be adjudicated upon. For the ready reference section 36 of the Act 1990 is reproduced herewith.

> **"36. Recovery of tax not levied or short-levied or erroneously refunded.**
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> (1) Where by reason of some collusion or a deliberate act any tax or charge has not been levied or made or has been short-levied or has been erroneously refunded, the person liable to pay any amount of tax or charge or the amount of refund erroneously made shall be served with a notice, within five years of the relevant date, requiring him to show cause for payment of the amount specified in the notice.
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> (2) Where, by reason of any inadvertence, error or misconstruction, any tax or charge has not been levied or made or has been short-levied or has been erroneously refunded, the person liable to pay the amount of tax or charge or the amount of refund erroneously made shall be served with a notice within three years of the relevant date, requiring him to show cause for payment of the amount specified in the notice:
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> Provided that, where a tax or charge has not been levied under this sub-section, the amount of tax shall be recovered as tax fraction of the value of supply.
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> (3) The officer of Sales Tax empowered in this behalf shall, after considering the objections of the person served with a notice to show cause under sub-section (1) or sub-section (2), determine the amount of tax or charge payable by him and such person shall pay the amount so determined.
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> Provided that order under this section shall be made within one hundred and twenty days of issuance of show cause notice or within such extended period as the Collector

may, for reasons to be recorded in writing, fix, provided that such extended period shall in no case exceed one hundred and twenty days**:**

(4) For the purpose of this section, the expression "relevant date" means--

(a) the time of payment of tax or charge as provided under section 6; and

(b) in a case where tax or charge has been erroneously refunded, the date of its refund."

10. As per sub-section (1) to the above provision of law, within five years of the relevant date the person who was liable to pay any amount of tax or charge or the amount of refund erroneously made or on account of some collusion or a deliberate act had not been levied or made or had been short-levied or had been erroneously refunded could be served competently with a notice requiring him to pay the amount specified therein. The relevant period which has been made the subject matter of the present proceedings happens to be the months of September, October and November 1999, and the show cause notice issued to the respondent is dated 19.04.2000, which, therefore, admittedly is within the stipulated period of five years. The learned Appellate Tribunal has apparently not adverted to such factual position obtaining at the relevant time while deciding the appeal preferred by the respondent against the order in original. In addition to it, the impugned order does not reflect that section 33 of the Act, 1990 which comes into play in the event of violation of provisions of the Act, 1990; and which has been specifically referred to in the show cause notice has been deliberated upon by the learned Appellate Tribunal to support its findings recorded therein.

11. Under the circumstances, we found the impugned order not sustainable for want of necessary findings over the prevalent facts and the relevant law, hence the instant Reference Application was remanded back to the learned Appellate Tribunal for decision on merits strictly in accordance with law within a period of 90 days from the receipt of the order, and these are the reason for the same.

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