

APPELLATE TRIBUNAL INLAND REVENUE OF PAKISTAN LAHORE

STA No.149/LB/2014

M/s. Sheikh Khair-ud-Din,
Lal Muhammad & Company, Multan

..... Appellant

Versus

The Collector of Customs, Sales Tax,
& Federal Excise, Multan

.....Respondent


Appellant by : Mr. Monim Sultan, Advocate
Respondent by : Ms. Ghazala Hameed Razi, D.R.
Date of Hearing : 17.03.2014
Date of Order : 28.04.2014

ORDER

The above captioned sales tax appeal was filed at the behest of the Appellant/Registered Person challenging the Order No.09 of 2006 dated 16.10.2006 passed by the Collector, Customs, Sales Tax & Federal Excise Multan.

Brief facts of the case as gathered from the audit of Appellant/Registered Person bearing Sales Tax Registration No.04-07-2836-001-37 was conducted and observed that for the period January, 2001 to December, 2001, the Appellant/Registered Person did not provide the bank statements to ascertain that payments against purchases and receipts against supplies through banking channel as required under section 73 of the Sales Tax Act, 1990. Allegedly, input tax amounting to Rs.7,099,250/- was inadmissible under section 73 read with sub-section (1) of section 7 of the Sales Tax Act, 1990 and held as recoverable along

with additional tax and penalty. It was further observed that the Appellant/Registered supplied "Soda Ash" valuing to Rs.2,596,000/- to unregistered persons in the month of August, 2001 and did not charge further tax amounting to Rs.77,880/- as required under section 3 (1A) of the Sales Tax Act, 1990 which was also held as recoverable along with additional tax and penalty.



Earlier, the Auditor, Sales Tax, therefore, made out a case against the Appellant/Registered person for violation of Section 3(1A), 6, (7), 25, 26 and 73 of Sales Tax Act, 1990 punishable under section 33(1), 33(2) (cc), recoverable under section 36(I) along with additional tax under section 34 of the Sales Tax Act, 1990 and forwarded the case papers to this office for adjudication. But the adjudication officer held as under:

- "i. Against all purchases made by the unit concerned, payments are made by the registered person either through cheques or through travel cheques or through call deposit. The departmental representative has accepted only payment through cheques as the genuine payment as required and covered under section 73 of the Act and objected to the remaining modes of payments. After consideration it is held that above referred all modes can be used and checked as far as documented payment through banking channels is concerned therefore all payments are accepted and declared to be covered under section 73 of the Act.*
- ii. As far as the receipts are concerned it is established that an amount of Rs.36,687,000/- was not received as required to be received under section 73 of the Act. This amount involves sales tax @*

15% Rs.5,503,050/- which according to prosecution is inadmissible. The matter has been examined and considered that the demand of the prosecution is too harsh. In the light of higher forums lenient view on this issue, the input is allowed against a penalty of Rs.165,000/- which is imposed under section 33(7) of the Sales Tax Act, 1990.

iii. As far as the matter of non-payment of further tax under section 3(1A) of the Sales Tax Act, 1990, is concerned, since the defendants have admitted their fault therefore they are directed to pay further tax amounting to Rs.77,880/- alongwith the additional tax (to be calculated at the time of actual payment) forthwith. A penalty of Rs.5,000/- is also imposed under section 33(2)(cc) of the Act."

3. Being aggrieved and dissatisfied with the Order-in-Original passed by the Adjudicating Officer the Collector of Customs, Sales Tax & Federal Excise, who vide his order u/s.45-A observed as under:

"I have examined the connected records of the case and considered the arguments advanced by the defence as well as by the departmental representative. The crux of the allegation is that the respondent failed to follow the provisions of Section 73 of the Sales Tax Act, 1990. Therefore, they were not entitled to claim the input tax. Perusal of Section 73 of the Sales Tax Act, 1990 reveals that payment of the amount transaction exceeding value of Rs.50,000/- (Fifty Thousand Rupees) shall be made by a crossed bank draft or crossed payment order or any other crossed banking instrument showing transfer of the amount of the sales tax invoice in favour of the supplier from the business bank account of the buyer. The

buyer is not authorized/entitled to claim input tax credit, adjustment or deduction of input tax, otherwise than in the manner prescribed under Section 73 of the Act. Further Sub Section 3 of Section 73 also describes that the supplier is also not entitled to claim the adjustment of input tax, if the amounts are not deposited in his business bank account as discussed above. In the instant case only an amount of Rs.75,49,570/- were made through cheques. Reportedly, an amount of Rs.11,32,436/- as input tax was admissible to the respondent against purchases. Further an amount of Rs.35,40,000/- involving sales tax amounting to Rs.5,31,000/- was also received to the respondent against the supply of taxable goods as required under Section 73 of The Sales Tax Act, 1990. The respondent were entitled to claim only adjustment of Rs.11,32,436/- involved against purchases and Rs.5,31,000/- involved against taxable supplies made by the respondent. But the Adjudicating Officer allowed all the adjustment of input tax amounting to Rs.70,99,250/- against payment of penalty of Rs.1,65,000/- on the grounds that the "demand of the prosecution is too harsh and the in the light of higher forums". It is observed that the adjudicating officer failed to discuss the details of 'higher forums' and he allowed the adjustment of input tax beyond the Act. It is surprising to note that she said adjudicating officer has also decided the same issue in case of M/s. Elite Force and Commander Agro, Multan vide Order-in-Originals No.769/2005 and 471/2005 both dated 31-5-2005 and he has disallowed the adjustment of input tax as the respondents in these cases failed to follow the provisions of Section 73 of the Act. He has allowed the input tax adjustment in the instant case without considering that the respondent had fulfilled the requirement of Section 73 of the Act or otherwise. The respondent have failed to prove that:

- (i) They made the payment against purchased to the supplier from their business account except Rs.75,49,570/-.
- (ii) They also failed to receive the payment against the goods supplied by them from the recipient of the goods as required under Section 73 of the Sales Tax Act, 1990, except Rs.35,40,000/-.

In the light of above discussion, it is concluded that the orders passed by the adjudicating officer in charges No. (i) and (ii) has been passed contrary to the provisions of Section 73 of The Sales Tax Act, 1990, thus the same are hereby cancelled. The respondents are directed to pay the sales tax involved in these charges except an amount of Rs.11,32,436/- involved in charge No. (i) and Rs.5,31,000/- involved in charge No.(ii). They are also directed to pay the additional tax/default surcharge as required under Section 34 of the Sales Tax Act, 1990. A penalty equivalent to 3% (three percent) of the sales tax is also imposed under Section 33(2) of the Sales Tax Act, 1990."

4. Again feeling aggrieved and dissatisfied with the order of the Collector Customs, Sales Tax & Federal Excise Karachi the Appellant/Registered Person has filed Appeal under Section 46 of the Sales Tax Act, 1990 before Customs Appellate Tribunal Lahore, but the matter was not decided. The Registrar of Customs Tribunal transferred the appeal file alongwith a certificate No.LB-II/4(ii)/2007-B-II dated 18.02.2014, certifying pendency of appeal as worded below:

"I am directed to refer to your letter No.F.7/ATP/(Reg)/2014 dated 12.02.2014 on the subject cited above.

In this connection, it is stated that the office has put in all efforts but being an old file/record, the same is not traceable at the moment. However, during search the duplicate file has been found. The Record Keepers of both the Benches of the Tribunal have certified that as per their record, the case has not been decided by this Tribunal meaning thereby the case is pending.

Keeping in view the above stated position, I have been directed to send you the duplicate file alongwith four photocopies of the order sheet of the above noted case for necessary action at your end."

Hence the appeal was taken up by this Tribunal now holding jurisdiction under Section 46 of the Sales Tax Act, 1990.

5. On the date of hearing, Mr. Monim Sultan, Advocate appeared on behalf of the Appellant/Registered Person while Ms. Ghazala Hameed Razi also appeared on behalf of the Department.

6. During the proceedings before this Court, the Learned Counsel for Appellant/Registered Person has contended that the Sales Tax Order No.09/2006(re-open) is bad in law and against the facts of the case. He further argued that the order-in-original No.328/2005 was issued and the taxpayer made the payment according to that order and availed the amnesty SRO 520(1)/2005 on 06-06-2005 in this way the matter has been settled and closed. He further pleaded that the second show cause notice was issued to the registered person and in 5th

line of para-5 of the show cause it is mentioned, "after perusal of the record it has been observed that the decision made at para-4 (i) and (ii) above has not been made according to the law" whereas no intimation was given to the taxpayer for the examination of the record nor it was examined but powers u/s. 45-A of the Sales Tax Act, 1990 has been exercised without any cogent reasons. According to Learned Counsel for the Appellant that the registered person (buyer)/ the alleged appellant is distributor of ICI Pakistan (Ltd) and principal is a Multi National Company and the statement provided by the parent/supplier for the whole year indicates the reconciliation of the payments of Sales Tax. He further argued that as for as the other cases decided by the Additional Collector (Adjudication) Multan are concerned. Every case has its own history and different circumstances hence, only to say that he has not allowed the adjustment of input tax is not enough without putting any proof on record. He further argued that the Learned Collector Customs Sales Tax Federal Excise of Multan has not considered final discharge of Sales Tax liability made by the appellant under the amnesty SRO 520(1)/2005 his remarks are incorrect and not sustainable under the eye of law. In support of his contention he has relied upon the case law reported as 2005 PTD 1790 [Lahore High Court]. He lastly prayed that the appeal may please be accepted and the Sales Tax Order No.09/2006 dated 26.12.2006 passed by the Collector Customs Sales Tax and Federal Excise Multan may kindly be vacated and demand raised there in be recalled. The learned DR also referred to

a circular of FBR vide C. No. 3(36)/STP/99 dated 13.07.2002 elaborating the scope of Section 73 of the Sales Tax Act, 1990.

7. On the other hand, Learned D.R. supported the order of the Collector of Customs and contended that the Respondents were asked to provide the bank statement and other books of accounts relating to the purchases and supplies during the period January 2001 to December, 2001 to ascertain the position whether the respondent had made the transactions according to the provision of Section 73 or otherwise. Learned D.R. further argued that the Respondents failed to provide the bank statements to ascertain that payments against purchases and receipts against supplies through banking channel as required under Section 73 of the Sales Tax Act 1990. He further pleaded that input tax amounting to Rs.70,99,250/- was inadmissible under Section 73 read-with sub-section 1 of Section 7 of the Sales Tax Act, 1990 which was recoverable along with additional tax and penalty. He further argued that the respondents supplied "Soda Ash" valuing to Rs.25,96,000/- to un-registered persons in the month of August, 2001 and did not charge further tax amounting to Rs.77,880/- as required under Section 3 (1A) of the Sales Tax Act, 1990 which was also recoverable along with additional tax and penalty. He has argued that no lacuna/error in the order of the Collector Customs and order passed by the Collector Customs in accordance with law. He prayed that the order of the Collector Customs may kindly be maintained.

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8. We have heard to rival arguments of both the sides and have carefully examined the case record including Order-in-Original and Order passed by the Collector Customs, Sales Tax & Federal Excise Multan.

9. We have given due consideration to the arguments advanced by both the side. After carefully examining the case record it transpires that the mandatory provisions of Section 73 of the Sales Tax Act, 1990 exist on the statute book to ensure independent transacting parties, a genuine transaction, a third party evidence in reference to transfer of money on a particular date as well as volume besides availability of a secondary evidence to support the primary evidence i.e. invoice.

10. That in the instant case, some transactions took place between buyer (taxpayer) and the seller (M/s. ICI) though crossed traveler's cheques and statedly the sum was not withdrawn from own bank account but cash sales were used to obtain traveler's cheques in favour of principal. However, none of the two officers below have alleged the very existence of the transactions. The taxpayer has also referred to matching/reconciling ledger accounts with the principal in respect of his purchases. The transactions are quite capable to sustain the core audit tests of existence, measurement, valuation, timeliness, presentation or declaration, cross verification and an arm's length relationship. During the course of hearing before this Tribunal, taxpayer filed copies of ledger account which were initially relied by the Adjudicating Officer but later on the

Collector questioned the legality and propriety of earlier decision in terms of Section 45A of the Sales Tax Act, 1990. Moreover, the claim of output of the principal (M/s. ICI) was allowed as such which reveals the acceptance of transaction for the purpose of output Sales Tax in the hands of seller. Now the question arises of the status of crossed traveler's cheques not specifically finding place in the substantive law. Following decisions of apex courts are quite relevant in the facts of the instant case.

- (i) (2010) 102 Tax 219 (Trib.)
- (ii) (2011) 104 Tax 349 (Trib.)
- (iii) (2011) 104 Tax 252 (Trib.)
- (iv) 2005 GST 309

11. In the case referred at Sr. No. (iv) Above, the Honorable Customs, Excise and Sales Tax Appellate Tribunal, Karachi vide its Order No. 213/2003(K-2) dated 30.04.2004 has held as under:

FACTS –

Appeal against Order-in-original – audit observed wrongly adjusted input tax i.e. transactions exceeding fifty thousand rupees not effected through bank account as payment made through travelers cheques – Appeal filed –

HELD – –

It will be not only unjust but unlawful also to disallow adjustment of input tax, which was actually collected from the appellant and deposited in the exchequer, simply for the reason that the payments were made through travelers cheques –

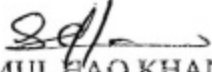
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12. However, we feel that in the light of documents produced by the taxpayer a better course would be to take action in terms of Section 33(16) of the Sales Tax Act, 1990 as an optimum punishment in respect of extent of oscillation of the taxpayer. Accordingly we order that claim of input be allowed to the taxpayer yet we uphold the levy of penalty under Section 33(16) @ 3% of the disputed/impugned amount of input. Moreover, the sales tax charged amounting to Rs. 77,880/- on alleged sales of "Soda Ash" needs no interference by this forum and the treatment meted out in the impugned order under Section 45-B is confirmed.

13. The appeal of the taxpayer is allowed to the extent mentioned above.


(FAHEEMUL HAQ KHAN)
ACCOUNTANT MEMBER


(JAWAID MASOOD TAHIR BHAT II)
CHAIRMAN