

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

**STA No.1203/LB/2013**

**M/s. Asghar Surgical Works, Daska. ...Applicant**

**Versus**


**The CIR, Zone-I, RTO, Sialkot. ...Respondent**

**Applicant by: Mr. Abu Zar Hussain, Advocate**  
**Respondent by: Ms. Fouzia Adil, DR**

**Date of Hearing: 23.04.2014**  
**Date of Order: 01.07.2014**

**ORDER**

The above titled sales tax appeal on behalf of the registered person has been directed against the Order-in-Appeal No.29/2013 recorded by CIR(Appeals) Gujranwala.

The facts in brief leading to instant appeal are that the registered person derives income from manufacture and supply of surgical goods/instruments. On scrutiny of the income tax return filed for the tax year 2010 to 2012, it was observed by the departmental authorities that the appellant made supplies of surgical instruments without payment of sales tax leviable thereon and that he had not got himself registered as required under the Sales Tax Act, 1990 (hereinafter called "the Act"). Based on situation stated supra, appellant was noticed for compulsory registration on 22-10-2012 followed by certain other notices for requisition of records and documents as detailed therein and reportedly due to its noncompliance, appellant's case was recommended for compulsory registration but all this prolonged hectic exercise, came into end when the appellant was found as he had already been registered compulsorily on 24-05-2011 for sales tax purposes under STRN 28-00-0396-507-11. The appellant was called upon to show cause vide notice dated 23-05-2013 as to why sales tax worth Rs. 3,002,681/- may not be recovered under section 11(2) and 11(3) of the Act along with default surcharge under section 34 ibid and as to why penalties of Rs. 180,000/- may not be imposed under section 33(1) ibid

for non-filing of sales tax returns for thirty six tax periods of three financial years. The said proceedings culminated in passing of ONO No.01/2013 dated 31-05-2013 wherein default surcharge amounting to Rs.19,79,783/- was held to be recoverable from the appellant due to failure in depositing sales tax of Rs.848,000/-, Rs.10,00,076/- and Rs.11,54,605/- for the tax periods July 2009 to June 2010, July 2010 to June 2011 and July 2011 to June 2012 respectively. Feeling aggrieved, the appellant preferred appeal before CIR(A), Gujranwala, who also upheld the ONO in toto. Still discontented, the appellant/registered person has come up in further appeal before Tribunal assailing the treatment meted out by both authorities below.



Learned counsel appearing on behalf of the registered person has termed the action of both authorities below to be arbitrary and contrary to facts of the case. Initiating arguments, the learned counsel of the appellant has vehemently contested that attitude of learned adjudicating authority is beyond comprehension as despite zero-rating of sales tax on surgical instruments being notified goods by the Federal Government under section 4(c) of the Act, he is found bent upon to adjudge sales tax liability at standard rate of sales tax of 16% or as the case may be, 17% under section 3(1) *ibid* without any lawful excuse and accordingly an adverse order has been passed. Continuing his arguments, learned counsel submits that recovery of sales tax not levied and not charged for the period from 1<sup>st</sup> July, 2009 to 30<sup>th</sup> June, 2012 has been adjudged through impugned show cause notice and consequent adjudication order by invoking provisions of section 11(3) of the Act whereas, it has to be adjudged under section 36(1) *ibid* as the provisions of section 11(3) have been inserted to the Statute Book with effect from 1<sup>st</sup> July, 2012 in the Finance Act, 2012. Therefore, these provisions are not applicable retrospectively as no saving clause for protection of provisions of section 36 has been found given therein and in absence of all this, recovery of sales tax, short

levied, not levied or amount erroneously refunded cannot be made adjudged under section 11(3).

According to learned counsel, the provisions of section 36(1) or as the case may be, section 36(2) of the Act will come into play in all old cases of recovery for the period prior to 1<sup>st</sup> July, 2012. He further submits that provisions of section 4 of the Act being "*non-obstante clause*" have an overriding effect on the provisions of section 3. It is due to non-obstante clause of sales tax under section 4 of the Act on the goods notified in its sub-clause (c) by the Federal Government is chargeable at zero-percent. Accordingly, 'surgical goods' have been put to zero-rating sales tax regime on 06-06-2005 by virtue of Notification No. S.R.O 621(I)/2005 dated 17-06-2005 and remained effective to sales tax at zero percent upto 14-03-2011. Reliance in this regard is placed on [2009 PTD (Trib.) 654]=[2009 PTD 1314]=[PLD 1991 SC 258].

He further contends that surgical goods remained zero rated unconditionally without any restriction thereof till inception of Notification No. S.R.O. 283(I)/2011 dated 01-04-2011 made applicable retrospectively on 15-04-2011, wherein zero rating facility has been restricted to registered person only and in case supply of notified goods is made to unregistered persons, sales tax shall be charged at the rate of 6% thereon, which has been revised to 4% under Notification No. S.R.O 1058(I)/2011 dated 23-11-2011 and again has been revised to 5% under Notification No. S.R.O. 1125(I)/2011 dated 31-12-2011. By virtue of all these statutory regulatory amendments, the applicable rate of sales tax on surgical goods for the period from 15-03-2011 to 30-06-2012 is six percent, four percent and five percent respectively and in no way, standard rate of sales tax of sixteen percent or as the case may be, seventeen percent can be applied on its supply made in that very period.

Learned counsel further submits that sales tax liability for the period from 15-03-2011 to 30-06-2012 has been discharged

as appellant has paid sales tax through Cash Payment Receipts (CPR) all dated 26-06-2013 while filing its monthly sales tax returns for that very period by availing amnesty scheme granted under Notification No. S.R.O. 494(I)/2013 dated 10-06-2013. Since, whole principal amount of sales tax has been paid before 30-06-2013 during currency of said amnesty scheme, therefore, recovery on account of default surcharge and penalties shall remain abated.

While concluding his arguments learned counsel submits that heavy penalties under section 33(2), 33(5), 33(7), 33(8), 33(9) and 33(13) of the Act have been imposed and adjudged in impugned adjudication order, whereas no such penalties under the provisions of any of said sub-sections have been cited and confronted in impugned show cause notice, wherein a penalty of Rs. 180,000/- for non-filing of sales tax returns is imposed under section 33(1) of the Act.

On the other hand, when learned DR appearing on behalf of the department was confronted with tax situation cited supra, she has fully supported the orders passed by both authorities below simply reiterating the basis evolved therein.

We have heard the arguments advanced by the representatives of both the parties and also carefully gone through the relevant record available on file. We do not find ourselves in agreement with action of both authorities below on the strength of following grounds:-

- i) Recovery of sales tax not levied and not charged on supply of goods made during July-2009 to June-2012 in the impugned show cause notice and consequent adjudication order has been adjudged under section 11(3) of the Act, which came into being w.e.f., 1<sup>st</sup> July, 2012 by virtue of the Finance Act, 2012. The provisions of said section have not been made applicable retrospectively by the legislation consciously as the provisions of section 36(1) providing limitation of five years and section 36(2) providing

limitation of three years respectively for issuance of show cause notice in different tax situations have been kept intact for all recovery cases for the period prior to 1<sup>st</sup> July, 2012 on account of sales tax short levied, not levied or any amount erroneously refunded. Despite deletion of section 36 from the Statute Book, we have currently found its existence in section 25(3) for audit purposes and in section 45B for appeal before the Commissioner Inland Revenue, in all such old recovery cases pertaining to the period before its deletion. No saving clause for cases of section 36 particularly the cases falling under section 36(2) of the Act has been provided in section 11(3) of the Act, therefore, in all old cases, recovery of sales tax has to be adjudged under section 36(1) or as the case may be, under section 36(2) *ibid*. Even otherwise, provisions of section 11(3) are not deemed to be curative, remedial and beneficial in nature as it curtails right of a registered person not to be called upon to show cause notice after expiry of time limitation under section 36(2) of the Act by impeding him with tax liabilities beyond three years in case of inadvertence, error and misconstruction as well, hence, cannot be made applicable retrospectively on this general principle of law. As such, learned adjudicating authority has erred in invoking provisions of section 11(3) of the Act for recovery of sales tax for the period prior to its insertion in all cases squarely falling under section 36(1) or as the case may be under section 36(2) of the Act.

- ii) Provisions of section 3 of the Act are, no doubt, charging provisions for the purposes of sales tax on which whole edifice of value added general sales tax is built. It has nothing to do with the goods falling under section 4 of the Act, which starts with a non-obstante clause, "Notwithstanding the provisions of section 3". Meaning thereby that section 4 has an overriding effect on the

provisions of section 3 of the Act. Non obstante clause is usually used in a provision to indicate that the provision should prevail despite anything to the contrary in the provision mentioned in such non obstante clause. In case, there is any inconsistency between non obstante clause and another provision, one of the objects of such a clause is to indicate that it is non-obstante clause, which would prevail over the other clause. Since, the goods in question have been specified as zero rated goods by virtue of various notifications as cited supra under section 4(c) of the Act, therefore, provisions of section 3 of the Act for chargeability of sales tax at standard or any other rate on all these notified goods will never come into play due to existence of non-obstante clause in preamble of section 4 of the Act and it would be provisions of section 4 to prevail on the provisions of section 3 of the Act. Accordingly sales tax on surgical goods shall be charged and levied at the rate of zero-percent as specified in section 4 providing complete ouster to standard or any other rate of sales tax specified in section 3 of the Act. We have a great veneration and reverence for the judgments of superior courts as relied upon the learned counsel on the subject matter.

- iii) We completely tend to agree with the connotation that in case supply of notified goods is made to a person not registered, there shall be charged and levied sales tax at rate of six percent, four percent or as the case may be as modified by different notifications cited supra. Since, appellant has discharged his sales tax liabilities by way of depositing principal amount of sales tax within the time frame given under amnesty scheme granted by the Federal Government through a notification duly published in the official gazette therefore, nothing remains payable as an additional amount on account of any default surcharge and penalty.

- iv) It is not needless to maintain here that no penalty under any sub-section of section 33 can be imposed and adjudged against a taxpayer through an adjudication order until and unless each and every sub-section is specifically confronted in the show cause notice and if any penalty is imposed without confronting the relevant provisions as contained in sub-sections of section 33, it would definitely fall beyond the scope of show cause notice which would render it illegal, unlawful and void ab initio.

In view of what has been discussed herein above, the instant appeal is accepted by way of vacating the orders passed by both authorities below being devoid of legal substance.

*Self*  
( FIZA MUZAFFAR )  
Accountant Member

*Self*  
( NAZIR AHMAD )  
Judicial Member