[Inland Revenue Appellate Tribunal]

Before Jawaid Masood Tahir Bhatti, Chairman and
Farzana Jabeen, Accountant Member

F.E.D. No.72/KB of 2012, decided on 14th February, 2013.

Messrs Haq Bahoo Sugar Mills Lahore vide FE No.11/LB/2011

Messrs Tharparkar Sugar Mills' case **rel.**

Muhammad Fahim Bhaio for Appellant.

Tariq Hussain, DCIR/DR, for the Respondent.

Date of hearing: 14th February, 2013.

ORDER

JAWAID MASOOD TAHIR BHATTI, CHAIRMAN.---The appellant through this appeal has objected against the impugned order of learned CIR(A) dated 10-8-2012 on the following grounds:--

"(1) 'That the learned respondents passed the impugned orders in a whimsical and stereo typed manner without application of judicious norms of justice.

(2) That the instant show-cause notice and resultant demand of alleged SED so far as the transactions pertaining to 1st July 2007 till September, 2008 is time barred under section 14(1) of the Act.

(3) That the learned respondents Nos.1 and 2 erred by passing a confused, vague and self-contradictory orders.

(4) That the impugned demana of SED does not hold true in the light of section 14(2) of the Act as the learned respondents Nos.1 and 2 failed to ascertain facts of the case and causes of the alleged short payment of SED. Thus, the determination of alleged demand of SED failed to meet the test of section 14 of the Act.

(5) That the impugned demand of SED if factually defective and incorrect as the respondent erred in ignoring the fact that a sum of over Rs.8 million also accrued to the appellant as a result of higher payment of SED.

(6) That the learned respondents Nos.1 and 2 erred in holding that the appellant supplied sugar of 2875 metric ton during November 2007 and onwards, on the pretext that such sugar pertained to old stock as lying on 30th June 2007.

(7) That the learned respondents Nos.1 and 2 failed to comprehend that the appellant paid SED strictly on the basis of guiding principle envisaged under section 12 of the Act.

(8) That the learned respondents Nos.1 and 2 failed to highlight/ refer to a single tangible and legal support whereby the appellant could be made liable to pay SED in terms of section 2(46)(a) of Sales Tax, Act, 1990 instead of Proviso to section 2(46)(a) of the Sales Tax Act, 1990.

(9) That the learned respondents Nos.1 and 2 failed to acknowledge that the intent of legislature/Federal Government in imposing reduced sales tax on sugar was aimed towards facilitating the end consumer, was evenly applicable over assessment of another indirect tax i.e. SED.

(10) That the learned respondents Nos.1 and 2 failed to appreciate the fact that section 10(a) of FE Act provides that the value applicable to any goods shall be the value on the date on which such goods are supplied for home consumption. It is notable to mention that section 12(1) of FE Act and section 2(46) of Sales Tax Act talks about chargeability of sales tax and SED on the basis of 'value of supply' as envisaged in their respective laws.

(11) That the learned respondent No.1 grossly erred in holding that section 12(I) and subsection (4) of FE Act has not relevance in the case of the appellant.

(12) That the learned respondent passed order-in-original in contradiction to section 72 of Sales Tax Act read with FBR's letter dated 11 July 2012 whereby the Board had held that SED would be charged on fixed value.

(13) That the respondent also erred to respect the recent judgment of Appellate Tribunal whereby the Tribunal allowed Appeal No.FEA No. 1/LB/2011 and held in its findings that SED is levied on fixed price, as set out by Federal Board of Revenue, i.e. on fixed basis.

(14) That the respondent erred in understanding the intent/purpose of substituting section 12(1) of FE Act through Finance Act, 2008 was to create harmony and uniformity in prices to calculate SED which otherwise were not uniform. However, it is noted that the respondent passed order-in-original on some distinct ground in negation to his earlier findings as enumerated above.

(15) That without prejudice all the foregoing grounds, the appellant failed to establish the element of mens rea in the instant case, which has been held by Supreme Court of Pakistan to a mandatory condition for imposition of default surcharge and penalty.

(16) That without prejudice all the foregoing grounds, the Learned respondent erred in imposing default surcharge and penalty in contravention of the dictum laid down by superior courts whereby default surcharge and penalty cannot be levied in case involving legal interpretation of law."

2. The appellant in this case is engaged in the manufacturing and sale of sugar and allied products. On perusal of the record of the case and return for the period of July 2007 till May 2011, the respondent department observed that the appellant, has allegedly short paid Special Excise Duty (SED). Accordingly, the show-cause notice under section 14 of the Federal Excise Act, 2005 was issued on 12-9-2011 and subsequently as a result of adjudicating proceeding an assessment order No.6/2011 dated 9-12-2011 was passed by the DCIR, against which the appellant filed appeal before the learned CIR(A) which has also been dismissed, hence this appeal before this Tribunal. The leaned counsel representing the appellant has contended that in response to show-cause notice, it was explained to the adjudicating authority that the SED was payable in terms of section 12(1) of the Federal Excise Act, 2005 read with section 2(46)(g) of the Act and S.R.O. No.564(I) of 2006 dated 5-6-2006 on the basis of a fixed value as determined rather on market sales price in respect of laws of sale of sugar. However, both the officers below have not accepted the plea without any justification and has held that the SED was payable on actual value of sugar and the appellant was required to make payment of differential amount of SED in terms of section 14 of the Federal Excise Act, 2005. The learned counsel has contended that as per section 14(1) of the Federal Excise Act, 2005 a person shall be serviced notice requiring him show-cause for payment of duty and such a notice shall be issued within three years of such non-payment/short-payment. The said period of three years was increased to five years through Finance Act, 2011. It is contended that the presumed liability against the appellant pertains to period from July 2007 to March, 2011 and therefore, the SCN is hit by the time limitation to the extent of

period July 2007 to August 2008 as the Show-cause notice was time barred under the law. It is contended that the Hon'ble High Courts as well as this Tribunal have struck down such liabilities of duties and taxes which have been created beyond stipulated time. In this regard reliance is placed on the following repotted decision:--

(i) 2008 PTD 60
(ii) 2008 PTD 758
(iii) 2008 PTD 2025
(iv) PTCL 2010 CL 1134
(v) 2008 PTD 981

3. The learned counsel has contended that the show-cause notice does not contain reason for short payment of SED as alleged against the appellant. He is of the view that any notice without reasons is nullity in the eye of law and on the basis of that, no liability can be created. In this regard, he has placed reliance on the decision reported as 2003 PTD 1797, 2007 PTD 2265, 2009 PTD (Trib.) 1263 and 2005 PTD 480. The learned counsel has argued that the respondents Nos.1 and 2 framed SED liability against the appellant without application of judicial principle of law as set out by superior courts that all the relevant provisions of law is to be taken into cognizance while interpreting a statute. As per section 12(1) of FE Act, it is provided that the goods liable to SED at a rate depending on their value, duty shall be assessed and paid on the basis of value as determined under section 2(46) of Sales Tax Act. The term value of supply as envisaged under subsection (46) of section 2 of Sales Tax Act provides options and various situations for determining the value of supply. He has contended that the FBR in exercise of power conferred under clause (g) to subsection (46) of section 2 of Sales Tax Act issued S.R.O. 564(I)/2006 dated 5th June 2006 whereby value for levy of sales tax on sugar was fixed @ Rs.28.80. According to learned AR the first and second proviso to subsection (46) of section 2 pertains to all other provisions to subsection (46) of section 2 of Sales Tax Act and is not specifically related to clause (g) thereof. FBR had fixed value of sugar which is not a retail tax item in exercise to powers vested in section proviso to subsection (46) of section 2 of Sales Tax Act. From aforesaid legal position, it is established that the Board will never have issued S.R.O. 564 for fixation of value of sugar if clause (g) to subsection (46) of Section 2 exclusively pertain to retail tax regime. He has contended that the value in accordance with direction by FBR under S.R.O. 564 in term of subsection (46) of section 2 of Sales Tax Act was treated as value for the purpose of computation of sales tax and SED which was done by the appellant. However, the department have taken plea in the impugned order and order-in-original that S.R.O. 564 was issued by FBR for the purpose fixing value of sales tax. It is contended that the respondent /department officials have mis-interpreted

S.R.O. 564 and has read the same in isolation and with disregard to other related provisions of both Sale Tax Act and FE Act. In other words, the guiding principle laid down by superior courts was altogether ruled out by respondents and badly failed to interpret on taxability of SED with respect to sales of sugar without taking into cognizance the related provisions of the law and rules thereof. It is contended that the Board had issued various concessionary notifications for sugar sector under section 2(46) of Sales Tax Act, 1990. The appellant according to him relied upon section 2(46) of Sales Tax Act, 1990 read with Board's notifications and started SED on the basis of value so fixed by the Board. The appellant continued to make compliance with tax laws; so much so that during the period when market value of sugar was less than the price fixed by said notifications, the appellant continued to pay SED on such (higher) price fixed by the Board instead of prevailing market price. Thus, the appellant paid higher chunk of SED into the government coffer. He has contended that after 30-6-2008, 'SED on Sugar became chargeable on the basis of value 'determined' under subsection (46) of section 2 of the Sales Tax Act, 1990, because no Notification was issued for 'fixation' of value for the purpose of levy of Special Excise Duty under subsection (5) of section 12 of the Federal Excise Act, 2005. He has argued that the Board has not mentioned any specific clause of section 2(46) of Sales Tax Act for determining value of SED for sugar. The board in fact under S.R.O. 564 has determined value of sugar for levy of sales tax and again has been stressing through aforesaid letter to levy SED on 'value determined' by itself as it prevalent in S.R.O. 564. However, the respondent in his self-contradictor' and vague order, completely failed to comply with Board's letter and legislature intent thereof and fabricated liability of SED upon appellant through order-in-original in contradiction to directions of Board which is violation of section 42 of FE Act and section 72 of Sales Tax Act. On the basis of the foregoing submission, arguments and fact, it is requested to declare that the impugned order in appeal and order-in-original are void, illegal, unwarranted and ultra virus to the provisions of the Act and the rules made thereunder and the impugned show cause notice also to be void and of no legal effect.

4. On the other hand, the learned DR is supporting the orders of both the officers below. He has contended that section 2(46)(g) is relevant to retail tax and is not relevant to appellant's case and also not levying FED but is not relevant in levying SED. The learned DR in this respect has also referred the relevant provisions. As regard section 12(1) and (4), he has contended that these are specifically related to FED and have no relevance to SED for which charging section is 3(A) of the Federal Excise Act, 2005. Regarding S.R.O. 564(I)/206 dated 5-6-2006. The learned DR has contended that it is related to Sales Tax Act, 2009

and has no relevance in levying of SED which is governed by section 3(A) of the Federal Excise Act, 2005. He has further contended that section 3(A) was not in statute book on 5-6-2006 therefore benefit of S.R.O. 564(I)/2006 dated 5-6-2006 cannot be taken by the appellant in this situation. He has contended that section 12(5) of the Federal Excise Act, 2005 becomes fully operation in such a situation as it empowers the officers to charge higher price than fixed by Board until and unless it is specifically directed not to do so. According to learned DR, this section covers the situation when the registered persons supply goods on higher profit margin in past there has a reason such situation when sugar price went very high and to cover up such situation law has been brought on statute book to take care. The learned DR has submitted that in view of this specific section, the application of S.R.O. 655(I)/2007 dated 29th June, 2007 becomes insignificant and is of no help to the appellant, and section 12(5) of the FEA being substantive law i.e. being one of the main provisions of Federal Excise Act, 2005 has obviously to be given more consideration than any of the special subservient S.R.O. In view of this submission, the learned DR has requested to uphold the impugned orders of the officers below.

5. We have heard the learned representatives from both the sides and have also perused the impugned order and the order-in-original. The main point requiring adjudication in this case is whether Special Excise Duty was, payable with reference to notified price or actual sale price of sugar during the period under consideration i.e. July 2007 till May 2011. The case of the Revenue is that the SED was with reference to actual sale price whereas the appellant had paid the same on the basis of notified price. We have perused the referred S.R.O. 564(I)/2006 dated 5-6-2006 which lays down the value of taxable supply of locally produced White Crystalline Sugar which from time to time have been changed by the notifications issued by the FBR. The rate of taxable supply of White Crystalline, Sugar earlier fixed by the notification S.R.O. 4(I)/2009 dated 2-1-2009 has now been fixed at Rs.28.88 per kg. The fixation of the rate is for the purpose of charging tax on the value of supply fixed by the amending S.R.O. irrespective of the value at which the supply is made. We have noted that the appellant had been charging sales tax at the above mentioned rate of Rs.28.88 per kg following the scheme of the Notification S.R.O. 564(I)/2006 dated 5-6-2006 referred to above. We have further noted that the FBR vide its letter C. No. STM/2004(Pt-111)92346-R dated 24-6-2011 has determined the value of sugar for the supply for the purpose of SED vide Notification S.R.O. 564(I)/2006 dated 5-6-2006 which has been issued under section 2(45) of the Act. As has been explained by learned counsel, the value as applicable in the Act mutatis mutandis applied for the purpose of SED. On behalf of the appellant, the decision of this Tribunal dated 6-6-2012 in the case of Messrs Haq Bahoo Sugar Mills Lahore vide FE No.11/LB of 2011 has been placed before this Bench wherein in the similar circumstances the impugned order of learned CIR(A) as well as the assessment order and the show-cause notice has been declared to be null and void. We have further noted that in the case of Messrs Tharparkar Sugar Mills, the learned CIR(A) has followed the decision of the Tribunal in his order bearing No.12/2012 dated 27-9-2012, but in the case of present, appellant, the different view has been taken. In view of this situation and legal position, the impugned order of learned CIR(A) and the order-in-original is set aside and the appeal filed by the taxpayer is allowed.
