APPELLATE TRIBUNAL INLAND REVENUE LAHORE BENCH LAHORE

S.T.A. NO.387/LB/2014

Cine Star (SMC) (Private) Limited, Lahore ... Appellant

Versus

The CIR., Zone-VIII, RTO., Lahore. ... Respondent

Appellant by: - Mr. Qamar Rashid, FCA

Respondent by: - Mr. Sajjad Tasleem, D.R.

Date of Hearing:-11-06-2014 Date of Order:-11-06-2014

ORDER

Through this appeal the appellant has objected against the impugned order of the learned CIR(A) dated 6.3.2014 which is arising out of the Order in Original No.39/2014 dated 30.01.2014 passed by the DCIR.

The following grounds of appeal have been framed by the appellant:-

1. *"That the Order-in-Appeal is against the express provisions of law.*
2. *That the learned respondent no. 1 was unjust in charging penalty of Rs. 55,500 on late filing of sales tax returns for the said tax period. The late filing was unintentional as the key accounting staff had left the company in the said tax period and late filing did not cause in any loss in revenue. Penalty was charged despite the clarification given which is unjust.*
3. *That the learned respondent no. 1 was unjust in charging penalty of Rs. 25,000 on account of wrong-filing of sales tax returns. It was submitted that the main revenue of the tax payer i.e. sale of movie tickets is exempt from sales tax. Sale from cafeteria fall under the 3rd Schedule of the Sales Tax Act, 1990 and the tax payer being a retailer was not allowed to obtain the benefit of input tax adjustment on such items and resultantly being ultimate consumer did not showed or claimed input tax in its sales tax returns, which is according to the sales tax laws. Hence charging any penalty on wrong-filing would be illegal.*
4. *That the learned respondent no. 1 was unjust in remanding back the case to learned respondent no. 2 as the arguments placed before his office were self-explanatory and did not require further investigation.*
5. *That all the relevant records and documentary evidence were provided to the office of learned respondent no. 2 during the audit proceedings u/s 177 of the Income Tax Ordinance, 2001 and sales tax audit u/s 72B of the*

Sales Tax Act, 1990. The officer perused and accepted all these documents and evidence provided during the course of audit proceedings. In the case of sales tax audit the learned respondent no. 2 assumed that all the sales made by the tax payer were manufactured goods. This assumption was drawn despite the provision of relevant records and documentary evidence and is strictly against the fact of the case and any conclusion drawn on basis of assumption and surmise is against the express provisions of law, which is unjust.

6. That the learned respondent no. 1 overlooked the fact that the tax payer is supplying goods which fall in two distinct categories i.e. retail supplies amounting to Rs. 7,784,581 and manufactured / processed goods amounting to Rs. 2,879,228.

7. That the retail sales amounting to Rs. 7,784,581, without a shadow of doubt, are subject to retail tax under the provisions of Chapter II of the Sales Tax Special Procedure Rules, 2007 and retail tax has been paid by the tax payer on the said sales. Hence no question arises for charging theses sales to tax at the rate of 16%.

8. That the manufactured / processed goods of Rs. 2,879,228, fall under the definition of cottage industry as per section 2 (5AB) of the Sales Tax Act, 1990. The conditions laid down under the said section are being fully met to classify these sales as sales by a manufacturer falling under the definition of cottage industry. These conditions are explained as under:

   - Total turnover of a manufacturer should not exceed Rs. 5,000,000 in last twelve months to classify him as a cottage industry, whereas in this case total turnover is Rs. 2,879,228, which is well within the said limit.

   - Annual utility bills (electricity, gas and telephone) of the manufacturer should not exceed Rs. 700,000 to classify him as a cottage industry. In this case utilities attributable to manufactured goods are calculated as under:

Item	Ticket Sale	Cafeteria Sales- Manufactured Goods	Cafeteria Sales- Retail Goods	Total
Sales	37,836,591	2,879,228	7,784,581	48,500,400
Utilities	2,584,451	196,791	531,732	3,312,974

Above calculations clearly show that utilities related to sale of manufactured goods are well below the said limit hence qualifying the manufacturer as a cottage industry.

As per clause 3 of the Table 2 of the 6th Schedule read with section 13 of the Sales Tax Act, 1990, the sales of cottage industry are exempt

from tax under the said Act. Hence it is evident that these sales are exempt from sales tax and charging sales tax on them would be unjust and against the provisions of law."

3. The facts of the case as argued by the learned council of the appellant are that the tax payer is a Private Limited company operating a Cinema house under a name and style of Cine Star. The case of appellant was selected for audit for the period started from July 2010 to June 2011. During the audit proceedings, the appellant provided all the related documents and records to the audit team. After the completion of audit, a show cause notice dated 15-03-2013 was served on the appellant with compliance date of 24-01-2014. Adjournment request was filed with DCIR on 24-01-2014 and adjournment was given till 07-02-2014 by DCIR office. Reply to show cause notice no. 615 dated 16-01-2014 was filed in the DCIR office on 07-02-2014 i.e. the date till which adjournment was given. On 09-02-2014, the appellant received an order in which sales tax of Rs.2,016,213 and penalty of Rs. 188,560 was also charged. Perusal of the order revealed that the reply filed by the appellant was not considered and discussed in the said order. Being aggrieved, the appellant filed appeal before learned Commissioner Inland Revenue Appeals-II, Lahore, who disposed off the said appeal vide his order dated 18-03-2013. This resulted in present appeal by the appellant against the impugned order of learned Commissioner Inland Revenue Appeals-II, Lahore before this Tribunal.

4. The first ground pressed by the learned AR was that the taxation officer acted against the law and decisions of higher courts by passing order U/S 11 of sales tax act 1990 without giving reasonable opportunity of being heard to the tax payer as required by section 11(5). The taxation officer proceeded in hasty manner and finalized assessment proceeding in only 14 days from the date of receipt of notice by the tax payer and illegally ignored relevant adjournment which was given till 07-02-2014. The learned AR of appellant in this regard

referred judgment of the honorable Karachi High Court cited as **(1999) 79 TAX 605 (H.C. Karachi)** in support of his contention.

It is argued that the authorities below have misconceived the facts and circumstances of the case and failed to apply the law in its true spirit with proper application of their own judicial mind. He contended that the learned officer of Inland Revenue was unjustified in charging sales tax of Rs. 1,706,209/- and penalty of Rs. 85,310/- on alleged under declaration of sales. He submitted that the officer assumed that the appellant is processing all of its cafeteria related supplies and hence sales tax on sales of cafeteria should be charged to sales tax under section 3(1) of the Sales Tax Act, 1990, whereas the fact of case is that substantial amount of sales from the aforementioned figure is retail supplies and does not include any type of manufacturing. He has furnished before this Bench the following bifurcation of sales relating to cafeteria operations to explain the factual position;.

Processed Goods (Manufactured)

Sr. No.	Item	Amount (Rupees)
1.	Popcorn	1,168,605
2.	Burgers and French fries etc.	790,077
3.	Tea and coffee	113,445
4.	Fizzy drinks (bibs)	807,101
	Total	**2,879,228**

Un Processed Goods (Retail)

Sr. No.	Item	Amount (Rupees)
1.	Fizzy drinks (bottled)	1,698,562
2.	Nachos	2,228,555
3.	Burger and sandwiches etc. (Ready to eat)	917,005
4.	Chips	1,249,024
5.	Mineral water	594,550
6.	Nestle juices	1,096,885
	Total	**7,784,581**

The learned AR explaining legal position in respect of applicability of aforesaid two sales submitted that the sale of unprocessed goods is subject to retail tax under the provisions of Chapter II of the Sales Tax Special Procedures Rules, 2007, which has been paid on these supplies amounting to Rs. 33,556. The processed sales of Rs. 2,879,228 fall under the definition of cottage industry as per section 2 (5AB) of the Sales Tax Act, 1990. He submitted that two conditions laid down under the said section namely sales less than 5 million and annual utility bill less than Rs. 700,000 are being fully met to classify these sales as sales by a manufacturer falling under the definition of cottage industry and are exempt from tax as per clause 3 of the Table 2 of the 6th Schedule read with section 13 of the Sales Tax Act, 1990.

The learned AR also agitated that late filing penalty of Rs. 55,000, and wrong filing of sales tax return of Rs. 25,000 charged in this case is also illegal and is not sustainable under the eyes of law. He has therefore requested to cancel the orders of the officers below.

5. On the other side the learned DR pleaded for maintaining the impugned orders of the learned CIR (Appeals) and the DCIR for the reasons recorded therein.

6. We have considered the rival arguments from both the sides and have perused the impugned orders of the officers below. After due consideration, we feel persuaded with the arguments put forth by the learned AR of the appellant as supported by statutory provisions and the case laws cited. We have observed in this case that the impugned assessment order has been passed without considering the circumstances of the case and without following the true spirit of law, natural justice and the ratio settled through various judgments. It is settled principle of law that no one can be condemned unheard. The department failed to confront the appellant with the objections raised against reply to show cause notice and proceeded to finalize the impugned assessment order in an

unjudicious manner and such treatment can never be upheld. The principles of maxim *audi alteram partem* should be followed in every statute and any variation there from has been deemed to be in violation of the principles of natural justice as held in the judgments reported as 2004 PTD (Trib) 2432 and (1999) 79 TAX 605 (H.C. Karachi). It is also imperative to discuss the judgment of honorable Karachi High Court cited as (1999) 79 TAX 605 (H.C. Karachi) in which detailed guidance was provided by the court of the issue of "opportunity of being heard.

> *".....the law required that no order affecting the rights of a person shall be passed without providing him on opportunity of being heard. The word "hear" according to the Chambers Dictionary (1994 Edition) means "to perceive by the ear, to have exercise the sense of hearing, to listen, or be spoken of". The past participle "hears" means "action of perceiving sound" and the noun "hearing" means "power or act of perceiving sound; an opportunity to the heard; judicial investigation and listening to evidence and arguments". The Standard International Dictionary (1973 Edition), Part 1, defines "hear" to mean "to listen, to perceive by means of the ear, to listen to officially, judicially". The phrase "opportunity of being heard" would, therefore, mean that the party concerned should be allowed to present his point of view, explanations, clarification and arguments by spoken words which should be heard by the officer passing the order. Any explanation given in writing which is perceived by the sense seated in the eye has generally not been considered sufficient. Experience has shown that many doubts, complaints and misunderstandings between parties are cleared, resolved and remove when they meet face to face and communicate by word of mouth. Appearance in person and explanation by word of mouth, therefore, is placed on a higher footing both in daily life and in judicial and administrative proceedings, where rights of parties are involved. Therefore, it is not the written explanation or the answer submitted to the show-cause notice but the expression of spoken words of the person concerned which have been emphasized by the legislature in the relevant provisions relating to order which would adversely affect the rights of a party should hear that person's explanation, clarification and arguments in his defense submitted by him personally or through his counsel or his duly authorized agent. If such a hearing is not given to the person concerned, the order would be in violation of not only the principles of natural justice*

but also of the statutory requirement and consequently would be invalid".

The Honourable court has laid down following strict requirement which must be satisfied before passing order which would adversely affect the rights of a party;

1- Issuance of show cause notice specifying the adverse inferences drawn and consequential effects by the assessing officer.

2- Submission of the written explanation or the answer to the show-cause notice by the tax payer.

3- Appearance in person and explanation by word of mouth in a face to face meeting with tax payer or through his counsel or his duly authorized agent to discuss and present his point of view, explanations, clarification and arguments by spoken words to resolve doubts, complaints and misunderstandings between parties.

In the instant case last two fundamental steps which must be undertaken to give final opportunity of being heard to tax payer were totally ignored by the officer. Keeping in view the facts of the case and guidance of the Honourable High court on matter under consideration we are of the view that officer did not provided opportunity of being heard to the appellant and acted against the law and decisions of superior courts, hence the entire order in this case is illegal and Void-ab-initio.

7. We also find ourselves in agreement with the learned AR that the sale of goods as retailer of Rs.7,784,581/- is subject to retail tax under the provisions of Chapter II of the Sales Tax Special Procedures Rules, 2007, which has been duly paid by the appellant amounting to Rs. 33,556. The sale of processed items of food of Rs. 2,879,228 being below threshold limit of 5 million and the annual utility bill of Rs.196,791/- directly attributable to this area of operation is also less than Rs.700,000/- per annum, the said retail sales fall under the definition of cottage industry and is exempt from tax as per clause 3 of the Table 2 of the 6th Schedule read with section 13 of the Sales Tax Act, 1990. The relevant officer could not appreciate and comprehend the aforesaid provisions of law and created illegal demand of Rs. 1,706,209/- and penalty of Rs. 85,310/-on the

basis of personal conjectures, which were distinct from the facts and legal position of the case.

8. For all of the foregoing reasons and the discussion supra, we are of the view that the entire order dated 30-01-2014 passed by the DCIR was framed without following the principles of law, natural justice and was against the facts of the case and relevant legal provisions, hence is hereby declared illegal, void ab-initio and is annulled accordingly. Consequently, the impugned order of the learned CIR(A) is vacated.

Sd-
(JAWAID MASOOD TAHIR BHATTI)
CHAIRMAN

Sd-
(FIZA MUZAFFAR)
ACCOUNTANT MEMBER