[IN THE APPELLATE TRIBUNAL INLAND REVENUE,
LAHORE BENCH, LAHORE]

Present: Ch. Anwaar Ul Haq, Judicial Member and Sohail Afzal, Accountant Member.

S.T.A. No. 228/LB of 2012,
decided on 7-10-2013

Taxpayer *Versus* Department

M. Nazeer Chauhan, Advocate, for the Taxpayer.
M. Asif, DR., for the Department.
Date of hearing: 23-9-2013.

O R D E R

[The Order was passed by Ch. Anwaar Ul Haq, Judicial Member] - The captioned appeal has been directed against the Order-in-Appeal No.72 dated 02-01-2012, passed by the learned Commissioner Inland Revenue, Appeals-III, Lahore.

2. The facts leading to the filing of present appeal are that during the scrutiny of sales tax record of the appellant in respect of the tax periods August, 2005, April, 2006, and October, 2006 it was observed that the appellant had claimed illegal input tax of Rs.224,570/- on invoices issued by blacklisted units, which was not admissible to the appellant under the law and thus contravened sections 2(37), 3(1), 6(2), 7(1), 7(2), 8(1)(d), 8A, 22(1), 23(1), and 26(1) of the Sales Tax Act, 1990 read with 2(37) ibid details of which are as under:–

Sr.No.	Sales Tax amount	Seller Reg. No	Seller Name	Tax Period
1	19,542.	0301999970219	M/S S.R. Traders	04.2006
2	100,005	031034010046.	M/S Ujala Traders	10.2006
3	105,023	0398999997328	M/s Shahbaz Enterprise	08.2005

3. On the basis of aforesaid facts, the appellant was called upon to show cause as to why input tax amounting to Rs.224,570/-along with default surcharge and penalties may not be recovered from them under sections 11(2) and 36(1) of the Sales Tax Act, 1990. The adjudication proceedings culminated in passing an Order-in-Original No.8/2011 dated 25-06-2011. The appellant preferred the appeal before the learned Commissioner Inland Revenue appeals who after considering the submission of the appellant rejected the appeal vide order dated 02-01-2012 inter alia with the following observations:-

> *"It has further been observed that the appellant has not been able to establish that the suppliers had paid the sales tax involved into government exchequer as required under section 8(1)(ca) of the Act. For the sake of ready reference, the relevant portion of the aforesaid provision is reproduced as under:*
>
> ***"8. Tax credit not allowed.*** *(1) Notwithstanding any thing contained in this Act, a registered person shall not be entitled to reclaim or deduct input tax on*
>
> *(a) the goods or services used or to be used for any purposes other than for taxable supplies made or to be made by him;*
>
> *(b) any other goods or services which the Federal Government may, by a notification in the official Gazette, specify;*
>
> (c) the goods under sub-section (5) of section 3;
>
> **(ca) the goods or services in respect of which sales tax has not been deposited in the Government treasury by the respective supplier;"**

It is evident from the clear language of clause (ca) above that no input tax adjustment is admissible if the supplier has failed to deposit sales tax in respect of such invoices. In the case in hand, the appellant has not produced any evidence, either during assessment proceedings to the effect that provisions of section 8(1)(ca) had been complied with in respect of the relevant invoices. The learned Appellate Tribunal in the case reported as (2012) 105 Tax 177=2011 PTD 2332 has held that no input tax is admissible to buyer if supplier has not deposited tax into government treasury."

4. Now, the appellant assailed the aforesaid impugned appellate order before us. A number of grounds were taken up at the time of filing of appeal, however, the learned counsel appearing on behalf of the appellant pleaded at the Bar during hearing of appeal that the date of blacklisting of the alleged suppliers were neither confronted to the appellant nor mentioned in the show cause notice. He further submitted that at the time of transaction the suppliers were operative at the FBR record and were filing their sales tax returns in accordance with the provisions of the Sales Tax Act, 1990. In support of the arguments the learned counsel submitted the copies of the sales tax returns of the suppliers in respect of the tax periods under consideration which are placed on file. While continuing with the arguments the learned A.R. put his emphasis on his second limb of argument that even for argument sake that subsequently the Commissioner had declared the units blacklisted even than the effect of executive order made by the Commissioner could not be made applicable retrospectively. To substantiate his argument with regard to said issue, the learned A.R. relied upon judgment of the Customs, Excise and Sales Tax Appellate Tribunal. In somewhat similar circumstances, the appeal of the appellant was accepted and the impugned order-in-original as well as the order-in-appeal was set aside. The learned A.R. also placed reliance on the judgment of the Lahore High Court Lahore reported as 1993 PTD 713 and the judgment of the apex court reported as 2005 SCMR 492. He further stated that the honorable High Court in the case *M/s D.G. Khan Cement Ltd v. Federation of Pakistan etc* W.P No.3515/2012 has declared the provision of section 8(1)(ca) illegal and ulra vires to the Constitution, therefore, the observation of the learned Commissioner appeals is unsustainable in law.

5. The learned D.R. has opposed the arguments advanced by the learned A.R. It was submitted by the learned D.R. that show-cause notice was issued in accordance with law. On the issue of retrospective application of the executive order whereby the suppliers were declared blacklisted, it was argued that the said suppliers were declared blacklisted on account of past activities since audit is always conducted with regard to past business/transactions of the unit. The suppliers were only declared blacklisted after conducting thorough audit, hence it would have a retrospective effect.

6. We have heard the learned counsel for both the parties and have also gone through relevant order and case-law cited at the Bar. After hearing the assertions made by learned counsel for the respective parties, we feel inclined to accept the appeal of the appellant. Perusal of the impugned order in appeal passed by the learned Commissioner (Appeals) giving the main emphasis of the learned first appellate authority was that the suppliers of the appellant were declared blacklisted and they did not deposit the tax into the government treasury and thus, the appellant was not entitled to claim input in terms of section 8(1)(ca). The learned AR relied upon the recent judgment of the high court mentioned supra whereby the honourable high court held in para 35 that:

> ***"35.For the reasons elaborated above, section 8(1)(ca) of the Sales Tax Act, 1990 besides being illogical and absurd, offends articles 23 and 24 of I the Constitution and is hereby declared to be unconstitutional and, therefore, struck down."***

[1]6. Following the ratio settled in the above mentioned judgments, we are of the view that the department was not within the ambit of law while passing the Order against the appellant for the reason that the suppliers in question were operative during the period under consideration when the business/transaction took place. We must further add that if it is allowed to happen then the engine of business would come to grinding halt because nobody would know with regard to fate of its business concern if the subsequent events like declaring a business blacklisted are allowed to cover the period when the other business concern with whom it was dealing with, was operative and the registered person who has been called upon to show cause entered into business transaction with the subsequently blacklisted business in good faith and as per prevailing conditions at that time.

[2]7. For the foregoing discussion, we allow the appeal of the appellant, both the orders passed by the learned lower officers are directed to be vacated.
