APPELLATE TRIBUNAL INLAND REVENUE LAHORE BENCH LAHORE
(CAMP AT FAISALABAD)

STA NO.418/LB/2013

The CIR., RTO., Lahore. ... Appellant

Versus

M/S. Jaffali (Pvt) Ltd. 23-Chenab Block, Allama Iqbal Town, Lahore. ... Respondent

Appellant by:- Mr. Muhammad Arshad, D.R.

Respondent by:- Mr. Abdul Sattar, Advocate

Date of hearing:-3-04-2014 Date of Order:-03-04-2014

ORDER

Titled appeal has been filed at the instant of the Department calling in question the impugned order dated 07-01-2013 passed by the learned CIR(Appeals-II), Lahore on the following grounds:-

That the order of the learned Commissioner Inland Revenue (Appeals-II) is bad in law and contrary to the facts of the case.

That the CIR(A) was not justified in respect of second observation for which it was held "that the department may verify the genuineness of the input consumed through the prescribed record giving appeal effect of this order". Hence this direction of the CIR is without jurisdiction as the same constitutes remanding of the case for which he was not authorized as per sub-section 45-B of the Sales Tax Act, 1990.

iii). The CIR(A) was not justified in respect of second observation for which it was held "that the department may verify the genuineness of the input consumed through the prescribed record giving appeal effect of this order. Whereas the sub-section 3 of section 45-B to the extent is reproduced as under:-

> "That in the deciding an appeal, the Commissioner Inland Revenue (Appeals) may make such further inquiry as may be necessary."

iv). That the Appellant craves his right to alter, amend, modify as submit further or additional grounds of appeal before the disposal of present appeal.

2. Briefly stated the facts of the case are that the refund claims files of the taxpayer were audited for tax periods December 2009 to February 2011 and the following main issues were noted:-

i). Inadmissible refund claimed and received in violation of section 73 of the Sales Tax Act, 1990 involving sales tax of Rs.6,372,288/- alongwith default surcharge and penalty.

ii). Illegal refund received by showing excess production that the actual involving sales tax of Rs.4,477,346/- alongwith default surcharge and penalty.

iii). Non-production of Record involving penalty of Rs.15000/-.

On the basis of above observations, a show cause notice was issued under section 11 of the Sales Tax Act, 1990, requiring the appellant to explain as to why inadmissible and illegal input tax adjustment refunded amounting to Rs.10,849,634/- may not be recovered from him alongwith default surcharge and penalty. In response thereto, the appellant furnished its written submissions. The alleged amount to Rs.4,918,275/- and directed the appellant to pay the said amount alongwith default surcharge (to be calculated at the time of deposit) u/s 34 alongwith penalty of Rs.162,548/-. Being aggrieved with the above treatment the taxpayer prefer appeal before the learned first appellate authority who vide an order dated 07-01-2013 remanded the case back with the direction that "The department may verify the genuineness of the input consumed through prescribed record giving appeal effect of this order." Hence the Revenue is in appeal before the Tribunal.

3. Both the parties have been heard and relevant orders perused. The learned Counsel of the taxpayer contended that the case is not remanded by the learned CIR(A) but was given a chance to the department to verify the genuineness of the case, if so desire. It was further argued that the case can be remanded when the facts are not clear, or unable to thrash them out and the deciding authority is unable to decide them or give clear cut opinion etc. whereas in the instant case all facts are thoroughly thrashed out and clear cut intention of the first appellate authority was delivered in the impugned Order, which is reproduced as : " *the charge is therefore non-sustainable under the law hence deleted*" then how the inference can be drawn from the word "may" as direction. It was submitted by the learned counsel of the taxpayer that meanings of remanding the case back as defined in Black's Law dictionary as follows

"the act or an instance of sending something (such as case, claim or person) back for further opinion which is not clear for deciding the case".

It was averred at the bar that the word "may" is used for discretionary sense, it is used in the meaning of "permissive or permitted etc. It was argued that in the impugned order, by no stretch of imaginations the word "may" can be presumed in the sense of "direction", it is directory not mandatory because

i- There is no clear cut or strict directions to comply with.
ii- There is no consequential effect of the word "May" .
iii- No time frame to dispose off the direction (if presumed).

It was submitted that if it is presumed as direction even then the Impugned Order does not impose any direction on the department for *de-novo* consideration on the basic issue of the case (i.e., excess productions) because the sentence being challenged, allows the department just

to verify the genuineness of input consumed and not the production process. Even otherwise the main cause of action had been settled in favour of the taxpayer in very clear words as "*the charge is therefore non-sustainable under the law hence deleted*".

4. It is also interesting to note that the main cause of action is not appealed against or objected anywhere which means the issues settled by the first appellate authority is admitted by the department and it is settled principle of law that the court can't re-decide an issue or remand an issue for trial, which had not been appealed against and had thus attained finality.

5. Now the question is what is the main grievance of the department? The said sentence "*the department may verify the genuineness of the input consumed through the prescribed record pending appeal effect of this Order*" is already in favour of the department hence appeal is not maintainable.

6. It is ordered accordingly.

Sd/-
(JAWAID MASOOD TAHIR BAHTTI)
CHAIRMAN

Sd/-
(MUHAMMAD RAZA BAQIR)
Accountant Member