

STA NO. 888/LB/2015

M/S HAJI MOHAMMAD ALAM AND SONS, ~~OIL MILLS~~,  
VEHARI

APPELLANT

VERSUS

THE CIR, RTO, MULTAN.

RESPONDENT

APPELLANT BY :- MR. MUHAMMAD IMRAN GHAZI, ADVOCATE

RESPONDENT BY :- MR. BILAL AHMED DR & MR. ATTIQ-UR-REHMAN, DR.

DATE OF HEARING : 04-11-2015

DATE OF ORDER : 17-12-2015

ORDER



Titled appeal has been filed at the instance of the Registered Person calling in question the impugned order dated 16-06-2015 passed by the learned

★ CIR(A) Multan on the following grounds:-

- i). That the learned CIR (A) was not justified to uphold the order of DCIR without adjudicate the complete grounds of appeals.
- ii). That the CIR (A) was not justified to wrongly upheld the order u/s 33 without given due consideration and according to the facts that demand actually was created u/s 11(2).
- iii). That the CIR (A) was wrongly upheld tax without given weightage on the fact that provisions of section 38 can't be initiated without fulfillment of statutory requirements laid down in 1st proviso of sub-section (1) of Section 25.
- iv). That the CIR(A) grossly erred to upheld appellant liable to tax u/s 11(2) read with section 38 on the basis of merely consumption of electricity units without giving weightage that assessment on the basis of consumption is hardly a safe rule and yardstick to assess the production.

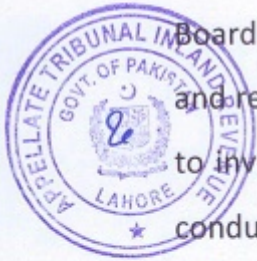
- v). That the learned CIR(A) was not justified to uphold the tax which calculated on the basis of formula, ignoring the fact that the learned DCIR has not provided any matter of tax fraud and reasons for rejection of books of accounts.
- vi). That the learned CIR (A) was erred to upheld the order of DCIR who wrongly and without jurisdiction determine the value of supply against the provisions of section 2(46)(e).
- vii). That the CIR(A) was erred to upheld the order based on defective show cause in terms of wrong calculation of electricity units consumed and also without given the credit of tax already paid.



Briefly stated the facts of the case as narrated the impugned findings of the officers below are that the Registered Person was liable to pay sales tax on supplies of cotton seed oil, oil cake and oil dirt, as per applicable rates in terms of SRO-549(1)/2008 dated 11-06-2008 as amended vide SRO-602(1)/2012 dated 01-06-2012, SRO-213(1)/2013 dated 15-06-2013 read with Sr. No.2 of Eighth Schedule of the Sales Tax Act, 1990 inserted vide Finance Act, 2014 introduced amendment in Section 3 by adding a new provisions 3(2)(aa), in which he failed to do so. Accordingly, the DCIR issued a show cause notice to the Registered Person for violation of sections 3(1), 3(2)(aa), 6(2), 7, 22, 23, 26 & 73 of the Sales Tax Act, 1990. The case was fixed time and again but no response was made by the Registered person, hence the DCIR was left with no option but to proceed exparte. Ultimately sales tax was charged alongwith default surcharge u/s 34 & Penalty u/s 33 of the Sales Tax Act, 1990. The Registered Person approached the learned first appellate authority who upheld the order of the DCIR, hence the instant appeal by the Registered person before the Tribunal.

3. Both the parties have been heard and relevant orders perused. The learned counsel of the taxpayer contended that the DCIR, Audit Unit-02 & 03 Income Tax Complex, Canal Colony, Sahiwal has no jurisdiction over the case because powers were vested with the Officer Inland Revenue, Enforcement & Collection Unit-07, Vehari. In this regard the learned counsel of the taxpayer produced before the court copy of the Jurisdiction order Inland Revenue No.CIR-

Zone-III/RTO/MN/2012-2013/748 dated 04-10-2012. It was submitted that provisions of section 38 cannot be initiated without fulfillment of statutory requirements laid down in section 25 of the Act. It was further submitted that the purpose of a visit under section 38 of the Act is just to see that proper records under the Act, Rules and Regulation are maintained, reasonable cause for a visit could, for example, arise in a situation where a registered person has filed documents in normal course which indicate that a particular record is not being maintained or that it is not being maintained in the required manner. It was argued that there is no provision in section 38 of the Act for conducting an audit of a Registered Person except empowering an Officer of Inland Revenue by the Board or by the Commissioner to have free access to premises, stocks, accounts and records to examine it and to take into his custody such records to inquire and to investigate cases of tax fraud but after resumption of record and documents, conduction of its audit and scrutiny thereof can only be made in way and procedure given under Section 25 of the Act read with General Order No. 03 of 2004, hence exercise of audit carried out under the garb of section 38 of the Act is illegal, ab initio void and without jurisdiction. In this regard the counsel of the taxpayer relied upon a reported judgment cited as (2015) 112 Tax 51 (Trib). The relevant extract from the reported judgment is reproduced as under:



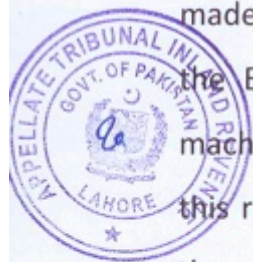
*"We are not persuaded with the departmental point of view that an investigative audit exercise was carried out under the provisions of section 38 of the Act, after having heard both the sides and carefully examining the relevant provisions of section 38 and section 25 of the Act, we find that there are no provisions in section 38 of the Act for conducting an audit of a Registered person except empowering an officer of Inland Revenue by the Board or by the Commissioner to have free access to premises, stocks, accounts and records to examine it and to take into his custody such records to inquire and to investigate cases of tax fraud but after resumption of record and documents, conduction of its audit and scrutiny thereof can only be made in a way and procedure given under section 25 of the Act read with General Order No.3 of 2004 therefore, exercise of audit carried out under the garb of section 38 of the Act is illegal, ab initio void and without jurisdiction. The officer of Inland Revenue was not legally empowered by the Commissioner to conduct audit under provisions of section 25(2) of the Act and approval of the Board or the Commissioner under section 38 of the Act was only for free access to business and manufacturing premises of the registered person and its record and documents which never provides powers of conducting of an audit requiring another authority under section 25(2) of the Act. Section 38 of the Act encompassing*

*enabling provisions to have free access to a registered person but section 25 of the Act provides a mechanism for conduction of its audit. Co-existence and co-invocation of both sections might have any meanings but provisions of section 38 of the Act alone in its sole clad are nothing for conduction of an audit without its counterpart provisions as given under subsection (2) of section 25 of the Sales Tax Act, 1990."*

4. The learned counsel of the taxpayer also objected that the CIR (A) grossly erred to upheld appellant liable to tax u/s 11(2) read with section 38 on the basis of merely consumption of electricity units without giving weightage that assessment on the basis of consumption is hardly a safe rule and yardstick to assess the production. It was argued that there is no provision of Act or the Rules made there under which allows the assessing officer Inland Revenue to determine the Excise Duty or Sales Tax on the basis of production of capacity of the machines or the consumption of electricity in the manufacture of such goods. In this regard reference was made to a reported judgment cited as 1985 PTD 315, the relevant extracts from the reported judgment is reproduced for the sake of convenience.

*"Whether sales could be presumed on consumption of electricity when audited accounts have been accepted by the department – Held no—Whether there is no provision or Act or the Rules made there-under which allows the assessing officer of Inland Revenue to determine the Excise Duty or Sales Tax on the basis of production of capacity of the machines or the consumption of electricity in the manufacture of such goods—Held yes – Whether assessment of tax on the basis of consumption of electricity is hardly safe rule and yardstick to assess the production—Held yes."*

5. After hearing the rival parties, we are of the view that the learned representatives of the department failed to rebut the assertions made by the learned counsel of the taxpayer. The reported judgment cited supra are also on all fours to the case to the Registered person wherein it is clearly mentioned that Section 38 of the Act encompassing enabling provisions to have free access to a registered person but Section 25 of the Act provides a mechanism for conduction of its audit. We also in agreement with the observation that there are no provisions in section 38 of the Act for conducting an audit of a Registered person except empowering an officer of Inland Revenue by the Board or by the Commissioner to have free access to premises, stocks, accounts and records to



examine it and to take into his custody such records to inquire and to investigate cases of tax fraud but after resumption of record and documents, conduction of its audit and scrutiny thereof can only be made in a way and procedure given under section 25 of the Act read with General Order No.3 of 2004 therefore, exercise of audit carried out under the garb of section 38 of the Act is illegal, ab initio void and without jurisdiction. Even otherwise, the assessment on the basis of consumption of electricity can hardly be considered a yardstick to assess the production.

The contention of learned DR that almost all the taxpayer had made in tax years 2002 and onward at certain rate, hence they are not entitled to any relief. We are not persuaded to agree with the contention of learned DR as sales tax could not be levied on presumption as has been held in the judgment of the Tribunal and referred to by the learned AR hence keeping in view all the aforementioned, we have no hesitation to allow the appeal of the Registered Person and vacate the decisions passed by authorities below.

7. It is ordered accordingly.

Sd/-  
(MUHAMMAD RIAZ)  
ACCOUNTANT MEMBER

Sd/-  
(JAVED IQBAL)  
CHAIRMAN

Copy of the bench order forwarded to

- ✓ 1. The Appellant, *Ms. Haji Muhammad Alam & sons Vehari*  
2. THE CIR, *1/1/16*

By order  
*Javed Iqbal*  
18/1/16  
Assistant Registrar  
Appellate Tribunal Inland Revenue  
Lahore.