

IN THE HIGH COURT OF SINDH AT KARACHI

Special Sales Tax Reference Application No.105 of 2006

Before:

Mr. Justice Nadeem Akhtar &

Mr. Justice Muhammad Iqbal Kalhoro

M/s SMS Courier (Pvt.) Limited..... Appellant.

Versus

The Collector (Appeals) and another..... Respondents.

Date of hearing : 11.12.2014.

Appellant : Through Mr. Mazahar Jafri Advocate.

Respondents : Through Mr. Shakeel Ahmed Advocate

J U D G M E N T

MUHAMMAD IQBAL KALHORO, J: - This judgment shall dispose of the instant Sales Tax Reference Application filed by the applicant against the impugned judgment dated 20.02.2006 passed by the learned single Member Technical-II Custom, Excise & Sales Tax Appellate Tribunal Karachi Bench-II, dismissing the appeal preferred by the applicant and confirming the Order-in-Appeal No.57/2005 dated 31.10.2005 and Order-in-Original No. 114/2005 dated 27.7.2005 passed respectively by the Respondents N0.1 and 2 whereby recovery of evaded sales tax amounting to Rs.473,449/- along with additional tax under sections 36 & 34 of the Sales Tax Act,1990 (hereinafter referred as the Act 1990), besides penalty in terms of section 33(4) (c) (f) and section 33 (3)(b) and 33(1) of the Act,1990 for violation of section 6(2),

11(1)(2), 22,23 & 26 read with section 2(9) of the Act,1990 was imposed upon the applicant.

2. The relevant facts in brief are that on receipt of an information regarding alleged evasion of sales tax by the applicant/Messrs SMS Courier (Pvt.) Limited on the services provided by them the Superintendent, Sale Tax Services Sector Hyderabad visited the aforementioned registered person at the office situated at 11-A, Unit No.5, latifabad, Hyderabad and observed that applicant were a nationwide courier service provider, however they were registered with the sales tax department zone-wise separately. The sindh zone Hyderabad was responsible for providing courier services at Hyderabad, Nawabshah and Mirpurkhas and it was registered with the Collectorate of Customs, Sales Tax & Central Excise Hyderabad having sales tax registration No.01-01-9801-00291. They were asked to produce the record regarding courier services provided by them which was required to be maintained under section 22 of Sales Tax Act, 1990. But they did not produce the same. However, the month-wise statements of the actual services provided and sales tax recovered at Hyderabad, Nawabshah and Mirpurkhas during the months from July 2002 to February 2003 which they had reported to the Head Office were obtained from them. According to these statements, the actual value of services provided and sales tax recovered by them were as under:-

Tax period	Hyderabad	Nawabshah	Mirpurkhas	Total	Sales Tax Recovered.
July, 02	276245	101183	89305	466633	53621
Aug, 02	813400	111221	86911	511532	60223
Sep 02	248615	105223	85763	439601	49102
Oct, 02	253654	98797	88156	440607	50162
Nov,02	232005	113169	94852	440026	47357
Dec, 02	221952	97653	74178	393783	44871
Jan, 03	281560	102198	90869	474627	54667
Feb, 03	173685	77060	66101	316846	35721

Total	2001116	808404	876135	3483665	395724
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3. The figure in the statements showed a lot of difference, when compared with the sales tax returns submitted by the applicant in the sales tax department and the amount of sales tax paid in the treasury. A comparison of the actual sales and the sales tax due thereupon with the sales declared and sales tax paid and the sales suppressed and sales tax evaded by the applicant begot the following figure.

Month	Actual Sales	Sales Tax Due	Sales Declared	Sales Tax paid	Sales Suppressed	Sales Tax evaded	Date of Payment
July, 02	466633	69995	0	0	466633	69995	Return not furnished
Aug, 02	511532	76730	72552	10883	438980	65847	14.09.12
Sept, 02	439601	65940	37092	5564	402509	60376	15.10.02
Oct, 02	440607	66091	37092	5564	403515	60527	15.11.02
Nov, 02	440026	66004	57092	8564	382934	57440	14.12.02
Dec, 02	393783	59067	80990	12149	312793	46018	15.01.03
Jan, 03	474627	71194	--	--	474627	71194	Return not furnished
Feb, 03	316846	475227	42503	6375	274343	41552	15.03.03
Total	3483665	522548	337321	49099	3156334	473449	

4. In view of such assessment, a show cause notice dated 17.10.2003 was issued to the applicant as it became obvious that applicant had evaded tax of Rs. 473449/- by declaring the sales amounting to Rs. 337,321/- during the period from July 2002 to February 2003, against the actual sales (value of services provided) of Rs. 3,483,655/-.

5. The applicant contested the show cause notice but could not give any evidence to neutralize the allegations leveled therein,

resultantly the order-in-original was passed, which was challenged by them in the appeal before the Collector (Appeals), Hyderabad/ Respondent No.1. The appeal was also dismissed vide order-in-appeal referred above. The applicant filed the second appeal before the Appellate Tribunal but to no avail. Feeling aggrieved by the impugned orders the applicant has preferred this reference application, proposing wherein the following questions of law for consideration.

(1) Whether the learned Tribunal was justified in holding that the Superintendent is empowered to act as officer of Sales Tax under section 25 of the Sales Tax, 1990 in visiting the office of a registered persons and in obtaining therefrom record / documents particularly when there is information or sufficient evidence showing that such registered person is involved in tax fraud or evasion of tax?

(2) Whether on the facts and in the circumstances of the case, the superintendent of Sales Tax is empowered / authorized as an officer of the Sales Tax to conduct an inquiry or investigation under section 38 of the Sales Tax Act, 1990, in relation to a registered person about whom the Collector of Sales Tax has information or sufficient evidence showing that such registered person is involved in tax fraud or evasion of tax?

6. Mr. Mazhar Jafri, counsel for the applicant in support of his case contended that in terms of proviso to section 25 of the Act, 1990 the superintend Sales Tax was not competent to visit/raid the office of the applicant and to seize the record wherefrom for inspection. According to him, in terms of section 25 of Act, 1990 only the Commissioner was empowered to collect the record from the office of the applicant and only he could authorize an officer not below the rank of Assistant Commissioner to hold an enquiry or investigation under section 38 of the Act, 1990, therefore the entire

proceedings initiated by the Superintendent Sales Tax against the applicant and subsequent orders passed thereon were illegal, coram non iudice and liable to be set aside. To vouch for his contention, he referred the case laws reported in 2004 PTD 1339 and 2005 PTD 1933 and lastly prayed for setting aside the impugned orders.

7. Mr. Shakeel Ahmed, learned counsel for the respondent in his arguments controverted the contentions of learned counsel for the applicant and stated that the examination of the record pertained to a period from July 2002 to February 2003, when proviso to section 25 of the Sales Tax Act, 1990 was not yet introduced. According to him the proceedings conducted against the applicant were just, proper and legal and no prejudice was caused to the applicant as on merits the applicant was not able to offer any evidence to refute tax evasion alleged against him in the show cause notice. He also emphasized that allegations against the applicant were confirmed firstly by the Respondent No.2 in his order-in-original, subsequently by the Respondent No.2 in his Order-in-Appeal and lastly by the Appellate Tribunal in the impugned order. He lastly sought for dismissal of the instant reference application.

8. We considered the arguments advanced by the learned counsel and perused the material available on record as well as the case laws cited at bar.

9. The case of the applicant mainly hinges upon the argument that under section 25 of the Act, 1990, the Commissioner is

authorized to require a registered person to produce the record or documents and only he, on the basis of information or sufficient evidence linking the registered person in tax fraud or tax evasion, could empower an officer not below the rank of Assistant Commissioner to conduct an inquiry or investigation stipulated under section 38 of the Act, 1990. There would be no cavil to such argument as far as the law, which stands today, is concerned. The facts in hand, however, testify that the record (which was inspected) relating to the services provided by the applicant and the sales tax recovered from Hyderabad, Nawashah and Mirpurkas, belongs to a period extended from July 2002 to February 2003. During which there was no proviso attached to section 25 of the Act, 1990. In the relevant period the Superintendent Sales Tax, being the officer concerned in terms of the then prevalent law was competent to require the applicant to allow him access to the record pertaining to the services provided during the subject period. Before the amendments brought about in the Act, 1990 through the Finance Act, 2003, dated 1st July 2003, whereby, *inter alia*, sub-sections (2) to (5) were introduced in section 25, it read as under:

25. Access to record, documents, etc. A person who is required to maintain any record or documents under this Act or any other law shall, as and when required by an officer of Sales Tax, produce record or documents which are in his possession or control or in the possession or control of his agent; and where such record or documents have been kept on electronic data, he shall allow access to such officer of Sales Tax and use of any machine on which such data is kept.

10. The scheme under the *ibid* provision of law read in conjunction with the section 38 of Act, 1990, as it was during the

relevant time, leaves no room to speculate adversely over the competency of the Superintendent Sales Tax being the officer concerned to ask for a free access to business or manufacturing premises, registered office or any other place, where any stocks, business records or documents were kept or maintained, belonging to any registered person which were required for any inquiry or investigation in any tax fraud committed by him or his agent or any other person. Such officer was within his bounds under the above arrangement of the law to inspect the goods, stocks, records, data, documents, correspondence, accounts, and statements, utility bills, bank statements, information regarding nature and source of funds, or assets with which the business of a registered person was financed and any other records or documents maintained in any form or mode and was competent to take in his custody any of such records. The registered person, his agent or any other person had no liberty or discretion to refuse to answer any question or furnish any information or explanation being asked of him by such officer. The facts of the case in hand show that on the basis of information the record concerning the relevant period was inquired about from the applicant by the Superintendent Sales Tax which was refused to him. He however was able to obtain the month wise statements regarding the subject period appertaining to the services provided and the sales tax recovered by the applicant. The assessment made and compared in respect of the actual services provided during the subject period and the sales tax recovered at Hyderabad, Nawabshah and Mirpurkhas with the sales tax returns submitted by the applicant in the

sales tax department and the amount of sales tax paid in the treasury, showed a lot of difference which was made subject matter of a show cause notice issued by the then Deputy Collector Sales Tax, against which, however, nothing was offered in explanation by the applicant on merits. No illegality appears to have been committed which has prejudiced the applicant. During the arguments also, the learned counsel for the applicant did not try to rationalize the difference in tax assessment made by the department on the basis of documents belonging to the applicant and consequent show cause notice on merits of the facts obtaining in the present case. He, however, questioned the entire proceedings so far conducted against the applicant on legal plane by referring to the proviso to section 25 and the scheme provided under section 38 of the Act, 1990, which we carefully examined, as discussed above, in view of the law as it stood then and found no force in it. The proposed questions are answered accordingly.

11. These are the reasons for our short order announced on 11th December 2015, whereby the instant reference application was dismissed.

JUDGE

JUDGE