Form No: HCJD/C-121

# JUDGMENT SHEET.

# IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

**Writ Petition No.1574/2016**

Fauji Fertilizer Company Limited

**Versus**

Federation of Pakistan, etc.

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| Petitioner By | : | Sardar Ahmed Jamal Sukhera and Mr. Sikandar Sukhera, Advocates. |
| Respondents By | : | Mr. Riaz Hussain Azam Bopera, Advocate. Mr. Sarfraz Rauf, Learned Assistant Attorney General. |
| Date of Hearing | : | 06.11.2024. |

**AAMER FAROOQ, C.J. –**The instant petition calls in question notice dated 20.04.2016, issued by the Department under Rule 9 of the Sales Tax Rules, 2006 ("**The Rules**").

2. The background leading to filing of the instant petition is that the petitioner is a registered taxpayer under the Sales Tax Act, 1990. It is engaged in the business of manufacturing and selling fertilizer and, for the said purpose, stores its products at factory and warehouses. The petitioner company, vide letter dated 19.02.2016, informed the Department regarding the warehouses it maintained. However, it received the impugned notice, whereby it has been alleged to clarify that the illegal shifting of finished goods to places not notified, why may not be considered as sale, and hence, sales tax payable on movement. The petitioner did file detailed reply to the notice and has also challenged the same.

3. Learned counsel for the petitioner, *inter alia,* contended that vide letter dated 19.02.2016, the respondents were informed about the warehouses, the petitioner maintained. It was contended that impugned notice has been

issued under Rule 9 of the Rules, which does not envisage the allegations contained in the notice. It was submitted that notice is based on assumption and vague and mala fide inasmuch as it is not covered under the provisions of the Sales Tax Act, 1990 or Sales Tax Rules, 2006. Defending the maintainability of the writ petition, learned counsel for the petitioner contended that since the impugned notice is without jurisdiction, a petition under Article 199 of the Constitution is maintainable. In support of his contentions, learned counsel made reference to *Abdul Rauf and others versus Abdul Hamid Khan and others (PLD 1965 SC 671), Edulji Dinshaw Limited versus Income Tax Officer (PLD 1990 SC 399), Adamjee Insurance Company Ltd. versus Pakistan through the Secretary to the Government of Pakistan in the Ministry of Finance, Islamabad and 5 others (1993 SCMR 1798), Commissioner of Income Tax versus Messrs Eli Lilly Pakistan (Pvt) Limited (2009 PTD 1392), Pak Telecom Mobile Ltd. versus Federation of Pakistan and others (2017 PTD 2296), Telenor Pakistan (Pvt) Limited versus Federation of Pakistan, etc. (ICA No.301/2019 etc, Dated 13.10.2022), Federal Board of Revenue versus Abdul Ghani and another(2021 SCMR 1154).*

4. Learned counsel for the respondents, *inter alia,* contended that petition is not maintainable inasmuch as only a notice had been issued to the petitioner to explain its position. It was contended that even otherwise, the movement of finished products to illegal premises might constitute the sale. However, when learned counsel for the respondents was inquired as to how it falls within the definition of sale, as made out in the Act and the Rules, he was at a loss and could not elaborate his submissions.

5. Submissions by the parties have been heard and the documents placed on record examined with their able assistance.

6. The controversy raised in the instant petition has been spelt out hereinabove. As noted, impugned notice has been issued under Rule 9 of the Rules, hence the relevant Rule is reproduced below:-

> ***"9. Option to file application with Commissioner Inland Revenue****.— A person who is unable to file application for registration or change in particulars of registration directly in computerized system may submit the prescribed application and required documents to the concerned Commissioner Inland Revenue at RTO, which shall ensure entry of the application and documents in computerized system within three days."*

Bare perusal of the said Rule shows that it provides an option for a person to file an application and required documents with the concerned Commissioner if he is unable to file for registration or a change in particulars directly through the computerized system. On the face of it, no relevance can be made out as to how the said Rule is applicable in the facts and circumstances. The only possible explanation can be that since the petitioner did not provide details of the warehouses, it committed illegality. However, there is available on record a letter dated 19.02.2016, whereby it seems that the Tax Consultant of the petitioner company did provide a list of the warehouses to the respondent department manually, and no exception was taken by the department to the said letter. The contention of the learned counsel for the petitioner appears to be correct that notice issued is without jurisdiction inasmuch as learned counsel for the respondents could not point out that moving the goods to warehouses, which, if for the sake of arguments, is taken as not having been intimated to the Department, constitutes a transaction that can be termed as a sale or supply of goods subject to taxable activity. The Supreme Court of Pakistan in *Abdul Rauf and others versus Abdul Hamid Khan and others (PLD 1965 SC 671)* held that a

mala fide act is by its nature an act without jurisdiction. No legislature when it grants power to take action or pass an order contemplates a mala fide exercise of power. A mala fide order is a fraud on the statute. It may be explained that a mala fide order means one which is passed not for the purpose contemplated by the enactment granting the power to pass the order but for some other collateral or ulterior purposes. Likewise, in *Edulji Dinshaw Limited versus Income Tax Officer (PLD 1990 SC 399),* the Supreme Court observed that there is no remedy in the Income Tax Act against the issuance of a wrongful notice and a petition under Article 199 of the Constitution is maintainable. However, somewhat different view was taken in *Adamjee Insurance Company Ltd. versus Pakistan through the Secretary to the Government of Pakistan in the Ministry of Finance, Islamabad and 5 others (1993 SCMR 1798).* In *Commissioner of Income Tax versus Messrs Eli Lilly Pakistan (Pvt) Limited (2009 PTD 1392),* the Supreme Court observed that where an order is without jurisdiction or authority, the statutory functionary acts mala fide or in a partial and oppressive manner and the High Court in exercise of writ jurisdiction has the power to grant relief to the party aggrieved. The concept of sale was elaborated by the Lahore High Court in *Pak Telecom Mobile Ltd. versus Federation of Pakistan and others (2017 PTD 2296).* The referred judgment was followed by this Court in *Telenor Pakistan (Pvt) Limited versus Federation of Pakistan, etc. (ICA No.301/2019 etc, Dated 13.10.2022)* wherein the concept of the sale and supply was discussed in detail, which are provided in section 2(33) read with section 2(35) of the Sales Tax Act, 1990.

7. In light of case law mentioned above, the impugned notice does appear to be without lawful authority inasmuch as the provision of law (Rule 9 ibid) does not seem to be attracted in the facts and circumstances; likewise, during the course of arguments, learned counsel for the respondent department

was unable to point out any violation of the law despite repeated inquiries from him. The mere fact that the finished products have been shifted by the petitioner from its factory to warehouses, which are not duly notified, the same does not *per se* mean that sale tax is payable on the transaction unless the concept of sale, supply and taxable activities are attracted in the facts and circumstances. The notice is vague and is based on the assumption that there is taxable activity without pointing out any practical instance. As already mentioned above, in the referred facts and circumstances, impugned notice is without lawful authority; hence, it cannot stand the test of the action taken under the Act or Rules by the Department. Since the notice is without jurisdiction and is not under the Act, the instant petition is maintainable.

8. For the above reasons, the instant petition is **allowed** and impugned notice dated 20.04.2016 is declared to be without lawful authority and consequently is **set-aside**.

**(CHIEF JUSTICE)**

Announced in open Court on 28.01.2025.

**(CHIEF JUSTICE)**

*Approved For Reporting.*

M.Shah/.