IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
MR. JUSTICE QAZI FAEZ ISA
MR. JUSTICE YAHYA AFRIDI
MR. JUSTICE MUHAMMAD ALI MAZHAR

CIVIL PETITION NO.409-L OF 2021
(Against the judgment dated 12.11.2020 passed by the Lahore High Court, Lahore in STA.No.13/2005)

The Collector of Sales Tax and Central Excise, Lahore ...Petitioner

Versus

M/s Qadbros Engineering (Pvt) Ltd., Lahore ...Respondent

For the Petitioner: Ch. Muhammad Zafar Iqbal, ASC
(Through Video Link from Lahore)

For the Respondent : N.R.

Date of Hearing: 20.02.2023

Judgment

MUHAMMAD ALI MAZHAR, J. This Civil Petition for leave to appeal is directed against the judgment dated 12.11.2020 passed by the learned Lahore High Court, Lahore in STA No.13/2005 whereby the sales tax appeal filed by the petitioner was dismissed.

2. The short-lived facts of the case are that during audit proceedings it was revealed that M/s Qadbros Engineering (Pvt) Ltd (respondent) had claimed input adjustment of sales tax paid earlier on purchases from their sister unit M/s Qadri Brothers (Pvt.) Ltd. A Show Cause Notice was issued to the respondent on 2.2.1998 ("**Show Cause**") with the allegation that it had wrongfully claimed input adjustment of sales tax on the purchase of M/s chanels from its sister unit, Qadri Brothers (Pvt) Ltd. Whereas said sister unit M/s Qadri brothers (Pvt) Ltd. was paying fixed sales tax on fixed production basis under the SRO.630(I)/1995 dated 02.07.1995, therefore the invoices No. 1 to 150 were issued by M/s Qadri Brothers (Pvt) Ltd. to illegally provide the benefit of input tax adjustment to its sister concern. The record reflects that the proceedings activated from the Show Cause culminated in the

Order-in-Original dated 10.06.1999 against the respondent which was challenged in appeal before the Collector of Central Excise & Sales Tax, Lahore, and their appeal was dismissed *vide* Order dated 07.10.1999. Eventually, the respondent approached the Customs, Excise and Sales Tax Appellate Tribunal, Lahore ("**Appellate Tribunal**") and filed an appeal which was heard by a two Member Bench but, due to divergent views, they framed some questions and referred the matter to be decided by a referee/third member who finally rendered the decision against the Department *vide* judgment dated 21.12.2004 which was challenged by the petitioner before the Lahore High Court by means of Sales Tax Appeal No. 13/2005, but it was dismissed vide impugned judgment dated 12.11.2020.

3. The learned counsel for the petitioner argued that the respondent could not claim input adjustment of sales tax on purchases from its sister concern. It was further contended that during the years 1995-96 150 invoices were fabricated in order to provide undue benefit to the respondent. It was further averred that the High Court had ignored the crucial point that the sales invoices were neither valid nor duly verified, nor the supplier was authorized to issue said invoices while paying fixed sales tax in view of SRO 639(1)/1995 dated 02.07.1995. It was further contended that the input tax under Section 7 of the Sales Tax Act, 1990 ("1990 Act") could not be claimed when the taxable supply is made under the presumptive production regime.

4. Heard the arguments. The bone of contention triggered from the Show Cause on the allegation of securing input sales tax adjustment by a company from its sister concern or subsidiary on the basis of manipulated and unverified invoices. However, in the Order-in-Original No. 48/99, the Additional Collector-II Sales Tax, Lahore has not given any definite findings on the crucial plea or allegation with regard to the relationship between the respondent and Qadri Brothers (Pvt) Ltd. But merely observed that the invoices were not authenticated by the proper Excise/Sales Tax Office and further that Qadri Brothers (Pvt) Ltd. was paying tax in terms of SRO.630(I)/1995 dated 02.07.1995, hence they could not issue tax invoices to the respondent. Even in the Order-in-Appeal passed by the Collector of Central Excise & Sales Tax Appeals-II, the actual point raised in the Show Cause was not properly dealt with or appreciated save for the reliance placed on the version of the Department that Qadri Brothers (Pvt) Ltd is carrying out business in the

fixed sales tax regime so it could not claim any rebate, remission and/or refund adjustment.

5. It is deducible from the judgment of the Appellate Tribunal rendered on 22.06.2002 in Appeal No.620/LB/1999 filed by the respondent that a plea was taken that the Department had earlier initiated similar proceedings for the recovery of the same amount and had issued a demand notice which was challenged in Writ Petition No.1765/1997 before the Lahore High Court, which was disposed of on the basis of a statement made by the advocate of the Tax Department that the notice has been withdrawn. However, after considering the pros and cons, one of the members of the Bench (Justice Abdul Majeed Tiwana, Chairman) allowed the appeal of the respondent with the finding that nothing was found on record to substantiate that M/s Qadri Brothers (Pvt.) Ltd. is a sister concern of the respondent and, even if it is subject to the fixed tax regime, there is no prohibition under the law for issuing sale invoices and the respondent was found entitled to claim and adjust input tax on the basis of the disputed invoices. Whereas another learned member (Sarfraz Amad Khan, Member Technical) recorded his dissenting view and held that when the supplier (Qadri Brothers) could not charge output tax on a tax invoice and was paying sales tax on presumptive production, the appellant/respondent could not get that right of input tax adjustment which was not available to the supplier. The appeal was partly allowed by the learned second Member with regard to the waiver of penalty amount but no definite findings were recorded in the order with respect to the basic allegation raised in the Show Cause *vis-à-vis* the relationship of sister concern or subsidiary company between the respondent and the supplier.

6. In order to reconcile and straighten out the views expressed by both the learned Members of the Appellate Tribunal *vice versa*, they also formulated some points for the Referee Member. To begin with, the then learned Chairman entrusted the case to Mir Fuad, learned Member Technical, Karachi Bench-I as Referee Member who, *vide* judgment dated 20.08.2002, dismissed the appeal of the respondent, but his judgment was set aside by the Lahore High Court and the matter was remanded for decision afresh by another Member of the Appellate Tribunal. Sooner or later, the Referee Member, after considering the divergent views as well as the formulated points, decided the appeal *vide* judgment dated 21.12.2004 and held that respondent/appellant

and Qadri Brothers (Pvt) Ltd both have different registration numbers; they are separately registered and are not sister concerns and finally, he subscribed to the views rendered by the learned Member Judicial/Chairman and accepted the appeal of the respondent/appellant.

7. The main allegation in the Show Cause is related to the alleged business transaction between the two sister concerns or subsidiary companies. There is no definition of “sister concern” either in the repealed Companies Ordinance, 1984 or the present Companies Act, 2017, but this turn of phrase basically delineates two or more distinct businesses or ventures owned by one and the same conglomerate but such undertakings/concerns do not have any link or nexus with the operations of each other’s business with the exception of conjoint ownership but legally or financially are not related to each other despite its affiliation with another company with a separate identity and workforces. According to Section 2, Clause 38 (definition clause) of the repealed Companies Ordinance, 1984, “subsidiary company” or “subsidiary” means a subsidiary company as defined in Section 3, which is replicated as under:-

> 3. Meaning of "subsidiary" and "holding company". (1) For purposes of this Ordinance, a company or body corporate shall be deemed to be a subsidiary of another if-
>
> (a) that other company or body corporate directly or indirectly controls, beneficially owns or holds more than fifty per cent of its voting securities or otherwise has power to elect and appoint more than fifty per cent of its directors; or
>
> (b) the first mentioned company or body corporate is a subsidiary of any company or body corporate which is that other's subsidiary;
>
> Provided that, where a central depository holds more than fifty per cent of the voting securities of a company, such company shall not be deemed to be a subsidiary of the central depository save where such voting securities are held beneficially by the central depository in its own behalf.
>
> (2) For the purpose of this Ordinance, a company shall be deemed to be another’s holding company if, but only if that other is its subsidiary.

8. Concomitantly in the Companies Act, 2017, there is no separate Section to define the subsidiary company but it is defined under Section 2, Clause 68 (definition clause) as under:-

> (68) "subsidiary company" or "subsidiary", in relation to any other company (that is to say the holding company), means a company in which the holding company-
>
> (a) controls the composition of the board; or
>
> (b) exercises or controls more than one-half of its voting securities either by itself or together with one or more of its subsidiary companies:

> Provided that such class or classes of holding companies shall not have layers of subsidiaries beyond such numbers, as may be notified,
>
> *Explanation:*-- For the purposes of this clause –
>
> (i) a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in sub-clause (a) or sub-clause (b) is of another subsidiary company of the holding company;
>
> (ii) the composition of a company's board shall be deemed to be controlled by another company if that other company by exercise of power exercisable by it at its discretion can appoint or remove all or a majority of the directors;
>
> (iii) the expression "company" includes any body corporate;
>
> (iv) "layer" in relation to a holding company subsidiary or subsidiaries;

9. A company is deemed to be a subsidiary of another, the holding company, if the latter holds a majority of its voting rights; is a member of it and has the right to appoint or remove a majority of board of directors; or is a member of it and controls alone (under an agreement with other members) a majority of its voting rights. A company is also deemed to be a subsidiary of another if it qualifies as a subsidiary of a subsidiary of the holding company. A "wholly-owned subsidiary" is one whose shares are exclusively owned by a holding company, its wholly-owned subsidiaries and the nominees of either [Ref: Palmer's Company Law (2019 Edition), Volume 3, paragraph 9.303, page 9246]. According to Halsbury's Laws of England (Fifth Edition), Volume 14 (pages 54-55), a company is a 'subsidiary' of another company, its 'holding company', if that other company: (1) holds a majority of the voting rights in it; or (2) is a member of it and has the right to appoint or remove a majority of its board of directors; or (3) is a member of it and controls alone, pursuant to an agreement with other members, a majority of the voting rights in it, or if it is a subsidiary of a company which is itself a subsidiary of that other company. A company is a 'wholly-owned subsidiary' of another company if it has no members except that other and that other's wholly-owned subsidiaries or persons acting on behalf of that other or its wholly-owned subsidiaries. Whereas in Company Law by C.R. Datta (Seventh Edition), Volume I, Chapter I (Page 1382-1383), a holding company and its subsidiary are separate legal entities. But, for certain purposes, affairs of a subsidiary have been treated by the Acts as affairs of the holding company. It is true that occasionally the corporate veil of a company is pierced through in order to find out the substance but that is only where it is permitted by a statute or in exceptional cases of fraud.[1] It is well-settled that, in a suitable case, the court can lift the corporate veil where the companies

share the relationship of a holding company and a subsidiary company and also to pay regard to the economic realities behind the legal facade.[2] The modern tendency is, where there is identity and community of interest between companies in the group, especially where they are related as holding company and wholly owned subsidiary or subsidiaries, to ignore their separate legal entity and look instead at the economic entity of the whole group tearing of the corporate veil.[3] Merely by becoming a wholly owned subsidiary of another company, the company will not be deemed to be directly/indirectly financed or the company's operations becoming substantially controlled by any other person or body of persons.[4] In Balwant Rai v. Union of India,[5] where the subsidiary company was responsible for facilitation of services from workmen to the holding company, even though the Memorandum and Articles of Association of the subsidiary company provided that the subsidiary shall wholly-owned subsidiary of the holding company, its share capital shall be held by the holding company and/or its nominees; the holding company controls the composition of the Board of Directors of the subsidiary, including the power to remove any such director or even the Chairman of the Board. Further, the holding company has the right to issue directions to the subsidiary company which the latter is bound to comply with. The Supreme Court held that even in such a case, it cannot be said that the subsidiary is merely a veil between the workmen and the holding company.

[C.R. Datta Ref:- **1**. L.I.C. Hari Das Mundhra, (1966) 36 Comp. Case. 371 (All) (DB); Spencer & Co. Ltd. v. CWT. 1969) 39 Comp. Case, 212 (Mad.): AIR 1969 Mad, 359: (1969) 72 ITR 33 (Mad.);

2.Tata Engineering and Locomotive Co. Ltd. v. State of Bihar, (1964) 34 Comp. Case. 458 (SC): AIR 1965 SC 40: (1964) 6 SCR 885;

3.Hackbridge-Hewittic and Easun Ltd. v. G.E.C. Distribution Transformers Ltd., (1992) 74 Comp. Case. 543 (Mad.) (DB); ICI v. EC. Commission, (1972) 11 CMLR 557.);

4.Gotan Lime Stone Khanij Udyog Private Limited v. the State of Rajasthan, 2015 (3) WLN 236(Raj.)

5. Balwant Rai v. Air India Limited, AIR 2015 SC 375)]

10. The petitioner's department completely failed to establish that M/s Qadbros Engineering (Pvt) Ltd (respondent) is the sister concern or a subsidiary company of the M/s Qadri Brothers (Pvt.) Ltd. (supplier). No tangible evidence was produced including the record, if any, obtained from the Securities and Exchange Commission of Pakistan (SECP) in relation to the incorporation and substratum of both the companies

together with the verification of holding company of the alleged subsidiary company. The Tribunal is the final forum to settle all the factual aspects in the matter and the findings of fact recorded by the Tribunal are considered final. No doubt the learned Appellate Tribunal, being cognizant of its jurisdiction as conferred by the law, engaged it in order to unravel the alleged claim of input adjustment by means of the stratagem adopted by the respondent assessee and also determined the true character of the transactions but did not find out that the respondent, being a subsidiary company, embarked on any fake or sham transaction or applied any feigned modus of presenting paper transactions or fake invoices issued by its sister concern with the sole intent of claiming tax benefit. No material or concrete evidence was produced by the department to substantiate the principal ground of sister concern relationship. The Tribunal had judiciously examined the pith and substance of the transaction and then rightly reached the conclusion that the respondent is not a subsidiary or holding company of M/s Qadri Brothers (Pvt.) Ltd.

11. The learned counsel for the petitioner further argued that the M/s Qadri Brothers (Pvt.) Ltd. was paying sales tax under the presumptive tax regime; hence it was not entitled to claim any rebate, remission, refund, adjustment or drawback of sales tax. He also relied on the niceties of S.R.O.630(I)/1995, dated 2.7.1995 and S.R.O. 639(1)/1995, dated 2.7.1995. In order to appreciate this contention, we also ruminated the nitty-gritties of the presumptive tax regime, which in fact denotes that the tax so deducted or paid is treated as a final discharge of tax liability whereas the production capacity is reckoned by the Department according to the notified and applicable sales tax rates *vis-à-vis* the production as per comparative past and present physical production data including the machine ratings. Presumptive tax regime predominantly encompasses the usage of indirect means to determine tax liability, which diverges from the normal rules founded on the taxpayer's accounts to indicate a legal presumption that the tax liability is not less than the amount occasioning from the application of the indirect method. Indeed *vide* S.R.O.630(I)/1995, dated 2.7.1995, the Central Board of Revenue (now FBR), with the prior approval of the Federal Government in exercise of the powers conferred by sub-section (4) of section 3 of the 1990 Act, was pleased to levy the fixed amount of sales tax, on mild steel re-rolled products manufactured by non-

automatic re-rolling mills, on the basis of presumptive production of various types of the mills based on their sizes in lieu of the sales tax leviable on such re-rolled mild steel products and specified the rates of sales tax in the Table appended to the aforesaid Notification which was made effective for the year 1995-96 to such registered persons to whom the fixed amount of sales tax for the financial year 1994-95 was applicable [**Ref: PTCL 1995, Page St.1428-St.1431**]. In order to effectively implement the aforesaid presumptive tax regime on the manufacturers of goods specified in the appended Schedule which includes "Re-Rolled Mild Steel Products (Non-Automatic Mills)" at Serial No.24, the Fixed Amount of Sales Tax Rules 1995 were framed *vide* SRO. 639(I)/1995 dated 2.7.1995 by the Central Board of Revenue with the prior approval of the Federal Government in exercise of the powers conferred by Section 50 of the 1990 Act [**Ref: PTCL 1995, Page St.1458-St.1466**]. Rule 11 of the aforesaid Rules has direct nexus with the present controversy which for the ease of convenience is reproduced as under:-

> **11. Limitation for rebate, remission, refund, drawback or adjustment.**--A manufacturer paying sales tax under the notification shall not claim any rebate, remission, refund, adjustment or drawback of sales tax under any provision of the Act or any other rules made thereunder.

12. The predominant allegation in the Show Cause was that M/s Qadri Brothers was paying fixed sales tax on fixed production basis, therefore the invoices No. 1 to 150 were arranged by it to provide the undue benefit of input adjustment to its sister concern M/s Qadbros Engineering (respondent). Notwithstanding the fixed sales tax payment structure, M/s Qadri Brothers, being an independent registered person is not proscribed under the letter of law from issuing invoices as a supplier against the sales made to the buyers. The invoices were issued under Section 7 of the 1990 Act which permits the adjustment of input tax with a rider under Sub-section (2) that a registered person shall not be entitled to deduct input tax from output tax unless, in case of a claim for input tax in respect of a taxable supply made, he holds a tax invoice in his name and bearing his registration number in respect of such supply or in case of supply of electricity or gas, a bill bearing his registration number and the address where the connection is installed. If the supplier issued invoices erroneously or in violation of law then the Department should have initiated legal action for recovery against them

rather than the buyer which is not the sister concern or subsidiary company of the supplier. In all fairness, if some fault was committed by the supplier while issuing invoices then the respondent could not be penalized or disqualified from claiming input tax adjustment in accordance with the law.

13. So far as the jurisdiction of the High Court under Section 47 of the 1990 Act is concerned, we have noticed that prior to the amendment made through Finance Act 2005, (assented on 29.6.2005), a right of appeal was provided which was later amended to a remedy of filing Reference. In both the scenario, the jurisdiction of High Court was and is strictly confined to answering questions of law which is evident from plain reading of original and amended Section 47 of the Sales Tax Act 1990 and obviously, the source of question must be the order of the Tribunal. The elementary characteristic of this jurisdiction is that it has been conferred to deal only with questions of law and not questions of fact. When we talk of a question of law, it connotes a tangible and substantial question of law on the rights and obligations of the parties founded on the decision of the Tribunal. In the case of Army Welfare Trust (Nizampur Cement Project), Rawalpindi and another. Vs Collector of Sales Tax (Now Commissioner Inland Revenue), Peshawar **(2017 SCMR 9),** this Court held that an appeal, like a reference, could only be filed "in respect of any question of law arising out of an order" of the Appellate Tribunal. Subsection (5) of Section 47 of the 1990 Act provides that the High Court "shall decide the question of law raised thereby [in the appeal/reference] and shall deliver judgment thereon". The jurisdiction of the High Court under the 1990 Act was and is, restricted to matters involving only questions of law. It was further held that an appeal or reference to the High Court against a judgment of the Appellate Tribunal under the Act could only be filed on a question of law. While in the case of Pakistan Match Industries (Pvt.) Ltd. & others Vs Assistant Collector, Sales Tax and Central Excise Mardan and others **(2019 SCMR 906),** it was held that all factual aspects of the case are closed by and at the level of the Appellate Tribunal. It is only questions of law that can travel to the High Court. Factual points cannot be allowed to be opened or reagitated, unless there has been a material misreading or non-reading of the evidence, which is itself a question of law that can be taken to the High Court. Last but not least, again in the case of Commissioner of Inland Revenue,

Lahore Vs Messrs Sargodha Spinning Mills (Pvt.) Ltd. Faisalabad and others **(2022 SCMR 1082)**, it was held that the Tribunal is the final forum for determination of facts in tax matters. The Appellate Tribunal is therefore the final fact-finding body and its findings of facts are conclusive; the High Court cannot disturb them unless it is shown that there was no evidence on which the Appellate Tribunal could arrive at its conclusion and record such findings, or the same are perverse or based on surmises and conjectures.

14. In the wake of above discussion, we do not find any infirmity or perversity in the impugned judgment of the High Court. The Civil Petition is dismissed and leave is declined.

Judge

Judge

Judge

Announced in open Court
on 10.3.2023 at Islamabad Judge
Approved for reporting
Khalid