

APPELLATE TRIBUNAL INLAND REVENUE, LAHORE BENCH

STA No.175/LB/2011

M/s. Al-Madina Plastic, Lahore ... Appellant

Versus

1. The Assistant Commissioner Inland Revenue, RTO, Lahore.
2. Commissioner Inland Revenue, (Appeals-III), Lahore.

... Respondent

Appellant by : Mr. Zahid Attique , Advocate
Respondent by : Ms. Fauzia Fakhar, DR.

STA No.547/LB/2011



M/s. Al-Madina Plastic, Lahore ... Appellant

Versus

M/s. Al-Madina Plastic, Lahore

... Respondent

Appellant by : Ms. Fauzia Fakhar, DR.
Respondent by : Mr. Zahid Attique , Advocate

Date of hearing : 13.06.2013
Date of Order : 13.06.2013

ORDER

Titled cross appeals have been filed against the order of learned Commissioner (Appeals) passed vide No.70 dated 10.02.2011.

2. Brief facts of the case are that during audit of M/s. Al-Madina Plastic Industry for the period July, 2007 to June, 2009, the following contraventions of the Sales Tax Act, 1990 had been observed by the Assistant Commissioner Inland Revenue, Unit-03, Audit Division-III, Lahore.

Non-Payment of Special Excise Duty:

The appellant failed to make payment of Special Excise Duty as required by SRO 655(I)/2007 dated 29.06.2007 to charge SED from the 1st day of July 2007, SED of Rs.5,000 was still payable. The appellant was also liable to pay default surcharge in accordance with section 8 of the Federal Excise Act, 2005 and penalty in accordance with the provisions of section 19 of the Federal Excise Act, 2005.

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II. **Violation of Section 73 of the Sales Tax Act, 1990:**

The appellant failed to make payments to its suppliers in terms of section 73 of the Sales Tax Act, 1990 during the period July, 2007 to June, 2008. Since the appellant violated the provision of section 73 read with section 7 of the Act, it was liable to pay sales tax amounting to Rs.239,170 along with default surcharge (to be calculated at the time of deposit) under section 36(1) of the Act and penal action under section 33(1)(16) of the Act.

III. **Non-Payment of sales tax against empty sacs:**

The appellant consumed 2291157 Kgs of raw material which gave rise to 91646 empty sacs (*bardana*) and failed to charge sales tax on supply of empty bags. The appellant was liable to pay sales tax amounting to Rs.102,643 and SED of Rs.6,415 along with default surcharge (to be calculated at the time of deposit) under section 34 of the Sales Tax Act, 1990 and under section 8 of the Federal Excise Act, 2005 and also liable to penal action under section 33(1) of the Sales Tax Act, 1990 and section 19 of the Federal Excise Act, 2005.

Cash receipt against supplies over Rs.50,000:

The appellant failed to receive payments from its buyer in terms of provisions of section 73 of the Sales Tax Act, 1990 during the period July 2008 to June, 2009 and lost its entitlement to claim input tax adjustment, therefore, it is liable to pay sales tax amounting to Rs.151,780 along with default surcharge (to be calculated at the time of deposit) under section 34 of the Sales Tax Act, 1990 and also liable to penal action under section 33(1)(16) of the Act, 1990.

V. **Supply of waste below market price:**

The appellant has made supply of wastage below the market price even lesser than the price charged in previous months at its own. The appellant was liable to pay sales tax and SED as per table below:

Period	Qty	Ex.V	Tax	Tax paid	Tax payable	SED
07.08	7915	197,875	39,575	20,545	19,030	951
08.09	15308	459,240	96,440	52,603	43,837	3,039
					62,867	3,039

VI. **Late filing of sales tax return:**

The appellant submitted sales tax return late for the month of July, 2007, December 2008 and January, February, March, April 2009. The appellant was, therefore, liable to pay penalty of Rs.30,000 under section 33(1)(10) of the Sales Tax Act, 1990.

VII. **Non-Payment of sales tax against undisclosed supply of wastage:**

As per sales tax record of the appellant, a quantity of 198322 Kgs was produced during the manufacturing process whereas it disposed of 180197 Kgs. The non-availability of closing stock clearly depicts that the appellant has sold out such stock. The appellant was, therefore, held to be liable to pay sales tax amounting to Rs.114,188 and SED Rs.5,437 against missing quantity of 18,125 Kgs of waste under section 3 of the Sales Tax Act, 1990 which was liable to penal action under section 33(1) of the Sales Tax Act, 1990 and section 19 of Federal Excise Act, 2005.

VIII. **Excess input tax claim:**

The appellant had claimed excess input tax compared to what was mentioned on the invoice. The invoice No.14.2 dated 08.03.2008 shows that input tax has been charged as Rs.6,038 whereas the appellant had claimed input tax as Rs.8,050. It was, therefore, proved clearly that the appellant had claimed excess input tax of Rs.2,012 which was recoverable along with default surcharge (to be calculated at the time of deposit) under section 34 of the Sales Tax Act, 1990 which is liable to penal action under section 33(1) of the Sales Tax Act, 1990.

3. Feeling aggrieved with the assessment order of Assistant Commissioner, the registered person filed appeal before learned Commissioner (Appeals), who set aside/annulled the addition under the head "low value addition compared to other identical manufacturing units of plastic bags" and upheld the sales tax and special excise duty involved in observation Nos. I to VIII. Department is in appeal before this Tribunal against this deletion whereas registered person is aggrieved against the upholding of sales tax and special excise duty involved in others heads.

4. Learned counsel for the appellant submitted that allegation regarding violation of section 73 of the Sales Tax Act, 1990 and disentitlement of credit of input tax on account of mere non-adherence to section 73 of the Sales Tax Act, 1990, is not fair as transaction is genuine and the department has not questioned genuineness of input tax invoices and the penalty under section 33(16) of the Sales Tax Act, 1990 shall be imposed in case of non-adherence to the provisions of section 73 of the Sales Tax Act, 1990. Reliance was placed on 2011 PTD 2679, 2010 PTD 575 and 2007 PTD 1982. He further submitted that the taxpayer had paid tax to the suppliers but admitted that due to certain unavoidable circumstances failed to fulfill the requirements of section 73 *ibid*.

5. The learned counsel for appellant contended that the entire audit was conducted by the auditor who did not figure as an authority in the Sales Tax Act, 1990. He relied upon the learned Tribunal's case law reported as 100 Tax 84 to claim that an act by an officer who did not figure in the relevant statute for the purpose is without jurisdiction. He argued that documents evidences as well as case laws referred/ submitted by the appellant in respect of suppression of sales and other impugned observations had not been properly considered and interpreted by the adjudicating officer while disposing the case.

6. He asserted that the allegation at serial No.4 of the impugned order regarding non-payment of sales tax against supplies of empty sacs is based on surmises/ conjectures and guess work and no conclusive evidence regarding gate passes, transport receipts or bank deposit entry was found by the audit team in this regard to prove any such supplies. He further apprised the Bench that accusation of cash receipts against supplies over the amount of Rs.50,000 is illegal as the same is permissible as per clarification letter issued by the FBR vide C.No.3/36 STP/99, dated 27.06.2001. Moreover, the respondents presumed application of Sales Tax Act, 1990 upon the unregistered buyers, which is baseless. Respondents at best could impose penalty under section 33(16) of the Sales Tax Act, 1990.

6.1 On the allegation of sale of wastage at below rate he contended that it is based on assumptions, surmises and conjectures, as no documentary evidence is available on record in support of impugned assessment. He further submitted that allegation regarding non-payment of sales tax against undisclosed supply of wastage is incorrect, as the sales of wastage at below rate has been alleged by the adjudicating officer respondents at Serial No.5 of the impugned assessment order.

7. Learned DR appearing on behalf of the Revenue supported the orders of the lower formation. In particular she defended the order of the learned CIR(A) regarding direction to registered person to pay sales tax and special excise duty involved in observation No.2, 3, 4, 5, 7 & 8 along with default surcharge and penalty.

8. While pleading the departmental appeal the learned DR submitted that learned CIR(A) was not justified to set aside/annul the sales tax amounting to Rs.1,811,747 and special excise duty along with default surcharge and penalty amounting to Rs.113,234 on account of value addition. She argued that appellate authority has failed to consider the fact that registered person was making a very nominal value addition compared to what was being reflected by the other manufacturing units of plastic bags ranging from 12 to 16% of total raw material consumed. The value shown by registered person was much less than the prevailing

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practice of business. She submitted that department has rightly determined liability of Sales Tax and SED along with default surcharge and penalties and prayed for its restoration.

9. The rival contentions have been heard. The learned AR's objection that Auditor was not an authority cannot be sustained because the impugned show cause notice as well as the assessment order No.21/2010 was issued by the Assistant Commissioner Inland Revenue, Audit Unit-03 and not by any Auditor. If the auditor had helped in conducting the audit he was merely performing his function and duties. No action is warranted in this regard.

Non-compliance of section 73:

10. The learned AR candidly admitted that due to unavoidable circumstances the appellant taxpayer had failed to fulfill the legal requirements as prescribed u/s 73 of the Sales Tax Act, 1990. He, however, contended that in such a situation only penalty can be imposed and the entire input cannot be disallowed. He placed reliance on 2011 PTD (Trib) 2679 in this respect.

10.1 We have considered the learned AR's contentions. However, the learned DR rightly pointed out that section 73 of the Act ~~ibid~~ is a non-obstante provision which over-rides not only the Sales Tax Act, 1990 but also any other law for the time being in force and categorically states that if its provisions are not followed the buyer shall not be entitled to claim input tax credit, adjustment or deduction, or refund, repayment or draw back or zero rating of tax under the Act if payment of the amount is made otherwise than through crossed cheque drawn on a bank or by crossed bank draft or crossed pay order or any other crossed banking instruments showing transfer of the amount of the sales tax invoices in favor of the supplier from the business Bank account of the buyer to the business bank account of the supplier. She is also right in her contention that the provisions of section 73 are mandatory in nature and have to be followed in true letter and spirit. She further stated and we endorse that their non-observance shall entail the necessary consequence which is spelled out elaborately in the statute and it is that input shall be disallowed. Since the appellant taxpayer has admittedly violated the provisions of section 73 he shall have to face the consequence so precisely mentioned in the said section. As a result the action of the learned officer in disallowing the input adjustment is upheld.

Non-Payment of Sales Tax against supplies of empty sacs:

11. The issue has been laid to rest by the honorable Supreme Court of Pakistan in the case reported as Collector Custom, Sales Tax & Central Excise Vs

Sanghar Sugar Mills Ltd, PTCL 2007 CL. 565 (S.C. Pak). Supply of empty sacs is neither exempt under the Sixth Schedule nor under any notification issued u/s 13 of the Sales Tax Act, 1990. Thus imposition of sales tax against supplies of empty sacs is upheld.

Cash receipt against supplies over Rs.50,000:

12. The learned CIR (Appeals) upheld the charge against the taxpayer on the basis of section 73 of the Act. We decline to interfere.

Sales of Wastage at low rate:

13. The charge was upheld by the learned Commissioner (Appeal) because the appellant taxpayer had shown supplies at a rate less than not only the market rate but also less than the prices charged by him in the past. Hence, the charge is upheld and sales tax and SED levied are upheld.

Non-payment of sales tax against undisclosed supply of wastage:

The learned assessing officer and the Commissioner (Appeals) have proved it through facts and figures that the appellant had sold out stock but not declared it. No cavil can be taken to the observations and the impugned action is upheld. As a result the appellant taxpayer's appeal is rejected.

Departmental appeal:

15. The department has contested the low value addition declared by the appellant whereas other manufacturing units of plastic bags were declaring 12% to 16% value addition. The learned Commissioner (Appeals) has thrashed out the issue well by concluding that if the department was not satisfied by the value addition declared by the appellant it could have resorted to constitution of a value committee u/s 2(46) of the Sales Tax Act, 1990. We feel no reason to interfere in the impugned order of the Commissioner (Appeals) which is accordingly upheld.

16. As a result both the cross appeals are rejected.


(NAZIR AHMAD)
Judicial Member


(FIZA MUZAFFAR)
Accountant Member