

APPELLATE TRIBUNAL INLAND REVENUE LAHORE BENCH LAHORE

STA No. 731/LB/2013

M/s. SGI Foundries, Mehmood Booti Near Kamal Kanta, Appellant
Bund Road, Lahore.

Versus

Commissioner Inland Revenue (Appeals – III), Respondent
Lahore.

Appellant by : Mr. Hashim Aslam Butt, Advocate
Respondent : Mr. Sajjad Tasnim, D.R.

Date of hearing : 15-04-2014

Date of Order : 15-04-2014

ORDER

Ch. Shahid Iqbal Dhillon (Judicial Member).

The titled Sales Tax Appeal has been filed by the registered person u/s. 46 of the Sales Tax Act, 1990 against Order-in-Appeal No.549 dated 05.06.2013 passed by the learned Commissioner Inland Revenue (Appeals-III), Lahore.

Facts leading for disposal of the instant case are that the appellant is engaged, in the manufacturing of auto parts and exclusively supplying the manufactured goods to verifiable purchasers i.e. Millat Tractors etc. The Directorate of Intelligence & Investigation – FBR, Lahore Region (DII-Lahore) summoned the appellant vide notice / summon dated 15.04.2011 alleging the appellant that they have illegally claimed input tax adjustment of Rs. 16,646,971/- on the strength of fake invoices issued by the suppliers registered with different Regional Tax offices i.e. RTO, Karachi & RTO Faisalabad. The Summon / notice dated 15.04.2011 further directs for the submission of sales tax record for conducting

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investigative audit. In response the appellant vide letter dated 05.05.2011, submitted the requisite record. After complete scrutiny of the record, DII-Lahore vide Audit / Contravention Report dated 01.02.2012 alleged that the appellant has claimed input tax adjustment of Rs. 16,646,971/- on the strength of fake/flying invoices. In response the appellant deposited an amount of Rs.4,161,743/- (Rs.2,530,946/- before and Rs.1630797/- after the issuance of impugned notice) under protest for avoiding criminal proceedings.

3. On the basis of aforesaid facts, the appellant was called upon through a show cause notice dated 31.08.2013, as to why the balance amount of sales tax may not recovered under section 11(2) & 36(1) and why penal action under section 33(13) of the Sales Tax Act, 1990 as tax fraud has been committed within the meaning of section 2(37) ~~ibid~~ of the Sales Tax Act, 1990 may not be initiated. In response thereto, a detailed reply was furnished by the appellant/registered person which could not satisfy the Deputy Commissioner Inland Revenue Audit-02, Zone -VIII, RTO-II, Lahore and he accordingly, proceeded against the appellant/ registered person which were culminated by giving direction to deposit balance sales tax and the amount of penalty and the default surcharge as per the law. The registered person impugned the said order before the CIR (Appeal-III), Lahore who maintained the order of the DCIR. Consequently, the appellant-registered person assailed the order in appeal before the Appellate Tribunal Inland Revenue.

4. During the proceedings, the learned counsel for the registered person pressed all the grounds as are enumerated in the paper book, along-with other, as under:-

- i) That the learned CIR (A) did not give due consideration to the arguments relating to section 2(37) while passing the impugned order. He further contented that the provisions of section 2(37) has been wrongly invoked in this case as the mandatory provision for invoking section 2(37) i.e. "prior knowledge" has not been established against the appellant. He vehemently contested that both authorities below were not justified to rely on the concocted story of the detecting agency whereas there was no statement of the supplier of so called gang that they issued fake invoices with the prior connivance with the appellant.
- ii) The AR of the Registered Person also argued that neither show cause notice nor during the adjudication proceedings the Appellant / Registered Person was ever confronted with the statements of the suppliers, who had allegedly refused to have issued the input tax invoices in question.
He also asserted that the input tax invoice produced by him in support of his claim, which could not have been brushed aside on the basis of alleged oral testimony of suppliers, as there is a rule against exclusion of documentary evidence by oral evidence.
- iv) The AR very vehemently argued that the suppliers having made the alleged statements against the interest of the Registered Person and contrary to the documents previously issued by them (i.e. input invoices) has become "hostile witnesses", who ought to have been produced by the revenue for cross-examination by the Registered Person in accordance with Article 150 of the Qanoon-e-Shahdat Order 1984, without which their testimony could not have been read into evidence.
- v) The learned counsel further argued that in terms of sub section 3 of section 3 of the Sales Tax Act. 1990 the entire liability of paying sales tax is on the registered suppliers therefore, the appellant cannot held responsible for the payment of tax which he has already paid. The buyer cannot be held liable for the suppliers default in payment. In support of this assertion reliance was placed on the following case law:-

- i) 2004 PTD 1893 ii) PTCL 2000 CL 356
- iii) 2002 PTD 2440 iv) 2000 PTD 399
- vi) He further argued that the appellant is entitled for the input tax adjustment in terms of section 7 as he hold a valid sales tax invoice u/s. 23 issued by an Active Tax Payer (showing active status on FBR web portal) and after fulfilling the provisions of section 73 of the Sales Tax Act, 1990. He further produced Taxpayer Online Verification status obtained from the website of FBR i.e. www.fbr.gov.pk which shows the status of the allegedly fake registered supplier to suspended / black listed with effect from 3rd July-2013. He further argued that all the transactions with the allegedly fake suppliers took place during the period July-2006 to Jan-2011. He further relied on the judgment dated 08.07.2013 passed in WP No.17185 / 2013 titled M/s Galaxy Textiles Mills Limited Vs FOP etc wherein the Honorable High Court held to consider the status of the supplier at the time of supply and not the status attained by the supplier, subsequently.
- vii) It was further argued by the learned counsel that the entire case revolves around section 8(1)(ca) & 8(1)(d) of the Sales Tax Act, 1990. Regarding the provisions of section 8(1)(ca) of the Sales Tax Act, 1990, the learned counsel relied upon the latest judgment of Honourable Lahore High Court in the case of M/s. DG Khan Cement Company Limited in WP No. 3515/2012 whereby the Honourable High Court has declared section 8(1)(ca) of the Sales Tax Act, 1990 as unconstitutional and struck down the same.
- viii) The AR's assertion in that provisions of section 7(2)(i) of the Sales Tax Act, 1990 stipulate two requirements for claiming credit of input tax.
- (A) The Registered Person held a tax invoice in his name;
and
- (B) The input tax invoice ought to have borne the Sales Tax Registration Number of the Registered Person.
- The Registered Person did hold input tax invoices in his business name and they bore his Sales Tax Registration Number.
- ix) In relation to Section 8(1)(d) of the Sales Tax Act, 1990, learned counsel also argued that in identical cases i.e. where input tax adjustment has been claimed against fake invoices has already been decided in favour of the

taxpayer by the Honourable Tribunal in number of judgments including the following judgments. Copies of the said judgments were also placed on record.

- (a) STA No. 55/LB/2012 M/s. Ibrahim Steel Casting, Gujranwala Vs. The CIR.
- (b) STA No. 226/LB/2011 M/s. Farooq Khalid Pipe Mills (Pvt.) Limited, Lahore Vs. The CIR (Appeals-II) Lahore.
- (c) STA No. 122/LB/2011 M/s. Pan Islamic Industries (Pvt.) Limited, Lahore Vs. CIR, Lahore.
- (d) STA No. 249/LB/2011 M/s. Chaudhery Enterprises, Gujranwala Vs. CIR(RTO), Gujranwala.
- (e) STA No. 536/LB/2011 M/s. BBJ Pipe Industries (Pvt.) Ltd., Vs. CIR (Appeals-I), Lahore.
- (f) 2011 PTD (Trib.) 2679
- (g) STA No.579 / LB / 2012 M/s Worldcall Telecom Limited, Lahore Vs. CIR (Appeals-I), Lahore
- (h) Judgments of the Court (Third Chamber) EU Commission. (Joined Cases C-354/03, 355/03 & C-484/03)

5. The learned department representative, on the other hand, defended the orders passed by the both the authorities below for the reasons stated therein.

6. We have heard the arguments of the learned counsel as well as the learned DR and found that the appellant under the prescribed mechanism of VAT, made payment of the input tax to the suppliers and the appellant has no asses to confirm whether the suppliers have made the payment of tax in the Government treasury or not? Therefore, it is opined that the case of the department revolves

around the provisions of section 8(1)(ca) of the Sales Tax Act, 1990 which has been declared unconstitutional and struck down by the Honorable High Court in judgment passed in WP No.3515/2012 as referred by the learned counsel for the appellant. We have also given due consideration to section 8(1)(d) of the Sales Tax Act, 1990 which prohibits inputs tax adjustment against fake invoices. The whole case of department rely upon the investigation carried out by the detecting agency and we only find the reason of "fakeness" as stated by the detecting agency was that the suppliers were not available on their given addresses and was assumed by the agency that they were being registered by the members of the "gang" by the misusing CNIC and other information. The status of the suppliers at the time of transaction was operative on Active Taxpayer List available on the website of the department and in the light of judgment of Honorable Lahore High Court in a writ petition passed with the consent of the department that in all the cases of similar nature, the status of the supplier at the time of transaction will be considered and not the status attained by supplier at the time of issuance of show-cause notice. It is, therefore, concluded that the department has failed in totally for proving the transaction as "fake" and the whole case is based on assumption. Since the impugned notice was issued and impugned order passed there under on the strength of concocted and assumption facts, therefore, such notice and the orders are not sustainable in the eye of law.

7. We have give due consideration to clause (d) of Sub Section (1) of Section 8 of the Sales Tax Act, 1990 which disallowed the credit of input tax claimed on the basis of "fake invoices". It is found that the issue has already been considered and decided by the learned ATIR in a reported case 2012 PTR 47(Trib.) in following words:

"Clause (d) of sub-section (1) of Section 8 of the Sales Tax Act, 1990 disallows the credit of input tax claimed on the basis of "fake invoices". What constitutes "fake invoices" has not been explained either through any "Explanation to Sub Section (1) of Section 8 (ibid), or any definition of this expression is contained in section 2 of the Sales Tax Act, 1990.

The word "fake", (as a noun) has been defined by the Black Law Dictionary, 8th Edition, to be "something that is not what it purports to be" and as a verb, it means, "to make or construct falsely" (at P-635).

In the expression "fake invoices", the word "fake has been used neither as a noun, nor as a verb, rather it is adjective, which describes the quality of input tax invoices, which are either not true in any material respect or they have been falsely made or forged by the person claiming credit of the input tax.

The word "invoice" has not been defined in the Sales Tax Act, 1990, rather an expression "tax invoice" has been defined by Sub Section (40) of the Section 2 of the Sales Tax Act, 1990 to be document required to be issued u/s.23. Section 23 of the Sales Tax Act, 1990 in turn describes the expression "tax invoice" as under:-

23 Tax Invoice:- (1) A registered person making a taxable supply shall issue a serially numbered tax invoice at the time of supply of goods containing the following particulars, namely:-

- (a) Name, address and registration number of supplier;
- (b) Name, address and registration number of recipient;
- (c) Date of issue of invoice;
- (d) Description and quantity of goods;
- (e) Value of exclusive of tax;
- (f) Amount of sales tax; and
- (g) Value of inclusive of tax:

[Provided that the board may, by notification in official Gazette, specify such modified invoices for different persons or classes of persons:

Provided further that not more than one tax invoice shall be issued for a taxable supply;

(2) No person other than a registered person or a person paying retail tax shall issue an invoice under the section.

If an input tax invoice, corresponds to the requirements of Section 23 (ibid), it qualifies to be a "tax invoice", and if it has been issued by a "registered person" [as required by sub-section (2) of section 23 (ibid)], it is a valid input tax invoice and entitle the holder to claim credit of the input tax evidenced by such invoice.

15. In the case of this Appellant, it is not case of the Department that the input tax invoices produced by the Appellant / Regd. Person did not qualify to be "Tax Invoices" within the meanings of Section 23 (ibid), rather the invoices-in-question were sp perfect and confidence inspiring that during scrutiny of the same none of the refund sanctioning authority raised any eye-brow to any of the invoices, and sanctioned issuance of R.P.O. on 24.08.2004. it was almost nine months later that the Assistant Collector (Officer-in-Charge), Refund Division (III/IV), Office of the Deputy Collector Sales Tax & Central Excise, Sialkot, on the direction of the Collector, Sales Tax and Central Excise, Gujranwala, re-initiated the scrutiny of the refund which has already been sanctioned to be issued. Wherefrom this authority was derived, the learned D.R. showed his inability to cite the relevant provision of the Sales Tax Act, 1990.

Such an exercise amounts to 'change of opinion' on the same material which is not permissible, as it would divest the actions taken in accordance with law of the finally, and the tax-payer's claim would remain "on the tenter-hooks of time-to—time changes in views of the succeeding officers, and no finally to an action wpuld ever be conferred.

Policy of law has always been to confer finality on the actions once taken in accordance with law, so that

enforceable rights and obligations may flow therefrom. The Department cannot be allowed to have dwindling views on a given issue, and move on changing views according to whims and caprices of the big bosses.

16. We wonder that the Department officers dubbed the input tax invoice produced by this Appellant / Regd. Person to be "fake" notwithstanding the fact that the same had been considered by their predecessors to be "genuine" and R.P.Os had been sanctioned to be issued on 24.08.2004. if the then refund sanctioning authority had treated the allegedly 'fake' invoices to be 'genuine', that authority was involved in the 'tax fraud', and action ought to have been taken against him too. If he was not tried for tax fraud, how his decision of issuance of refund can be dissented from, and the same be ignored in the lighter vein, and one can refuse to issue an already determined refund to this Appellant / Regd. Person.

17. The fact that there was nothing on record which may justify declining of the claimed refund is evident from the Daily Refund Sanctioning Report which shows that the Refund Payment Orders have been made after ascertaining the claimed input tax and refund, and there remained nothing except issuance of the refund in accordance with the R.P.Os., but for the reasons best known to the concerned Department officers, the whole mess was created and the Appellant / Regd. person was denied the refund due.

18. The Appellant/Regd. person in this case is an exporter, whose supplies/ exports were zero-rated, and he was entitled to refund of the whole of the sales tax paid as input tax on local purchases: provided he held a tax invoice in respect of taxable supply as required by Section 7(2) of the Sales Tax Act, 1990 – in his name; and bearing his registration number.

It was not the liability of the buyer to ensure payment of the input tax into the State exchequer, rather Section 3 of the Sales Tax Act, 1990 cast this duty upon the supplier to deposit the sales tax collected in a tax period into the State exchequer. If the supplier does not fulfill his obligation, the buyer cannot be victimized for the default committed by the supplier.

19. It has become customary that when defaulting suppliers are apprehended, they, in collusion with the Department, resile from the input tax invoices duly issued, and the Sales Tax Department, instead of compelling the suppliers to do the needful by depositing the unpaid output tax, start the proceedings against the buyers who have claimed the corresponding credit of input tax, which is utterly against the true spirit of Section 3 (ibid). It is trite law that the liability must be enforced against the person upon whom the same has been fixed by law."

We are also of the considered opinion that liability to pay sales tax lies on the suppliers under section 3(3)(a) of the Sales Tax Act, 1990 and the department should have proceeded against the suppliers and not against the purchasers, (2004 PTD 1893) and it could be extended to buyer only by a notification under the Sales Tax Act, 1990 wherein shifting of tax liability to the person receiving the supply of specific goods is provided. It is also found that in tax payers case no such notification was issued by the Federal Government nor it is brought to our knowledge by the D.R. Therefore we hold that such defaulted amount should have been recovered from defaulter supplier instead of buyer reliance is placed on reported case (2011 PTD (Trib.) 2090 and 2000 PTD 399. It is also trite law that the Revenue cannot recover the tax twice against single transaction.

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Since the Registered Person has paid the amount of supplies, wherever applicable through crossed cheque as required u/s. 73 of the Sales Tax Act, 1990. Therefore, it is held that the Registered Person has fulfilled his obligation under the law and he cannot be penalized for the default of other person who has allegedly not paid the tax into Government exchequer honestly.

9. The upshot of the above discussion is that having taken regard to the facts of the case in its entirety and after respectfully following the ratio decided in referred judgments supra we have no option except to reach to the conclusion that proper show cause notice as envisaged under section 11 read with section 36 has not been issued by the assessing authority, consequently, the proceedings conducted pursuant thereof could not have any legal consequences in the eye of law. It is also held that the Revenue has failed to prove the charges leveled in the show cause notice and CIR(A) has upheld the order of the assessing officer without appreciating the facts and judgments of the superior courts supra on the issues on hand. The order of the CIR(A) is illegal and against the judgments of the higher appellate fora. Consequently the impugned show cause, the Order-in-Original and order of CIR(A) are cancelled, and the appeal of the appellant-registered person stands accepted.

Sd/-
(Muhammad Raza Baqir)
Accountant Member

Sd/-
(Ch. Shahid Iqbal Dhillon)
Judicial Member