

**APPELLATE TRIBUNAL INLAND REVENUE, LAHORE BENCH,
LAHORE.**

**ITA No.2499/LB/2013
(Tax Year 2011)**

**ITA No.2500/LB/2013
(Tax Year 2012)**

NTN 1120191-6

Mr. Muhammad Javid Anwar, Faisalabad. ...Appellant

Versus

The CIR, Zone-II, RTO, Faisalabad. ...Respondent

Appellant by: Mr. Shahbaz Butt, Advocate

Respondent by: Ms. Fouzia Adil, DR

Date of Hearing: 15.04.2014

Date of Order: 25.06.2014

ORDER

Through the above titled further appeals pertaining to tax years 2011 and 2012, the consolidated appellate order dated 03.12.2013 recorded by CIR(Appeals), RTO, Faisalabad has been assailed by the taxpayer.

2. The facts in brief leading to the instant appeals are that the taxpayer deriving income as a cigarette distributor filed returns declaring turnover of Rs.953,505,151/- and Rs.1,094,848,854/-. Since, the turnover was more than 50 million, therefore, minimum tax liability amounting to Rs.1,907,010/- and Rs.2,189,698/- u/s 113 was discharged @ 0.2% by availing 80% rebate purportedly under clause (8) of Part-III of the 2nd Schedule to the Income Tax Ordinance, 2001 (hereinafter called 'the Ordinance'). It was observed by the Additional Commissioner Inland Revenue that the taxpayer was under legal obligation to pay minimum tax @ 1% on the turnover instead of claiming 80% rebate under clause (8) of Part-III of 2nd Schedule to the Ordinance, which is not available to a cigarette distributor being AOP or Individual. Therefore, making it a base, amendment proceedings were initiated by way of issuance of notice u/s 122(9) of the Ordinance, which

culminated in passing of two separate orders under section 122(5A) of the Ordinance both dated 30.09.2013 creating tax demand of Rs.10,250,182/- and Rs.10,054,599/- for the tax years 2011 and 2012 respectively.

3. Feeling aggrieved, the taxpayer preferred appeal before CIR(Appeals) Faisalabad, who also upheld the action of Additional Commissioner Inland Revenue. Still discontented, the taxpayer has come up in appeal before this Tribunal interalia on the following grounds.

- “(i) That the impugned orders passed by both the authorities below are bad in law and contrary to the facts of the case.
- (ii) That the Learned Additional Commissioner Inland Revenue was not justified in enhancing minimum tax @ 1% of the turnover while the Learned Commissioner Inland Revenue (Appeals) has erred in confirming the treatment.
- (iii) That the Learned Additional Commissioner Inland Revenue has erred in holding that sale of cigarettes does not fall within the expression “consumer goods including the fast moving consumers goods as enshrined under Clause 8 of Part-III of Second Schedule to the Income Tax Ordinance, the Commissioner Inland Revenue (Appeals) has failed to appreciate the submissions of the taxpayer.
- (iv) That the Learned Commissioner Inland Revenue (Appeals) has erred in holding that Clause-7 of Part-III of Second Schedule to the Income Tax Ordinance, is a special provisions therefore, shall prevail over the general Clause-8 of Part-III of Second Schedule to the Income Tax Ordinance, 2001.

- (v) That the Learned Commissioner Inland Revenue (Appeals) has failed to appreciate that Clause (8) of Part-III of Second Schedule to the Income Tax Ordinance is later in time and cover all such goods which are covered by the expression "consumer goods including the fast moving consumers goods", nevertheless the scope of later clause(8)is extensive and expanded.
- (vi) That even otherwise the Learned Commissioner Inland Revenue (Appeals) has failed to appreciate the nature of amendment made in Clause (7) through Finance Act, 2013 viz., substitution of words "any company" with the words "any taxpayer" in the perspective of beneficial amendment resolving an anomaly in the existing law.
- (7) That both the authorities have failed to apply correct law as it stood at the time of passing the impugned order under section 122(5A) of the Ordinance.

4. Learned counsel appearing on behalf of the taxpayer has termed the action of both authorities below to be arbitrary, against Law and contrary to facts of the case. Elaborating his view point, he submits that the taxpayer is an individual and deals in sale of cigarettes as distributor, which fall within the expression "consumer goods including the fast moving consumers goods" (FMCG) as provided in clause (8) of Part-III of 2nd Schedule to the Ordinance. He further submits that both authorities below have grossly erred in holding that clause (7) of Part-III of 2nd Schedule to the Ordinance being special provision shall prevail over the general clause (8) of Part-III of 2nd Schedule. Further submits that clause (7) was inserted in Part-III of Second Schedule to the Income Tax Ordinance, 2001 through SRO No. 69(I)/2010 dated 03rd February, 2010, while clause (8) was introduced in the aforesaid Part of the Schedule through SRO No. 1086(I)/2010 dated 30th November, 2010, therefore,

clause (8) supra is subsequent in time as compared to clause (7) of Part-III of Second Schedule. He adds that it has by now been settled by the superior courts including the Apex Court of Pakistan that the provisions which are later in time shall prevail over such provisions which are earlier in time. Relying upon, PLD 1997 SC 582 in re: M/s. Elahi Cotton Mills vs. Federation of Pakistan, he submits that the provisions of law which is later in time shall prevail over the earlier provision. He states that clause (7) of Part-III of Second Schedule is neither a non-obstante clause nor it is a special law, therefore, according to him clause (7) by no manner overrides the provisions as contained in clause (8) supra. He submits further that the scope of clause (8) is not only qualified but also retrospective for the reason that the benefit of reduced rate of minimum tax under this clause itself suggests that entitlement of reduced rate of minimum tax is based on two qualifications. Firstly, the beneficiary person should be a company engaged in the distinction of cigarettes and secondly such cigarettes must be manufactured in Pakistan whereas the scope of class 8 is exhaustive and not restrictive, rather extended to every person irrespective of status under Income Tax Ordinance meeting the criteria given in the said clause.

5. It is also the contention of learned counsel that it is understood that cigarettes come within the definition of fast moving consumers goods and this very fact also stands established at the level of this Tribunal vide its reported judgment cited as 2013 PTD (Trib.) 1413 wherein while defining fast moving consumers goods (FMCG), the cigarette was also defined as non-durable consumer good in the following manner:-

“Consumer non durable goods are purchased for immediate or almost immediate consumption and

have a life span ranging from minutes to three years. Examples of Non durable goods include fast moving consumer goods such as cosmetics and cleaning products, food, fuel, beer, **cigarettes**, medication, office supplies, packaging and containers, paper and paper products personal products, Rubber (Tyres and Tubes), plastics, textiles, clothing and footwear."

Alternatively the learned AR submits that as per clause 7 of part III of 2nd Schedule to the Ordinance application of minimum rate of tax of 1% reduced to 0.20% u/s.113 of the Ordinance, only to the companies dealing in business of cigarette as distributor. Learned counsel submits that the legislature considering the discriminatory and confiscatory nature of clause (7) brought change in the original clause and finally the words "any company" appearing in the said clause were substituted with the words "any taxpayer" through Finance Act, 2013 and consequently, the provision was rationalized through aforesaid amendment. This amendment was brought to resolve the existing anomaly by making a beneficial amendment in the statute. Therefore, the nature of amendment is as such that it being a beneficial amendment made so as to remove the existing anomaly was applicable retrospectively. He submits that this change from "any company" to "any taxpayer" being curative, remedial and beneficial has retrospective effect. To substantiate his argument, learned AR placed reliance on interpretation of statute 10th Edition by Bindra and also judgments of SC reported as 1993 SCMR 73, PLD 1993 Karachi 678, 2008 PTD 1401, 1991-64 Tax 119 H.C.K.

6. On the other hand, learned DR appearing on behalf of the department has fully supported the impugned orders simply by reiterating the basis evolved therein.

7. Arguments heard and record perused. The departmental contention is that clause (7) exclusively deals with the cigarette distributors and being a special one shall prevail and over ride the general clause (8) and that the relief given to corporate cigarette distributors in clause (7) for the period under consideration cannot be extended to the non-corporate distributors of cigarettes i.e., the taxpayer of the case in hand. On the other hand, the taxpayer contends that he is entitled to be beneficial for 80% relief on the 1% minimum tax u/s.113 on 2 counts, first on the basis of clause 8 as cigarette qualifies to definition of (FMCG) and secondly the amendment in the clause 7 by virtue of which "any company" substituted with "any taxpayer". In order to resolve the controversy following issues emerge from the arguments.

- i) Whether the taxpayer was entitled to relief of Clause (8) of Part-III of 2nd Schedule to the Ordinance.
- ii) Whether cigarette falls within the definition of consumer goods including FMCG.
- iii) Whether Clause (7) of 2nd Schedule to the Ordinance is a special law and clause 8 is a general provision, therefore clause 7 supra shall prevail upon the later.
- iv) Whether amendment in clause (7) of Part-III of 2nd Schedule to the Ordinance for the tax year 2013 is remedial in nature has retrospective effect.

8. Before giving our opinion on the issue under consideration, it would be better to have a glance on the provisions of clause (7) and (8) of Part-III of 2nd Schedule to the Ordinance, which read as under:-

"Clause (7) Where any [taxpayer] engaged in the business of distribution of cigarettes manufactured in Pakistan in required to pay minimum tax on the amount of representing its turnover under section 113, the amount of tax payable under the said section shall be reduced by eighty percent."

(Substituted for "company" by Finance Act, 2013.)

"Clause (8) For the distributors of pharmaceutical products, fertilizers, consumers goods including fast

moving consumers goods, the rate of minimum tax on the amount representing their annual turnover under section 113 shall be reduced by eighty percent.”

9. Before the taxation officer as well as CIR(Appeals), the contention of the taxpayer was that he qualifies to avail the benefits of Clause-8 of Part-III of Second Schedule to the Ordinance and this is for the first time that the appellant took the plea of taking the benefit of Clause-7 of Part-III of Second Schedule to the Ordinance, the scope of which was extended to all taxpayers including companies vide Finance Act 2013.

10. As far as, the plea of the taxpayer/appellant that he is entitled to take the benefit of Clause-8 of Part-III of Second Schedule to the Ordinance is concerned, admittedly clause (7) was inserted in Part-III of Second Schedule to the Income Tax Ordinance, 2001 through SRO No. 69(I)/2010 dated 03rd February, 2010, while clause (8) was introduced in the aforesaid Part of the Schedule through SRO No. 1086(I)/2010 dated 30th November, 2010, therefore, clause (8) supra is subsequent in time as compared to clause (7) of Part-III of Second Schedule. The hon'ble Apex Court of the country has settled the proposition that provisions of law which is later in time shall prevail over the earlier provision in the case of Elahi Cotton Mills vs Federation of Pakistan reported as PLD 1997 SC 582. Furthermore, Clause (7) of Part-III of Second Schedule is neither a non-obstante clause nor it is a special law, therefore, said clause by no manner override the provisions as contained

in clause (8) supra. We tend to agree with the contention of learned counsel that the scope of clause (7) is not only qualified but also has restrictive scope for the reason that the benefit of reduced rate of minimum tax under this clause itself suggests that entitlement of reduced rate of minimum tax is based on two qualifications. Firstly, the person entitled to benefit should be a company engaged in the distribution of cigarettes and secondly such cigarettes must necessarily be manufactured in Pakistan. However, from careful study of clause 8 it follows that scope of clause (8) of Part-III of Second Schedule is exhaustive and not restrictive. It is extended to grant benefit of reduced rate of minimum tax to every person irrespective of its status under the Ordinance, provided that such person should be engaged in the business as distributor of pharmaceutical products, fertilizers and consumer goods including the fast moving consumer goods. All those persons meeting the above said criteria are entitled to a reduced rate of minimum tax under section 113 on the amount representing its annual turnover. Thus, it is abundantly clear that the scope of benefit has to be given to such person who is a distributor and is engaged as such in consumer goods including the fast moving consumer goods. Therefore, in our view, the only question in this context which

needs consideration of this court is that as to whether the cigarettes are covered by the definition of consumer goods including the fast moving consumer goods and once this criteria is complied with such person shall be entitled to the benefit as flowing within the said clause.

11. The definition of consumer good including (FMCG) has not been provided in the Ordinance, therefore, reference has to be made to the dictionary meaning. The tribunal in the case reported as 2013 PTD (Trib.) 1413 has defined consumer goods including fast moving consumer goods in the following manner:-

“We have heard the arguments and perused the record. The definition of consumer goods including fast moving consumer goods has not been defined in the Income Tax Ordinance, 2001 therefore the reference can be taken from the web search and different law dictionaries. As a result of search from these sources the consumer goods including fast moving consumer goods can be defined as under:-

Goods

Goods can be divided into two types;

- (1) Capital Goods
- (2) Consumer Goods.

Capital Goods:

Any tangible assets that an organization uses to produce goods or services such as office buildings, equipment and machinery. Consumer goods are the end result of this production process.

Consumer Goods:

Consumer goods are those goods which are used by the final consumer as a person. These goods are further classified into two categories.

Durable Consumer Goods:

Consumer durable goods have significant life span, often three years or more. Examples of consumer durable goods include car, house hold goods, home appliances, consumer electronics furniture, sports equipment and toys.

Non-Durable Consumer Goods:

Consumer non durable goods are purchased for immediate or almost immediate consumption and have a life span ranging, from minutes to three years. Example of Non durable goods include fast moving consumer goods such as cosmetics and cleaning products, food, fuel, beer, cigarettes, medication, office supplies, packaging and containers, paper and paper products, personal products, Rubber (Tyres and Tubes), plastics, textiles, clothing and footwear.

To test that whether a consumer goods is a fast moving goods or not can be ascertained from the characteristics of consumer goods including fast moving consumer goods which are as under:--

- (a) Frequent Purchase
- (b) High Turnover and Lower gross Profit Rate
- (c) Extensive sale network

The appellant is the distributor of consumer goods including fast moving consumer goods therefore, the reduction specified under section 8 of Part-III to the second schedule of Income Tax Ordinance, 2001 shall be granted."

12. From the above it clearly transpires that cigarettes undoubtedly fall within the purview of non durable consumer good forming part of consumer good including the (FMCG) . Therefore, it is concluded that clause (8) firstly, being subsequent in time shall prevail over the clause (7), secondly

11.

ITA Nos.2499 & 2500/LB/2013

clause (7) not being a special law as it does not contain any non obstante provision, the same shall not have over riding effect over clause (8), **thirdly** the scope of clause (8) is exhaustive, extensive and larger than clause (7) and **fourthly** cigarettes being fast moving consumer goods the appellant is entitled to the benefit as contained in clause (8) of Part-III of Second Schedule to the Ordinance.

13. It is also well settled principal of interpretation that in fiscal statute where two equally good interpretations are available, the one favors the taxpayer shall be applied. Taking both the provisions as contained in clause (7) and (8) at juxta position, in view of the above settled principal of law, the appellant is entitled to the relief under clause (8) of Part-III of the Second Schedule.

14. In view of the above discussion, issues No.(i) & (ii) are replied in affirmative whereas Issue No.(iii) in negative.

15. Now, we come to the alternate plea of the learned counsel that since the word 'company' was substituted with the word 'taxpayer' in Clause-7 of Part-III of Second Schedule to the Ordinance vide Finance Act 2013 thus being remedial and beneficial in nature the appellant is also entitled to avail the benefit of the same. It is pertinent to note that the taxpayer being individual running the business of distributor of Cigarettes and filed his return for the tax year under consideration when the Law was as under:-

"Clause (7) Where any [company] engaged in the business of distribution of cigarettes manufactured in Pakistan in required to pay minimum tax on the amount of representing its turnover under section 113, the amount of tax payable under the said section shall be reduced by eighty percent."

16. The return filed for both the tax years under consideration were taken to be an assessment order on the date when it was filed. Thus on the date of order the Law was as reproduce above, which debarred the other taxpayers except company to avail the benefit of 80% concession of minimum tax. Later on vide Finance Act, 2013, the word 'company' was substituted with the word 'taxpayer' enlarging the scope to all the taxpayers instead of company.

17. The learned counsel while arguing his case contended that the substitution brought in clause 7 is beneficial, curative and remedial in nature. He submits that since the word beneficial, curative and remedial is not defined in the Ordinance whereas in a number of judgments the higher appellate forums have adopted dictionary meaning, moreover, the courts have also given retrospective effect to such amendments.

18. We have gone through definition of beneficial and remedial legislation and also thoroughly examined the case laws relied on by the Learned AR which revealed that benefit of a beneficial, curative and remedial legislation is only extended to the cases where lis is pending. We have noted that at the time of insertion of word "taxpayer" in clause 7 vide Finance Act, 2013, no proceedings under any provision of the Ordinance was pending in the taxpayer's case, as notice u/s 122(9) was issued on 03.09.2013. Therefore, in our considered opinion, although the amendment in clause 7 is remedial and curative in nature but cannot be applied retrospectively. While giving above findings, we were benefited by the following case laws:-

1993 SCMR 73 CIT Vs Shahnawaz Ltd and others

"Cases which were pending at the time the amending law was enacted i.e. cases which had not been finally determined or proceedings which had not attained finality. The retrospective effect of the amending law would, therefore, apply only to those cases where assessment had

not been made by the I.T.O. or where an appeal was pending before the Tribunal or reference was subjudice before the High Court, at the time the amending law was enacted. The cases which had finally been determined or had attained finality i.e. which were past and closed transactions, could not be re-opened under amending legislation, as there was no express words to that effect in the amending law.

2008 PTD 1401 CIR Vs M/s. Ellicot Spinning Mills Ltd.,

26. The only exception to the principle that curative and remedial legislature is retrospective, is that same applies only on the pending cases. 'Pending' would, however mean and include at any stage of the proceedings starting from Assessing Officer to the Supreme Court of Pakistan. This obviously means that it would not apply on the case wherein the concerned persons have not challenged the action of the revenue authorities before any higher forum and the same is not pending adjudication. In this regard the reference is made to the prime judgment on the issue Messrs Shahnawaz Ltd., and others (supra).

19. Hence, in view of above, the Question No.(iv) regarding retrospective effect of amendment is concerned, the same is replied in negative.

20. The upshot of the above is that relief under clause 8 of the part III of the 2nd schedule to the Ordinance is allowed to the appellant. Consequently, orders passed by both authorities below are vacated by way of accepting the titled appeals accordingly.

(NAZIR AHMAD)
Judicial Member

(FIZA MUZAFFAR)
Accountant Member