JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD

CASE NO. : W.P. NO.2158-2020
Pakistan International Airlines Corporation Limited
Vs.
Federation of Pakistan etc.

Petitioner by	:	**Mr. Anwar Kamal, Advocate** **Mr. M. Umer Khan Verdag, Advocate**
Respondents by	:	**Mr. Umer Farooq Malana, Advocate** **Mr. Mazhar-ul-Haq Hashmi, Advocate** **Kh. Muhammad Imtiaz, Deputy Attorney General.**
Date of hearing	:	**20.10.2021**

AAMER FAROOQ J. Pakistan International Airlines Corporation Limited (the petitioner) is a statutory Corporation, which is running the business of air transport service and allied activities and is result of creation of Pakistan International Airlines Corporation (Conversion) Act, 2016 (the Act). The petitioner, in the year 2013, added three Air Crafts to its fleet on Dry Lease. At the relevant time, when this was being done, it received demand from the competent authority for payment of customs duties, sales tax and other taxes. The petitioner referred the matter to the then Minister for Finance, which eventually, was considered by the Economic Coordination Committee (ECC) of the Cabinet and vide its decision dated 17.12.2013, the petitioner was allowed to pay the referred taxes in the sum of Rs.1,258,044,330/- in installments. Apparently, as a result of post clearance audit, a contravention case was made out against the petitioner bearing No.28/2019-20, which resultantly culminated into show cause notice from respondent No.6. The allegations levelled in the show cause notice were that surcharge as per section 83 of the Customs Act, 1969 was not levied at the time of payment of duty and taxes, hence petitioner was asked to show cause as to why a sum of Rs.84,120,240/- may not be paid by it; vide its reply dated 09.03.2020, the petitioner denied the

allegations and primarily relied on the decision of ECC dated 17.12.2013 for making payments in installments. The show cause proceedings culminated in Order-in-Original dated 09.06.2020, whereby the petitioner was required to make payments as per the demand. The petitioner challenged the referred order in the instant proceedings and subsequently, it also filed an appeal before Appellate Tribunal Inland Revenue, however, due to non-availability of the Chairman, the Appellate Tribunal was non-functional at the relevant time.

2. Learned counsel for the petitioner *inter alia* contended that appeal has been preferred against the order impugned in the instant petition, however, Appellate Tribunal Inland Revenue does not have the jurisdiction in the matter inasmuch as it cannot go behind the original proceedings which started with non-payment of customs duty timely and levy of surcharge; to substantiate his argument, learned counsel placed reliance on cases reported as 'Messrs Kamalia Sugar Mills Limited, Kamalia Vs. Superintendent, Intelligence and Investigation (Customs and Central Excise), Regional Office, Lahore and another' (2002 PTD 632) and 'Commissioner of Income Tax, Banglore Vs. B.C. Srinivasa Setty [(1981) 128 ITR 295]. Learned counsel further submitted that arrangement, on the basis of which Air Crafts were obtained by the petitioner from overseas lessor, was a dry lease and the referred property did not become the asset of petitioner and as such there was no import into the country. It was argued that under the facts and circumstances, the Customs Duty, Sales Tax and Income Tax were neither chargeable nor could be collected under the provisions of Customs Act, 1969, Sales Tax Act, 1990 and Income Tax Ordinance, 2001 on the Air Crafts bearing No.AP-BLC, AP-BLB and AP-BLD obtained on dry lease. It was submitted that since the principal duty was not chargeable, hence question of surcharge does not arise. In support of his contentions, learned counsel took the Court through sections 18 and 25 of the Customs Act, 1969 and stressed that the categories of goods, on which duty is payable under section 18 ibid, do not cover the transaction in question; likewise, it was argued that section 25 ibid provides for

valuation which cannot be done in the instant case, as there is no import of goods, Learned counsel pointed out that similar question arose in other jurisdictions like India and United Kingdom and law was accordingly amended to cover such transactions.

3. Mr. Anwar Kamal, Senior Advocate Supreme Court further submitted that since no duty is receivable hence demand made and duties/taxes levied, which the petitioner was required to pay, were uncalled for in the facts and circumstances, hence a declaration be granted. In this behalf, in support of his contentions, learned counsel placed reliance on cases reported as 'Dr. Sher Afghan Khan Niazi Vs. Ali S. Habib and others' (2011 SCMR 1813), 'Kamalia Sugar Mills Ltd. Vs. Superintendent, Intelligence and Investigation (Customs and Central Excise), Regional Office Lahore and another' (2020 PTD 632), 'The Collector of Customs, Customs House, Lahore and 3-others Vs. Messrs S.M. Ahmad and Company Pvt. Ltd. ' (1999 SCMR 138), 'The Murree Brewery Co. Ltd. Vs. Federation of Pakistan and 2-others' (PLD 1972 SC 279), 'Syed Ali Abbas and others Vs. Vishan Singh and others' (PLD 1967 SC 294), 'Lt. Col. Nawabzada Muhammad Amir Khan Vs. The Controller of Estate Duty' (PLD 1961 SC 119), 'Ch. Iftikhar Ahmad V.s Chief Secretary Punjab and others' (2012 PLC (CS) 1470), 'Corruption in Hajj Arrangements in 2010' (PLD 2011 SC 963), 'Commissioner of Income Tax Legal Division, Lahore and others Vs. Khurshid Ahmad and others' (2016 PTD 1393), 'Engineer Iqbal Zafar Jhagra and another Vs. Federation of Pakistan and others' (2013 SCMR 1337), 'Sanofi Aventis Pakistan Limited and others Vs. Province of Sindh and 2-others' (PLD 2009 Karachi 69), 'Abdul Sattar Vs. Federation of Pakistan and 2-others' (2006 PTD 1171), 'Messrs Mahmood and Company Vs. Assistant Collector, Sales Tax (Enforcement and Collection), Shalimar Division, Lahore and 2-others' (2005 PTD 72), 'Sadia Jabbar Vs. Federation of Pakistan and others' (PTCL 2014 CL 537), 'CIT Vs. B.C. Srinivasa Setty' [(1981 128 ITR 294)], 'Sui Northern Gas Pipelines Vs. Deputy Commissioner Inland Revenue and others' (2014 PTD 1939) and 'M/s

Pfizer Laboratories Ltd. Vs. Federation of Pakistan and others' (PLD 1998 SC 64).

4. Learned counsel for the respondents contested the instant petition and submitted that same is not maintainable, as the petitioner has an adequate and efficacious remedy in the form of appeal to the Appellate Tribunal Inland Revenue, which has accordingly been filed. It was also argued that at the time, when instant petition was filed, Appellate Tribunal Inland Revenue was non-functional due to non-availability of its Chairman, however, the same is functional now, as the Chairman has been duly appointed. It was submitted that all relevant objections and arguments can be raised before the said forum. It was also contended that arguments raised on merit, in the instant petition, are being raised for the first time, as in the reply to the show cause notice and even in the memorandum of appeal before the Tribunal, those arguments have not been raised. It was submitted that the issue of payment of duties and taxes, at the time of lease of the Air Crafts, stands settled and no question was raised regarding non-chargeability at the relevant time. It was submitted that even after issuance of show cause notice in 2020, only time was sought for payment of the amount and no legal argument was raised. Learned counsel pointed out that since the question of principal liability is a past and closed transaction, the same cannot be agitated in the instant petition by way of declaration without setting aside orders making demand and allowing the petitioner to pay the amount in question in installments by ECC.

4. Arguments advanced by learned counsel for the parties have been heard and the documents, placed on record, examined with their able assistance.

5. The gist of facts, leading to the controversy in hand, has been mentioned in the preceding paragraphs, hence need not be repeated.

6. Before proceeding to render opinion on the arguments addressed by learned counsel for the parties, it is only appropriate to reproduce the prayer made by the petitioner in the instant petition, which is as follows:-

"Wherefore it is respectfully prayed that this writ petition may graciously be allowed with costs and it may be declared that Customs Duty, Sales Tax and Income Tax were neither chargeable nor could be collected under the provisions of the Customs Act, 1969 (Act IV of 1969), the Sales Tax Act, 1990 (Act III of 1951) and the Income Tax Ordinance, 2001 (Ordinance XLIX of 2001) on the 3 dry leased air craft AP-BLC, AP-BLB and AP-BLD inducted into its fleet by the petitioner during the relevant Finance Years 2013-2014 and 2014-2015.

ii) It may further be graciously declared that the penalty of 'surcharge' amounting to Rs.84,120,240/- has been adjudicated without any legal basis, is without lawful authority and is void ab-initio.

As a consequence of the above declarations, the entire amount of Customs Duty, Sales Tax and Income Tax amounting to Rs.1,258,044,330/- may graciously be ordered to be refunded with mark up at the rate of Kibor+3% with effect from the date of payment of each installment and the impugned Order-in-Original No.107 of 2020 passed by respondent No.5, Collector of Customs (Adjudication), Islamabad may graciously be set aside and the demand for Rs.84,120,240/- on account of 'surcharge' under section 83(2) of the Customs Act, 1969 be remitted.

Another other or better relief which this Hon'ble Court deems to be appropriate in the facts and circumstances of the case may also graciously be granted.

It is prayed further that the operation of the impugned order dated 09.06.2020 may graciously be suspended till the decision of this writ petition".

The bare perusal of the prayer shows that declaration is sought with respect to the principal demand and liability raised by the Department for payment of Customs Duty as well as Sales Tax and Income Tax under the relevant laws; a declaration has also been sought for declaring the demand of Rs.84,120,240/- as without lawful authority as well as direction for refund of Rs.1,258,044,330/- along with compensation on the said amount by way of mark up at the rate of Kibor+3%.

7. In principal, the petitioner is seeking declaration that it was not required to pay customs duty, sales tax and income tax in the sum of Rs.1,258,044,330/- at the time of lease of the aforementioned three air crafts. It is pertinent to observe that at the relevant time, the payment was made without any protest or demur, however, through Aviation Division, the matter was taken up with the Finance Division and only

after decision of ECC, payments were made in installments. The orders passed by the competent authority demanding the above said liability and the decision of ECC requiring the petitioner to make payment in installment, has not been challenged specifically before any forum and now at this stage, when a demand for surcharge is made, a declaration has been sought.

8. The jurisdiction of this Court under Article 199 of the Constitution is divided in three different categories; under Article 199 (1)(a)(i) and (ii), a writ of *mandamus, prohibition and certiorari* can be issued, whereas under Article 199(1)(b) (i) and (ii), a writ of habeas corpus and quo-warranto can be issued and under Article 199(1)(c), appropriate jurisdiction to issue direction to any person or government authority for enforcement of fundamental rights.

9. As noted above, the prayer made in the instant petition, does not assail orders of demand or the payment in installments by the competent authorities but solely a declaration is sought on the basis that duties are not leviable due to the nature of the transaction.

10. The jurisdiction of this Court, in issuance of mere a declaration, was examined by Hon'ble Lahore High Court in case reported as 'Caroline Rehman Vs. Chairman, Union Council' (1985 CLC 2855), wherein it was observed that High Court, in exercise of its constitutional jurisdiction, could no grant declaration that the Talaq was effective because firstly such order would tantamount to a declaratory decree. Likewise, in case reported as 'Pakistan Medical and Dental Council Vs. Dr. Raza Muhammad Khan' (1992 SCMR 1621), it was held that where a High Court, in its constitutional jurisdiction, had granted declaration that fellowship was equivalent to M.R.C.P. in England and M.D. in Pakistan. The said order was set aside by the Hon'ble Supreme Court of Pakistan and it was observed that in exercise of constitutional jurisdiction, the High Court would not sit as Court of Appeal over decision of statutory bodies. Similar observations were made in cases reported as 'Percy Robinson and others Vs. Reverend Bashir JIWAN and others' (PLD 1998 Karachi 189) and 'Muhammad

Shahid Vs. Station House Officer (PS Preedy) and others' (2011 YLR 366).

11. As already observed that the orders, requiring the petitioner to make payment of Rs.1,258,044,330/-, have not been assailed since 2013-14, hence at this stage, issuance of declaration would amount to nullifying those orders, which as such, cannot be done especially when no specific challenge has been made to them in the instant petition and were not even amongst the documents appended with the petition .

12. In so far as the availability of adequate and efficacious remedy is concerned, the petitioner has filed an appeal before Appellate Tribunal Inland Revenue. The proceedings, against the petitioner, were initiated by issuance of show cause notice by respondent No.6 for contravention of section 83(2) of the Act. For ease of convenience, relevant section is reproduced below:-

> "***83. Clearance for homeconsumption.---(1)*** *When the owner of any goods entered for homeconsumption and assessed under section 80 or 81 has paid the import duty and other charges, if any, in respect of the same the appropriate officer, if he is satisfied that the import of the goods is not prohibited or in breach of any restrictions or conditions applying to the import of such goods, may make an order for the clearance of the same:*
>
> *Provided that, at customs-stations where the Customs Computerized System is operational the system may clear the goods through system generated clearance documents.*
>
> *(2) Where the owner fails to pay import duty and other charges within ten days from the date on which the same have been assed under sections 80 or 81, he shall be liable to pay surcharge at the rate of KIBOR plus three percent per annum on import duty and other charges payable on such goods*".

The examination of above provision shows that where the owner fails to pay import duty and other charges within ten days from the date on which the same have been assessed under section 80 or 81, he shall be liable to pay surcharge at the rate of KIBOR plus three percent per annum on import duty and other charges payable on such goods. Admittedly, no serious contest was made to the show cause notice, however, it is misconceived on part of petitioner that the grounds,

agitated in the writ petition, cannot be agitated before the customs authorities. In this behalf, under section 83(2), the petitioner is being asked to pay the surcharge and it could have always contested the position that no surcharge is required to be paid inasmuch as no chargeable levy could have been made under the customs, sales tax or income tax law and payments were made under the relevant law.

13. There is no cavil on the case law relied upon by learned counsel for the petitioner as to the scope of appeal, but while contesting the show cause notice, all legal and factual objections could have been agitated, which admittedly, was not done, however, perusal of memorandum of appeal shows that in vague form, attack has been made on the principal liability. The Appellate Tribunal Inland Revenue, which derives its jurisdiction from section 194-A of the Act, is a forum, which can adjudicate matters of facts and law, rather it is the last forum, which has jurisdiction to examine the question of facts raised before it. In view of said position, the submission made by learned counsel for the petitioner that it could not have raised an issue of principal liability qua the taxes, is meek, however, since Appellate Tribunal is a forum to determine law and questions of law can be raised at any stage. Moreover the ground, that there is no default, could also be raised as duties and taxes were paid in installments due to decision of ECC.

14. In view of above position of law and facts, the assault on the principal liability, leading to payment of surcharge, cannot be made in the instant petition by seeking a declaration, as this Court cannot grant a bald declaration without setting aside orders raising the demand or asking the payment of liability. The petitioner, if feels aggrieved of the decision by ECC, can approach through Aviation Division, the Federal Board of Revenue or other competent authority like ECC for re-visiting the issue of principal liability. Likewise, the questions on merits raised in the instant petition questioning the liability, can be agitated before the Appellate Tribunal Inland Revenue and if it is so done, naturally, the Appellate Tribunal Inland Revenue, shall render its findings on the same

after satisfying itself as to the maintainability of such argument for the first time before it.

15. Through passage of time, the jurisprudence developed by the courts, is that Appellate Tribunal is the first forum independent of departmental hierarchy, hence till the time it renders its decision on the subject, no recovery proceedings be initiated. Reliance is placed on case reported as 'Z.N. Exports Pvt. Ltd. Vs. Collector of Sales Tax' (2003 PTD 1746).

16. For the above reasons, instant petition fails, where it seeks declaration regarding principal liability as well as surcharge and direction for refund, hence relief to the said extent is turned down. However, learned Appellate Tribunal Inland Revenue (respondent No.3) is directed to decide the appeal of the petitioner expeditiously taking into account all legal and factual objections taken in the same and till such time that the decision is rendered, Department is restrained from taking any coercive measures against the petitioner for recovery of the disputed liability.

17. Disposed of accordingly.

(AAMER FAROOQ)
JUDGE

Announced in Open Court on 18.01.2022

JUDGE

Zawar