APPELLATE TRIBUNAL INLAND REVENUE, LAHORE BENCH, LAHORE.

ITA No.2377/LB/2013

M/s. Pepco Pakistan Gujranwala. ...Applicant

Versus

The CIR, RTO, Gujranwala. ...Respondent

Applicant by: Rana Munir Hussain, Advocate
Respondent by: Mr. Rashid Hussain Jamali, DR

Date of Hearing: 03.06.2014
Date of Order: 14.07.2014

ORDER

Nazir Ahmad, (Judicial Member): The titled further appeal at the instance of the taxpayer pertaining to tax year 2010 has been directed against the appellate order dated 16.10.2012 recorded by CIR(Appeals) Gujranwala.

2. The facts in brief leading to the instant appeal are that the taxpayer being commercial importer suffered withholding income tax on account of imports @ 1% u/s 148 of the Income Tax Ordinance, 2001 (hereinafter called the Ordinance) by reference to Clause 9 Part-II of the 2nd Schedule to the Ordinance read with SRO 575(1)/2006, and declared the same by filing statement u/s 115(4). According to the departmental authorities, the income tax collected @ 1% from the taxpayer was as a result of misapplication of the provisions of the clause 9 read with SRO supra as the same provides reduced rate to those goods which are covered by zero rating regime of the Sales Tax notified by the Board, whereas, in the present case the taxpayer was not entitled for application of reduced rate of 1% because the SRO cited supra was not issued by the Board rather the same was issued by the Federal Government in exercise of powers conferred under section 4(c) of the Sales Tax Act, 1990. Therefore, show cause notice u/s 162 dated 28.12.2011 was issued, against which explanation tendered by the taxpayer was treated unsatisfactory. Resultantly, order u/s 162/205 dated

23.01.2012 was passed by working out short payment of tax demand of Rs.29,26,356/- as per break-up given below:-

Tax under section 162	23,16,606
Default surcharge u/s 205	6,09,750
Total tax payable u/s 162/205	29,26,356

3. Feeling aggrieved, the taxpayer preferred appeal before CIR(Appeals), Gujranwala, who also upheld the treatment meted out by the taxation officer. Still discontented, the taxpayer has come up in appeal before this Tribunal on the strength of following grounds taken as per memo of appeal:-

i) That, the orders of the learned CIR(Appeals) as well as that of the assessing officer are bad in law and contrary to the facts of the case.

ii) That, the none speaking order passed by the CIR(Appeals) without considering the detailed written arguments is against the settled principles of law.

iii) That, the demand at Rs.2,316,606/- created against the appellant while exercising the powers u/s 162 of the Income Tax Ordinance, 2001 is illegal, void ab-initio and out of jurisdiction as the tax calculated through impugned order was not deductible at import stage.

iv) That, the order passed is ambiguous as the assessing officer himself was not clear that whether the exemption was claimed on the basis of clause 9 of part-II of the 2nd Schedule or on the basis of SRO.

v) That, the demand created on the import of machinery without issuance of specific notice is illegal and void ab-initio.

vi) That, the demand created in consequence of the show cause notice issued on the basis that the goods were imported is illegal.

vii) That, after the determination of the fact that the agricultural machinery was imported by the appellant instead of goods as confronted by the assessing officer there was no justification to create such a huge demand against the appellant.

viii) That, additional tax of Rs.609,750/- charged u/s 205 of the Ordinance is illegal particularly when there was no default on the part of the appellant.

4. Before us the learned counsel for the taxpayer has vehemently objected to the stance of the taxation officer as well as that of the learned first appellate authority and attempted to justify the applicability of 1% withholding tax rate, as aforesaid, inter- alia on the basis of following arguments:

i) That this Tribunal in decisions / judgments in 2013 PTD (Trib.) 595, ITA No. 590 & 591/LB/2013 dated 08-11-2013, ITA No. 345 & 346/LB/2013 dated 13-02-2014 and ITA 872/LB/2012 dated 01-04-2014 has already held that goods that remained chargeable to sales tax @ zero percent in terms of notifications issued under section 4(c) of the Sales Tax Act, 1990 duly qualify for benefit of 1% withholding income tax under Clause (9) of Part II of the Second Schedule to the Income Tax Ordinance, 2001;

ii) That in terms of principles of consistency and equality, it is incumbent upon this Tribunal to accept this appeal and approve similar relief / treatment to the appellant, especially in the background of admitted facts that the impugned goods attract zero percent sales under a notification issued under section 4(c) of the Sales Tax Act, 1990;

iii) That the use of word "Board" instead of "Government" in Clause (9) supra is, at best, a draftsman's mistake which could not be used as a tool to deny the legitimate benefit to a taxpayer. In this respect, it is held by courts that a person should not be made to suffer on account of act on the part of the court or other state functionaries;

iv) That it is a cardinal principle of interpretation that while interpreting any law one must look into the intention of the legislature which is most important. In this regard, one needs to appreciate that the intention was to extent benefit of 1% withholding tax at import stage in respect of all goods regarding which zero percent sales tax is notified under section 4 of the Sales Tax Act, 1990;

v) That if the goods listed notifications issued under section 4(c) of the Sales Tax Act, 1990 are not extended the benefit of 1% withholding tax rate, as stipulated in Clause (9) supra, it would effectively and practically make the said Clause (9) as redundant because in no case zero-rating is specified by Board under the law. In this regard, it needs to be appreciated that courts have consistently held

that such interpretation that causes or leads to redundancy should be avoided;

vi) That the due and legitimate relief could not be denied on the basis of technicalities and lacunas as it is a settled law technicalities are not allowed to obstruct the course of justice;

vii) That it is well-settled that in case of ambiguity or doubt in language it should be decided in the favour of taxpayer. Likewise, it is also settled that in cases where two equally reasonable interpretations are possible, one strict and other liberal, that which favours the subject / taxpayer should be adopted; and

viii) That, in any case, the taxation officer was not justified in adjudging liability under section 162 of the Income Tax Ordinance, 2001 as the action tantamount to amendment of income for which a specific recourse is provided in the statute and as such the conclusion of proceedings u/s 162 were null and void *ab initio*.

5. We have heard the rival parties, perused the available record, given earnest consideration to averments and have taken into account the ratio of the decisions relied upon before us. In the circumstances that the principle controversy revolves around interpretation and application of provisions contained in Clause (9) of Part II of the Second Schedule to the Ordinance, as has remained on the statute book during the period July 1, 2005 through February 26, 2013, therefore, it would be useful if the same is reproduced hereunder for the ease of a quick reference:

> *"Tax under section 148 shall be collected at rate of the 1% on import of fibers, yarns, and fabrics and goods covered by the Zero Rating Regime of the Sales Tax notified by Board."*

6. Admittedly, there is no confusion to the extent of applicability of the concessionary rate with regard to goods expressly mentioned in the Clause, however, the controversy pertains to phrase "goods covered by the Zero Rating Regime of the Sales Tax notified by Board". This controversy, we note, has fundamentally arisen on account of use of expression "Board" in the Clause. That is so, because relevant provisions of section 4

of the Sales Tax Act, 1990, under which goods could be subjected to zero *percent* rate of sales tax do not extend any powers to Board to specify such goods through issuance of a notification. This is evident from following provisions contained in section 4 of the Sales Tax Act, 1990:

> *"4. Zero rating.— Notwithstanding the provisions of section 3, the following goods shall be charged to tax at the rate of zero per cent:--*
>
> *(a) goods exported, or the goods specified in the Fifth Schedule;*
>
> *(b) supply of stores and provisions for consumption aboard a conveyance proceeding to a destination outside Pakistan as specified in section 24 of the Customs Act, 1969 (IV of 1969);*
>
> *(c) such other goods as the Federal Government may, by Notification in the Official Gazette, specify: and*
>
> *(d) such other goods as may be specified by the Federal Board of Revenue through a general order as are supplied to a registered person or class of registered persons engaged in the manufacture and supply of zero-rated goods.*
>
> *Provided that nothing in this section shall apply in respect of a supply of goods which --*
>
> *(i) are exported, but have been or are intended to be re-imported into Pakistan; or*
>
> *(ii) have been entered for export under Section 131 of the Customs Act, 1969 (IV of 1969), but are not exported; or*
>
> *(iii) have been exported to a country specified by the Federal Government, by Notification in the official Gazette:*
>
> *Provided further that the Federal Government may, by a notification in the official Gazette, restrict the amount of credit for input tax actually paid and claimed by a person making a zero-rated supply of goods otherwise chargeable to sales tax."*

7. If one goes by the text of the statute, there is absolute clarity that in terms of section 4(c) of the Sales Tax Act, 1990 the powers to extend zero rated regime through a notification

rests with Federal Government. The powers available with Board, under section 4(d) of the Sales Tax Act, 1990, on the other hand, authorize it to issue a 'general order' to specify zero-rated goods in certain specific circumstances. Accordingly, in these circumstances, the fundamental issue arises as how does one construe the provisions of the Clause so as to give an effect to the same. The learned counsel for the taxpayer is right is contending that such interpretation that renders a provision in a statute redundant must be avoided. In the light of what has been written in the subject Clause, we observe that apparently, either the word "notified" is inappropriate or the word "Board" has been wrongly used in the Clause.

8. Accordingly, in order to resolve the subject controversy and for the purposes of arriving at a just and proper conclusion vis-à-vis the anomaly, in our opinion, one needs to take into account following principles settled by the courts with regard to statute interpretation, few of which have also been referred to by the learned counsel for the taxpayer:

i. The provisions of fiscal statutes have to be strictly construed and there is no room for any intendment. One cannot read into the statute the words which are not there in the provision of law;

ii. The provisions of exemption provisions, in the case of any doubt, have to be construed in the favour of the revenue;

iii. No provision in a statute could be considered to be redundant and every effort should be made to give effect to a provision existing in a statute;

iv. If a provision of law could not be reconciled or could not be given effect to one could adhere to the intention behind the introduction of such provision in the statute;

9. A plain reading of the Clause, in the background of legislative scheme embodied in the Sales Tax Act, 1990, clearly suggests that apart from fibers, yarn and fabrics, nothing else notified to be zero-rated under the Sales Tax Act, 1990 could be extended the concessionary rate of 1% withholding income tax

by reference to the subject Clause. That is so because most of the zero-rated goods are those which were "notified" by the Federal Government and not Board. Consequently, the only recourse is to revert to intention behind introduction of the subject Clause so as an effect could be given to the same to avoid redundancy. This intention could be gathered from provisions of Circular No. 1 of 2005 dated July 5, 2005 whereby following explanation was tendered with regard to insertion of the Clause:

> "39. RATIONALIZATION OF WITHHOLDING TAX ON CERTAIN IMPORTS.
> [Clause (9) Part II of the Second Schedule]
>
> As a measure of liberalization and support to the textile sector which exports a bulk of its production, a Scheme of readjustment of rate of Customs duty has been introduced. A total number of 152 tariff lines (items) have been identified for this purpose. The list includes fibers, yarns and fabrics (excluding pure cotton or its yarn or its fabric), leather and articles thereof, textile and articles thereof, carpets, sports good and surgical goods and raw material. On a similar analogy, clause (9) of Part II of the Second Schedule has been substituted to reduce withholding tax rate under section 148 to 1% in the case of import of the aforementioned goods with effect from July 1, 2005. A notification/SRO.638(I)/ 2005 dated June 27, 2005 has been issued to identify the specific goods and materials for the purposes of 1% withholding tax under section 148."

10. The provisions of the Circular and more importantly the issuance of a separate and a detailed notification by the Federal Government makes the intention clear. It is all the more glaring when one reads the preamble of the notification which categorically states "in exercise of the powers conferred by sub-section (2) of section 53 of the Income Tax Ordinance, 2001 (XLIX of 2001), read with clause (9) of Part II of Second Schedule thereto". Thus, it is obvious that no general exemption could be given or claimed by reference to the subject Clause and as such the concessionary rate of 1% withholding income tax remained applicable to goods listed in the notification. We note that the notification SRO 638(I)/2005 dated 01-07-2005 did not include "plant and machinery" or "equipment" etc. therefore, it

cannot be inferred that the intention was also to extend the benefit of reduced rate of withholding tax @ 1% was also available to these goods. In our opinion, based on the aforesaid, the applicability of 1% withholding tax rate was exclusively available to the goods listed in the notification SRO 638(I)/2005 dated 01-07-2005 and as such the benefit was not generally available to all goods which were chargeable to zero percent sales under any notification issued under section 4 of the Sales Tax Act, 1990.

11. The aspect of the matter, discussed above, has not been dealt with in any of the prior judgments delivered by this tribunal and heavily relied upon by the learned counsel for taxpayer in support of his contention. There is no cavil to the proposition that courts must observe consistency in their judgments so that principle of equality is respected but it is also a settled position that where any particular aspect is not considered in an earlier order of a court / forum, such authority is not debarred from considering the same if this is essential for equitable and fair dispensation of justice. Accordingly, for the reasons discussed above, we take a different view from earlier judgments of this tribunal and hold that benefit of 1% withholding tax rate under Clause (9) of Part II of the Second Schedule to the Ordinance is available only to the goods covered by notification SRO 638(I)/2005 dated 01-07-2005 and ass such not available to all goods that were chargeable to zero percent sales tax under any notification issued under section 4(c) of the Sales Tax Act, 1990.

12. However, there is great deal of substance in the contention of the learned counsel for the taxpayer regarding assumption of jurisdiction and conclusion of proceedings, vis-à-vis the facts of the present case, under section 162 of the Ordinance. We are in full agreement with the learned counsel for the taxpayer that filing of statement under section 115(4) of the Income Tax Ordinance, 2001 with regard to subject imports constituted assessment order under section 120 of the income Tax Ordinance, 2001. This assessment order could have only be

lawfully and legally amended under section 122 of the Income Tax Ordinance, 2001 for which a comprehensive procedure is specified in the statute.

13. The amendment could not lawfully be carried out in the shelter of provisions contained in section 162 of the Ordinance. If we were to approve this recourse adopted by the Revenue in this case that would mean that while assessment order on the basis of declared income would be operative, still the taxpayer would be required to deposit further amount of tax. This is clearly unlawful because in such like case further amount of tax could not be levied or imposed without first amending the income regarding which the tax liability is sought to be determined. Not only the learned taxation officer erred in law by passing the order under section 162 of the Ordinance without amending the income but the learned first appellate authority also fell in grave error by upholding the illegal order.

14. Accordingly, we have no hesitation in annulling the orders of the authorities below being without jurisdiction. The orders of both the authorities are, therefore, vacated and it is held that no enhancement of income, be that in the nature of deemed income, could be made without following the recourse provided for in the statute for amendment of income. No amendment of income could be done under section 162 of the Income Tax Ordinance, 2001. Ordered accordingly.

15. The subject appeal stands decided in the manner and to the extent discussed above.

(NAZIR AHMAD)
Judicial Member

(FIZA MUZAFFAR)
Accountant Member

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