

Judgment Sheet
PESHAWAR HIGH COURT, PESHAWAR
(Judicial Department)

Sales Tax Reference No.58-P/2022

**“Khyber Pakhtunkhwa, Revenue Authority-KPRA,
through its Director General, Peshawar**

Versus

**M/S Legacy Pharmaceutical (Pvt.) Limited, 111-A,
Industrial Estate, Jamrud Road, Peshawar”**

JUDGMENT

Date of Hearing: 28.10.2022

Appellant(s) by: Mr. Rahman Ullah, Advocate.

Respondent(s) by: Nemo (in motion)

SHAKEEL AHMAD, J.- By this Sales Tax Reference (STR) application, the appellant Khyber Pakhtunkhwa, Revenue Authority (KPRA) through its Director General, Peshawar has assailed the impugned order dated 12.04.2022, passed by the learned Appellate Tribunal for Sales Tax on Services, Khyber Pakhtunkhwa, Peshawar in Appeal No.APL/89-ATSTS-2021, he has filed this reference to answer the following questions;

- I. Whether the Tribunal STS has properly construed the provisions of section 40 to be read with section 68(2) of the KP Finance Act, 2013 for the determination and assessment of tax payable within five years?***
- II. Whether the Tribunal STS has rightly and legally decided the case as per law and facts?***
- III. Whether the provisions of section 40 and 68(2) bar the assessing officer to issue show cause notice for the period of five years?***
- IV. Whether the respondent has not acted mala fide by not depositing the due taxes to the provincial exchequer on***

services provided during the period of five years?

- V. *Whether the case law has rightly been relied upon by the Tribunal STS to the instant case where entire adjudication proceedings have been considered by the Tribunal itself to be in accordance with relevant provisions of 40 and section 68 of the KP Finance Act, 2013?"*

2. Brief facts of the case, necessary to be noted for deciding this reference are that during examination of the Financial Statements of **M/S Legacy Pharmaceutical (Pvt.) Limited** received from Security and Exchange Commission of Pakistan (SECP) certain discrepancies were pointed out. It was alleged that the respondent has received taxable services from different service providers for the period of September 2015 to June 2018, involving sales tax amounting to Rs.1,150,667/-, which was neither declared nor deposited. Consequently, a show cause notice was served upon him under sections 40(2) and 68(2) read with para 11(1) of the Khyber Pakhtunkhwa Sales Tax on Services Special Procedures (Withholding) Regulation, 2015 (now repealed), asking therein to deposit the said amount in terms of the provisions contained in the Khyber Pakhtunkhwa Finance Act, 2013, besides penal actions. Pursuant to the show cause notice, the respondent put his appearance and submitted written reply of the show cause. After providing an opportunity of hearing, the Deputy Collector (Withholding) passed order for recovery of sales tax amounting to Rs.1,055,877/- alongwith default surcharge in terms of section 65 (to be calculated at the time of actual payment) besides penalty under serial No.4 of the

Table under section 64 of the Khyber Pakhtunkhwa Finance Act, 2013 vide order dated 28th June 2021.

3. Not contented with the order of the Deputy Collector, the respondent filed appeal No. C (A)-126/2021 before the Collector (Appeals), Khyber Pakhtunkhwa Revenue Authority, Peshawar, which was accepted and the impugned order mentioned above was set aside, vide order dated 25.08.2021. Being aggrieved of the same, the appellant/Additional Collector (Withholding), Khyber Pakhtunkhwa Revenue Authority (KPRA) filed appeal before the Appellate Tribunal for Sales Tax on Services, Khyber Pakhtunkhwa, Peshawar, which was dismissed by the majority, however, Technical Member-I recorded Dissenting Note and set aside the order of the Collector Appeals vide judgment dated 12th April, 2022. Hence, this reference application.

4. It is an admitted fact that the appellant issued a show cause notice to the respondent for payment of Rs.1,150,677/- as Sales Tax allegedly received by him from different Service providers during the period from 1st September 2015 to 30th June 2018, detail whereof is reproduced as under;

Freight and loading Expenses	142,657	155,930	2,060,433	2,359,020	15%	353,853
Transport.	725,000	740,000	1,080,000	2,545,000	15%	381,750
Repair & Maintenance	-	-	351,200	351,200	15%	52,680
Auditor's Remuneration	25,000	30,000	125,000	180,000	15%	27,000
Legal	60,476	75,430	698,600	834,506	15%	125,176
Entertainment	310,864	335,295	755,295	1,401,454	15%	210,218
Total Amount	1,263,997	1,336,655	5,070,528	7,671,180		1,150,677

5. In support of his claim, the appellant relied upon section 40(1A) and section 68(2) of the Finance Act, 2013 read with Khyber Pakhtunkhwa Sales Tax on Services Special Procedures (Withholding) Regulation, 2015 (now repealed). It is also an admitted fact that section 40(1A) of the Act *ibid* was added through an amendment introduced in July 2019, and claim for recovery of amount in question relates to the periods prior to the said amendment. A perusal of section 40 reflects that it deals with the assessment of tax by an officer or Authority, whereas section 68 provides for recovery of tax not levied or short-levied and non-payment/short payment of tax in certain cases. It will be advantageous to reproduce the said sections as under;

“40. Assessment of tax.---(1) Where on the basis of any information acquired during an audit, inquiry, inspection or otherwise, an officer of the Authority is of the opinion that a registered person has not paid the tax due on taxable services provided by him or has made short payment, the officer shall make an assessment of the tax actually payable by that person and shall impose a penalty and charge default surcharge in accordance with sections 64 and 65.

(1A) Where any person, registered to withhold sales tax under the provisions of this Act or regulations, fails to withhold the tax or withholds the tax but fails to deposit the same in the prescribed time and manner, an officer of the Authority shall, after a notice to such person to show cause, determine the amount in default and shall impose a penalty and default surcharge according to law.

(2) No order under sub-section (1) shall be made unless a notice to show cause is given to the person in default within five years from the end of the tax period to which the assessment relates specifying the grounds on which it is intended to proceed against him and the said officer shall take into consideration the

representation made by such person and provide him an opportunity of being heard if the person so desires.

(3) An order under sub-section (1), shall be made within one hundred and twenty days of issuance of the show cause notice or within such extended period as the officer may, for reasons to be recorded in writing, fix: Provided that such extended period shall ordinarily not exceed sixty days.

(4) In computing the period specified in sub-section (3), any period during which the proceedings are adjourned on account of a stay order or proceedings under section 89 or the time taken through adjournments by the person shall be excluded.

(5) An order passed under sub-section (1), may be further amended as may be necessary when on the basis of any information acquired during an audit, inquiry, inspection or otherwise, the officer is satisfied that-

(a) any tax has been under-assessed or assessed at a low rate; or

(b) any taxable service provided by the person has escaped assessment.

(6) The Collector may amend, or further amend any order passed under sub-section (1) or (5), if he considers that the order is erroneous or pre-judicial to interest of Justice.

(7) The provisions of sub-sections (2), (3) and (4) shall be applicable to an order passed under sub-section (5) and (6).

(8) Notwithstanding anything contained in this Act, the Authority may prescribe thresholds, parameters, standards and basis for assessment of supply value and the assessment of tax."

"68. Recovery of tax not levied or short-levied.---(1) Where by reason of inadvertence, error, misconstruction or for any other reason, any tax or charge has not been levied or has been short levied, the person liable to pay such amount of the tax or charge shall be served with a notice, within three years of the relevant tax period requiring him to show cause for nonpayment of the amount specified in the notice.

(2) Where by reason of some collusion, abetment, deliberate attempt, mis-statement, fraud, forgery, false or fake documents-

(a) any tax or charge has not been paid or is, short paid, the person liable to pay such tax shall be served with a notice within five years of relevant tax period, requiring him to show cause for non-payment of such tax; and (b) any amount of the tax is

refunded which is not due, the person obtaining such refund shall be served with a notice within five years of the receipt of such refund to show cause against the recovery of such refund.

(3) The officer shall, after considering the objections of the person served with a notice under subsections (1) or (2) or if the objections are not received within the stipulated period, determine the amount of the tax or charge payable by him and such person shall pay the amount so determined.

(4) Any order under sub-section (3) shall be made within one hundred and twenty days of issuance of the notice to show cause or within such extended period as the officer may, for reasons to be recorded in writing, fix provided that such extended period shall not ordinarily exceed sixty days.

(5) In computing the period specified in sub-section (4), any period during which the proceedings are adjourned on account of a stay order or proceedings under section 89 or the time taken through adjournments by the petitioner not exceeding thirty days, shall be excluded."

6. A plain reading of section 68 mentioned above reveals that it does not relate to withholding agent, whereas sub-section (1) of section 40 of the Act relates to service provider, which has no relevance with the instant case. No doubt, section 30 of the Act confers power upon the Authority to require any person to demand or withhold tax from any person, however, there was no enabling provision in the Act, whereby an officer or Authority could issue a show cause notice and determine/assess the payable withheld tax. Noticing this flaw in law, an amendment was introduced by the legislature in section 40 and inserted sub-section (1A) in section 40 of the Act, which clearly indicates that the original statute (section 40) did not provide for determination of default on the part of a withholding agent and imposition of

penalty and surcharge on default of such agent. It is not denied that the said amendment was brought in section 40 of the Act in July 2019, whereas claim of the appellant for recovery of amount in question relates to the period 1st September 2015 to 30th June 2018, prior to insertion of section (1A) in section 40 of the Act. It is by now settled that where the legislature has made its intention clear that the amending Act should have a retrospective effect/operation, there is no doubt that it must be so construed even though consequence may entail hardship to a party. Reference may be made to the case reported as "*The State Vs. Maulvi Muhammad Jamil and others*" (PLD 1965 SC 681). This view was reaffirmed by the August Supreme Court of Pakistan in its judgments reported as "*Muhammad Ali and 39 others Vs. United Bank Limited through President*" and "*Dr. Azam Sarfraz Vs. Government of Pakistan through Secretary Establishment Division Islamabad and others*" (2005 SCMR 1785 & 590), observing that it is well settled principle of interpretation of statutes that where a statute affects a substantive right, it operates prospectively unless "by express enactment or necessary intendment" retrospective operation has been given. However, statutes which is a procedural in nature, operates retrospectively unless it affects an existing right on the date of enactment or causes injustice or prejudice to a substantive right.

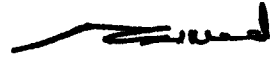
7. From the discussion made hereinabove, we are of the considered view that an amendment in the fiscal statute has always prospective effect unless retrospective effect is given to it by the legislature. It is an admitted fact that no retrospective effect has been given to the amendment quoted above, therefore, it was rightly held by the learned Appellate Tribunal that the assessment made by the appellant for the period prior to insertion of section (1A) in section 40 of the Act was illegal.

8. We find that the instant Sales Tax Reference (STR) has been filed beyond the stipulated period of sixty days. It is reflected from the record that the impugned order was passed on 12.04.2022, the certified copy whereof was issued to him on 15.04.2022, whereas the reference application was filed on 07.07.2022. This Sales Tax Reference is barred by 24 days. It is also by now settled that object of law of limitation is to help the vigilant and not the indolent and that the law of limitation was required to be construed strictly, coupled with the maxim that each day of delay to be explained by the party concerned. The Government department cannot be treated differently than the private individual on the question of limitation. In this behalf, reference may be made to the cases reported as "Province of Punjab and others Vs. Ghulam Shabbir" (2004 YLR 10), "Military Estate Officer and another Vs. Syed Qamoos Shah and 20 others" (PLD 2004 Peshawar 40) and "Muhammad Afzal Vs. Executive

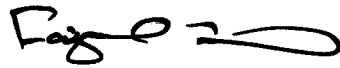
Engineer and another" (2009 MLD 82). The appellant could not offer any plausible explanation for condonation of delay in their application. Negligence to file the instant Sales Tax Reference, in our view must have its reward to punish the indolent. Under these circumstances, the request for condonation of delay in filing the STR is refused.

9. For what has been discussed hereinabove, this Sales Tax Reference (STR), being devoid of merits and barred by time, is hereby **dismissed** in *limine*. The Reference is answered in **Negative**.

Announced:
28.10.2022



JUDGE



JUDGE

(Shahid Nawaz, Steno)

(DB)

Hon'ble Mr. Justice Shakeel Ahmad
Hon'ble Mr. Justice Fazal Subhan