APPELLATE TRIBUNAL INLAND REVENUE, LAHORE BENCH, LAHORE.

ITA No.396/LB/2013
(Tax Year 2010)

ITA No.397/LB/2013
(Tax Year 2011)

Mr. Muhammad Atif Zubair, Gujranwala. ...Applicant

Versus

The CIR, RTO, Gujranwala. ...Respondent

Applicant by: **Rana Munir Hussain, Advocate**
Respondent by: **Mrs. Amna Naeem, DR**

Date of Hearing: **24.06.2014**
Date of Order: **04.08.2014**

O R D E R

The titled appeals at the instance of the taxpayer pertaining to tax years 2010 and 2011 have been directed against the consolidated appellate order dated 16.10.2012 recorded by CIR(Appeals) Gujranwala.

2. The facts in brief emanating from record are that the taxpayer being a commercial importer deducted tax at import stage as income tax @ 1% u/s 148 of the Income Tax Ordinance, 2001 (hereinafter called the Ordinance) for both the years under consideration. It was observed by the taxation officer that the taxpayer had deducted short tax by misapplying clause 9 of Part-II of Second Schedule to the Ordinance read with SRO 575(I)/2006, which provides reduced rate to those goods covered by zero rating regime of the Sales Tax. Therefore, the taxpayer was confronted by the taxation officer in this regard by way of issuance of show cause notice u/s 162 of the Ordinance dated 28.12.2011 followed by subsequent reminder dated 09.01.2012 but remained uncomplied with, which compelled the taxation officer to pass order u/s 162/205 of the Ordinance by creating a tax demand of Rs.11,40,453/- and Rs.4,77,619/- for the tax years 2010 and 2011 respectively. Feeling aggrieved, the taxpayer preferred appeal before CIR(Appeals) Gujranwala, who also upheld the action of the

taxation officer. Still discontented, the taxpayer has come up in appeal before this Tribunal.

3. The learned counsel has termed the action of both authorities below to be arbitrary on the plea that M/s. Naddah Agro, Gujranwala is registered with the Income Tax Department as commercial importer/exporter. Since, income tax at import stage on the items declared zero rated in sales tax is 1% under clause-9 of the Second Schedule to the Ordinance, therefore, in the case in hand, the tax rate u/s 148 of the Ordinance was rightly charged @ 1%. He has further added that both authorities below have failed to understand the difference between the Sales Tax SRO 549(I)/2008 dated 11.06.2008, which declared all type of machinery zero rated exempt from levy of Sales Tax and SRO 575(I)/2006 dated 05.06.2006, which is about the Customs Duty exemption and Sales Tax exemption on the import of the machinery. It is also the contention of learned counsel that in the case in hand, the taxation officer was not justified in adjudging liability under section 162 of the Income Tax Ordinance, 2001 as the action tantamount to amendment of income for which a specific recourse is provided in the statute and as such the conclusion of proceedings u/s 162 were null and void *ab initio*.

4. On the other hand, the learned DR appearing on behalf of the department has fully supported the action of both authorities below simply by reiterating the basis evolved in the impugned orders.

5. Arguments heard and relevant record carefully perused. Admittedly, the facts of the case in hand are quite identical to that of the case referred before us i.e., M/s. Pepco Pakistan, Gujranwala Vs. CIR, RTO, Gujranwala, in ITA No.2377/LB/2013 dated 14.07.2014 wherein after thrashing out the issue under consideration, following finding given below:-

> "A plain reading of the Clause, in the background of legislative scheme embodied in the Sales Tax Act, 1990, clearly suggests that apart from fibers, yarn and fabrics, nothing else notified to be zero-rated under the Sales Tax Act, 1990 could be extended the concessionary rate of 1% withholding

income tax by reference to the subject Clause. That is so because most of the zero-rated goods are those which were "notified" by the Federal Government and not Board. Consequently, the only recourse is to revert to intention behind introduction of the subject Clause so as an effect could be given to the same to avoid redundancy. This intention could be gathered from provisions of Circular No. 1 of 2005 dated July 5, 2005 whereby following explanation was tendered with regard to insertion of the Clause:

> "39. RATIONALIZATION OF WITHHOLDING TAX ON CERTAIN IMPORTS.
> [Clause (9) Part II of the Second Schedule]
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> As a measure of liberalization and support to the textile sector which exports a bulk of its production, a Scheme of readjustment of rate of Customs duty has been introduced. A total number of 152 tariff lines (items) have been identified for this purpose. The list includes fibers, yarns and fabrics (excluding pure cotton or its yarn or its fabric), leather and articles thereof, textile and articles thereof, carpets, sports good and surgical goods and raw material. On a similar analogy, clause (9) of Part II of the Second Schedule has been substituted to reduce withholding tax rate under section 148 to 1% in the case of import of the aforementioned goods with effect from July 1, 2005. A notification/SRO.638(I)/ 2005 dated June 27, 2005 has been issued to identify the specific goods and materials for the purposes of 1% withholding tax under section 148."

The provisions of the Circular and more importantly the issuance of a separate and a detailed notification by the Federal Government makes the intention clear. It is all the more glaring when one reads the preamble of the notification which categorically states "in exercise of the powers conferred by sub-section (2) of section 53 of the Income Tax Ordinance, 2001 (XLIX of 2001), read with clause (9) of Part II of Second Schedule thereto". Thus, it is obvious that no general exemption could be given or claimed by reference to the subject Clause and as such the concessionary rate of 1% withholding income tax remained applicable to goods listed in the notification. We note that the notification SRO 638(I)/2005 dated 01-07-2005 did not include "plant and machinery" or "equipment" etc. therefore, it cannot be inferred that the intention was also to extend the benefit of reduced rate of withholding tax @ 1% was also available to these goods. In our opinion, based on the aforesaid, the applicability of 1% withholding tax rate was exclusively available to the goods listed in the notification SRO 638(I)/2005 dated 01-07-2005

and as such the benefit was not generally available to all goods which were chargeable to zero percent sales under any notification issued under section 4 of the *Sales Tax Act, 1990.*

6. As far as the second issue regarding adjudging liability u/s 162 of the Ordinance is concerned, in the above said order, the Tribunal has held as under:-

> "However, there is great deal of substance in the contention of the learned counsel for the taxpayer regarding assumption of jurisdiction and conclusion of proceedings, vis-à-vis the facts of the present case, under section 162 of the Ordinance. We are in full agreement with the learned counsel for the taxpayer that filing of statement under section 115(4) of the Income Tax Ordinance, 2001 with regard to subject imports constituted assessment order under section 120 of the income Tax Ordinance, 2001. This assessment order could have only be lawfully and legally amended under section 122 of the Income Tax Ordinance, 2001 for which a comprehensive procedure is specified in the statute.
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> The amendment could not lawfully be carried out in the shelter of provisions contained in section 162 of the Ordinance. If we were to approve this recourse adopted by the Revenue in this case that would mean that while assessment order on the basis of declared income would be operative, still the taxpayer would be required to deposit further amount of tax. This is clearly unlawful because in such like case further amount of tax could not be levied or imposed without first amending the income regarding which the tax liability is sought to be determined. Not only the learned taxation officer erred in law by passing the order under section 162 of the Ordinance without amending the income but the learned first appellate authority also fell in grave error by upholding the illegal order."

7. Therefore, in the light of above mentioned ratio settled by this Tribunal, the instant appeal is also accepted by way of vacation of the orders passed by both authorities below. We order accordingly.

(NAZIR AHMAD)
Judicial Member

(FIZA MUZAFFAR)
Accountant Member