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Judgment Sheet

**IN THE LAHORE HIGH COURT LAHORE
RAWALPINDI BENCH, RAWALPINDI**

JUDICIAL DEPARTMENT

Case No: **STR No. 01/2011.**

Commissioner Inland **Versus** M/s Gul Enterprises etc.
Revenue.

JUDGMENT

Date of hearing	23.09.2014.
Applicant by:	Mr. Shaukat Ali Qureshi, Advocate.
Respondent No.1 by:	Ch. Naeem-ul-Haq, Advocate.

Shahid Jamil Khan, J:- Following questions of law, proposed through this Reference Application under Section 47 of the Sales Tax Act, 1990 (“**Act of 1990**”), are asserted to have arisen out of order dated 29.06.2010 passed by Appellate Tribunal Inland Revenue, Islamabad Bench, Islamabad (“**Appellate Tribunal**”):-

- a. *“Whether or not the learned Respondent No.2 is correct in construing the provisions of section 73 of the Sales Tax Act, 1990 while holding a personal Bank Account as Business Bank Account?”*
- b. *Whether or not the learned Respondent No.2 is correct in holding the carriage loading/unloading charges and commission as not part of the value of supply in view of the law contained in section 2(46) of the Act?*
- c. *Whether or not the learned respondent No.2 is correct in law in basing his decision upon the interpretation of the words “furtherance of business” which were not in force during the period involved?”*

2. Necessary facts are that respondent is a sole proprietorship concern, registered under Section 14 of the Act of 1990 as wholesaler and retailer. On the basis of audit, impugned show cause notice dated 13.05.2008 was issued. Considering reply to show cause notice as unsatisfactory, order-in-original was passed on 09.08.2008, directing

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respondent No.1 to deposit sales tax alongwith default surcharge and penalty. Respondent No.1 was found to had paid loading and unloading charges in addition to the price of cement, therefore, were declared taxable. Input adjustment for the period May 2005 to May 2006 was found inadmissible for non-compliance of Section 73 of the Act of 1990.

This order was assailed before the First Appellate Authority, which upheld the order-in-original vide order dated 25.03.2009. Respondent No.1 successfully challenged this order before Appellate Tribunal. The department has assailed findings of Appellate Tribunal in shape of the proposed questions of law.

3. Learned counsel for the applicant/department submits that Appellate Tribunal has wrongly interpreted the definition of “*supply*” and “*value of supply*” to hold that payment of freight, loading and unloading charges, in addition to price of cement was not taxable under the law.

It is further argued that findings of Appellate Tribunal are against the law, which envisages adjustment of input tax subject to compliance of the provisions contained in Section 73 of the Act of 1990. The respondent (registered person) was bound to make payments from business account and not from personal account.

4. Learned counsel for the respondent has supported the reasons given by Appellate Tribunal. He explains that respondent No.1 is a sole proprietorship concern, therefore, only his owner is authorized to operate the account. Being registered with personal account he was making payments from it.

Regarding other issues, i.e., loading/unloading charges to be part of supply, he submits that it has been settled by a Division Bench of this Court in case *Collector Sales Tax and Central Excise, Rawalpindi v. Messrs Wah Nobel Chemical Ltd., Wah Cantt. (2008 PTD 1693)*.

5. Heard, record perused.

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6. Appellate Tribunal found on the issue of compliance under Section 73 of the Act of 1990, that personal account of the owner was taken as business account at the time of registration under the Act of 1990. However, an account in the name of Gul Enterprises was also opened on objection by the applicant department. It is observed; that transactions were admittedly made through banking channels, therefore, adjustment of input could not have been denied merely on technicalities. Perusal of order-in-original shows that input adjustments (of the payments to supplier) made through business bank account were allowed, however, payments made through personal account were not allowed. No findings, by tax authorities, are available on record regarding the explanation that payments were made through personal account because respondent No.1 was registered with this account.

7. During arguments; learned counsel for the applicant/department was confronted with Taxpayer Profile of respondent No.1 where column of bank account was blank. Meaning thereby that no account in the name of business was available with the tax department. Mere fact that account registered with the department was not in the name of business, was not sufficient to invoke penal provisions of Section 73. To enforce the provisions under this section, the business account must be the one registered with department in due course. Intent of legislature is that all transactions taxable under the Act of 1990, must reflect from one account, for minimizing the opportunities of non or mis-declaration. All transactions from one account are also necessary to trace the chain of taxable supplies, which ensures proper taxation and adjustment, till taxable goods reach the consumer, who bears the burden of this tax. Since respondent had given an un-rebutted plausible explanation for making payments from personal account, therefore, decision by Appellate Tribunal was correct, under the facts and circumstances.

8. While giving its decision on the issue of non-payment of sales tax on value addition, Appellate Tribunal interpreted the definition of

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“*supply*” [Section 2(33)] and “*value of supply*” [Section 2(46)] to hold that payment of freight, loading and unloading charges was merely a service, not covered within the definition of “*supply*”. It was held that payment of loading and unloading charges was not in furtherance of business.

Findings by taxation officer that payments of freight, loading and unloading charges are admittedly paid by respondent No.1, therefore, it amounted to value addition, were rightly discarded by Appellate Tribunal. It may be observed that before construing any transaction as taxable activity; value addition or taxable supply; the department had to arrive at true nature of the transaction based on correct determination of facts. We are in agreement with the findings by Appellate Tribunal that the payment of freight, loading and unloading charges was not in furtherance of business carried out for consideration; rather was an ancillary service provided to the consumer, that too on occasional basis. Two incidents of making payments of freight, loading and unloading charges cannot make all transactions as taxable in relevant period. Under Section 3(1)(a) of the Act of 1990 (charging section), sales tax is levied on the value of taxable supply made by a registered person in the course or furtherance of any activity carried out by him. As found (ibid), payment of freight, loading and unloading charges, made occasionally and recovered from the consumer/customer could not be termed as a taxable activity, hence was not taxable. The judgment, in *Messrs Wah Nobel Chemical Ltd.*, (supra), relied upon by learned counsel for respondent No.1 is also on the same preposition where similar conclusion was drawn.

9. The questions proposed, are not happily worded. The applicant has used words “*whether or not*” which would not serve the purpose, if answered in “*Yes*” or “*No*”. Therefore, the questions are resettled in following words:-

- a. *“Whether Appellate Tribunal was justified to construe the provisions of section 73 of the Sales Tax Act, 1990 while holding a personal Bank Account as Business Bank Account?”*

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b. Whether Appellate Tribunal was justified to hold the carriage loading/unloading charges and commission as not part of the value of supply in view of the law contained in section 2(46) of the Act?"

10. For the reasons recorded (supra), our answer to the above resettled questions is in **affirmative** i.e., against the applicant department.

11. Question No. (c) is also resettled hereunder:-

c. "Whether Appellate Tribunal was justified in basing his decision upon the interpretation of the words "furtherance of business" which were not in force during the period involved?"

12. Definition of word "***supply***" was substituted under Section 2(33) of the Act of 1990 by Finance Act, 2008 whereas tax period relevant to this case is May, 2001 to May, 2006. Contention of learned counsel for the applicant/department is correct that the tax period to which the controversy of levying tax relates, is prior to 01.07.2008, therefore, the definition relied upon by Appellate Tribunal was not applicable as it did not contain the words "***furtherance of business***", yet these words are available in Section 3 (1)(a) of the Act of 1990 (charging section). Absence of said words from definition at relevant time would not change the finding given by Appellate Tribunal above. Answer to this question is also in **affirmative** (against the applicant department).

13. The Reference Application stands answered and **disposed of**.

14. Office shall send a copy of this judgment under seal of the Court to the Appellate Tribunal Inland Revenue as per Section 47(5) of the Sales Tax Act, 1990.

(Muhammad Ameer Bhatti)
Judge

(Shahid Jamil Khan)
Judge

Approved for Reporting.

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A.W.

Judge