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APPELLATE TRIBUNAL INLAND REVENUE (PAKISTAN) KARACHI

STA No.95/KB/2014
Tax Period May 2013 to February 2014
U/s.45-B

The Commissioner Inland Revenue,
Zone-I, Large Taxpayer Unit-II
Karachi ..... Appellant

VERSUS

M/s. L.J. International Pakistan,
Karachi ..... Respondent

Appellant by	:	Mr. Irfan Ali & Mr. Mukhtar Hussain, DRs
Respondent by	:	Mr. Naeem Noor & Aftab Naimat, Advocates
Date of Hearing	:	27-02-2018
Date of Order	:	14-03-2018

ORDER

The instant appeal is filed by the appellant/ department against the order in appeal No.81 of 2014 dated 24-06-2013 passed by the learned Commissioner Inland Revenue (Appeals-II), Karachi. The appellant/department has taken the following grounds:

(i) *That the order of the learned Commissioner Inland Revenue (Appeals-II),Karachi, is bad in law and contrary to the facts of the case.*

(ii) *That the learned Commissioner Inland Revenue (Appeals –II), was not justified to annulled the order, passed by the office Inland Revenue U/s 11(2) of the Sales Tax Act,1990 without considering of the facts of the case.*

(iii) *That the learned Commissioner Inland Revenue (Appeals-II), has seriously erred and did not appreciate the scope of Sales Tax Law.*

The legal Position is spelled out as below:

a. *Firstly the tax is to be deducted/ deposited on accrual basis and not on payment basis as per laid down procedure (Rule 2 (6) (7) (8) and 3) and 79.*

b. *Secondly, it is not the case of double taxation as the supplies have adjusted the taxes and not paid, in cash in most of the cases where it is required by law, to pay in cash in Advance, Refunds have been claimed.*

c. *The Sales Tax law of Withholding requires payment of tax @20% along-with return in addition to the tax liability determined u/s 7 of the Sales Tax Act. The tax to be withheld or withheld is to be deposited in each month with return.*

d. The monthly Sales tax Return required there fore, the payment of such tax and in respect of such supplies against which inputs has been claimed (both for which payment have been made or purchases were made on credits so payments are payable during the month) on Annexure (C & I). It cannot be adjusted by with holding agent out put.

(iv) That the appellant craves permission to add, alter, amend, withdraw or substitute all or any of grounds of appeal on or before the time of hearing of appeal.

02. Brief facts of the case are that the taxpayer/respondent being an AOP is registered in sales tax with principal activity as Wholesaler of Textile clothing and footwear (STRN 1750590004973) along with surplus / additional business activity as Exporter.

03. An amendment has been brought by the Federal Government under Sales Tax Withholding Rules 2007, amended vide SRO 98 of 2013. The aforesaid amendment in the subject Rules was made to bring following categories of registered persons in to withholding regime.

- Companies defined in the Income Tax Ordinance 2001, which is registered for Sales Tax, Federal Excise duty and Income Tax.
- Persons registered as exporters.

04. The Respondent taxpayer received a show cause notice u/s 11(2) for short payment/non payment of sales tax withheld within the dictates of Sales Tax Special Procedure (Withholding) Rules, 2007 as amended by SRO 98 of 2013 dated 14-02-2013, while considering the respondent taxpayer exclusively registered as exporter. Respondent Taxpayer replied the said show cause notice while contending that although respondent taxpayer have mentioned in its registration profile and additional business activity as exporter but the principal activity is Wholesaler of Textile Products which is verifiable from tax record and the respondent taxpayer has not made any export since its registration. The activity of exporter was only incorporated in its registration profile as surplus activity, however, Appellant department rejected the taxpayer's view point and passed the impugned order u/s 11(2) and raised demand of Rs. 2,492,399/-. Being aggrieved the taxpayer filed appeal before CIR(A-II) Karachi which decided the case in favour of taxpayer holding that Department was not justified in imposing tax on the taxpayer as withholding agent under category of exporter just because of its registration as exporter, without considering the admitted fact that the taxpayer has not carried out any business or taxable activity as exporter since its registration.

05. Learned DR appearing on behalf of Appellant/Department argued the case in length and also filed following written arguments:-

Grounds No /written Argument of Respondent	Grounds/ Arguments	Counter Argument/Comments
.	In support of grounds of appeal	1. The CIR Appeals order is in gross disregard of the scheme of law and could not appreciate that the tax to be withheld by withholding agent is to be deposited each month along with the return in addition to its tax liability deter u/s .7 of the STA , 1990. 2. The amount of withholding tax is to be paid /deposited in disregard of the time of payment to the seller, so the facility of deferred payment available u/s.73 does not preclude the requirement of deduction and payment of withholding tax @ 20% during the relevant month. 3. It further means that the tax withheld. is compulsorily deposited in advance (increases even the payment including remaining 80% of the sales tax is to be paid later with in 6 months) and to the aid extent, the tax is must paid leaving a link and connection regarding the seller party which thereafter has to must deposit the remaining80% due to documentation / recording at the buyers end. 4. Reference is made to Annexure– A & I of the sales Tax Return against both serial / row number 1 & 22 of the Sales Tax Return. **Serial /Row number 1contain "domestic purchases from registered person" while, serial / row number 22 contains "sales tax withheld as withholding agent " (Annexure –A).**Both of the annexure contain the disclosures (party wise) regarding purchases. The above procedure is meant to halt the trends of "flying /fake invoice & illegal claim of refunds". 5. If some body, makes payment later (within 6 months) and tries to pay tax during the relevant month after making entry in the return for said month, the system does not allow to do so. This situation conforms the departmental view that the tax is to be paid along with return during the months the input has been claimed (whether payment has been made or not). Further, this amount is to be paid over and above the tax payable u/s 7 of the Sales tax Act 1990. 6. The introduction of withholding of taxes through these rules primarily another step towards documentation, cross matching & practical legislative move / step to discourage the growing trends of flying & fake invoices. The procedural correction has been well appreciated and approved by Honorable LHC in its judgment (2016 LHC 1045) date 16-3-2016. 7. The decision of learned CIR Appeal is therefore, a step which has result in frustrating the purpose of law instead of advancing the case of justice and making the law workable. The case law relied upon in the backdrop of income tax Law, are not relevant to the situation and circumstance of the case and the same stands distinguished on the strength of ratio decidendi of LHC judgment refer to above. • The decision of Learned CIR Appeal is in total disregard pf the above scheme of law and analysis of the purchases time, times of payments and the time of credits claims. • In order to plug revenue leakages due to such methodical gaps in sales tax law and having received and witness thousands of bogus refunds frauds unearthed and busted by the FBR over time reported by media too, the parliament

		took legislative measures and introduced various legal section / sub-section / clauses and continues there substation and improvement likes; - Section 8(1)(d) –in 2004. - **Section 8(1) (ca)-in 2006/2007.** - Section 8(A) (ca) - in 2006/2007. - Section 8(B) -in 2007/2011. - Section 21(2) -in 2004/2011/2013. - Section 8(1) (caa) -in 2013- for crest software. - Sales Tax Withholding Rules 2007 - Etc..... • Mere cursory look on the above legislative steps and there periodical improvement through substitutions, over the years provide ample evidence regarding the following; - Legislative intent regarding non allow ability of any input tax credit for a tax which has not been deposited in the State Treasury, is quite Obvious. - The quantum and frequency of fake invoices / fake refunds etc. have reduced. - The loop holes in the tax laws stands much blocked. • While, the legislative intent is more than obvious where as, the Courts, were not properly assisted to arrive at decisions of the kinds which are in conformity of the settled principles of interpretation of fiscal statues as per plethora of decisions of High / apex Courts. • All those golden principles have been discussed /incorporated and relied upon by **Honorable Islamabad High Court in its latest decision dated 3-12-2015 reported as 2016 PTD 596.** Wherein, the reliance regarding the principles has been placed on the decision of Supreme Court reported as **2015 SCMR-1739**. • The said principles, scheme of law and legislative attempts to block illegal refunds and illegal input tax credits, have been appreciated, elaborated and relied upon by **Honorable Lahore High Court in a Latest decision dated 16-3-2016reported as 2016 LHC 1045** wherein, the vires and affectivity and procedure contained in self contained section of law i.e. **section 8B Sales Tax Act,1990 has been approved and un held.** In the said judgment, the wisdom of legislature has been appreciated and the argument like that of double taxation etc. has been repelled. • it is settled that what is required by law to be done in certain manner must be done in the same manner or the same must not be done at all. Reliance, in this regard is placed on reported decision of **LHR reported as 2001 PTD (H.C LHR) 781.** • The decision of Lahore High Court Which earlier held Section 8(1) (ca)in Wp No. 3515/ 2012 as "absurd ,illogical and volatile of Article 23 & 4" stands distinguished being latest and having the same "ratio decidendi". In the light of above decision, case laws relied upon by learned CIR Appeal, have no legal relevance to be adopted in this case.
	i. During the hearing it has been contended that the taxpayer did not export hence the provision of withholding tax not applicable.	The Sales tax withholding law, is novel attempt of legislature toward documentation besides ensuring the deposit of sales tax by purchaser (20%) to put an end to the rampant tax frauds of illegal input tax credits of the taxes which were not actually deposited. ii. The Law has only extended the scope of prescribe persons by

		inserting in rule 2, the clause (f) vide on 14-2-2013in respect of **"persons registered as Exporters".** The decision of learned CIR Appeal conveys that he has read the prescribed person as **"exporter".** iii. The learned CIR Appeal has rendered the letters of law "persons registered as…." As surplus, redundant by presumptions. Which is in disregard of settled principle that there in no scope for intendment or presumptions **(87 TAX 317)** and that no ward of law can be attributed as surplusage **(1996 PTD 664 SCP)** or redundant **(46 Tax 143 LHC).**
	ii. It was also contended tat the main activity is wholesaler and exporter was only a mirror activity. iii. It Was also Contended that recovery of Withholding tax amounts to double taxation as the withholdee has filed its return (2012 PTD (Trib) 122).	The legislature (subordinate), has not written any thing in rules as "main or mirror quantum of activity". It has not given any exception. <u>Exclusion or exception have to be specifically mention and not construed.</u> It a settled proposition in plethora of decisions. The argument of double taxation, is no relevance in this scheme of law because it is a procedural law which requires something to be done certain way because the legislature ahs taken this posture because of certain happenings and the legislature wisdom cannot be challenge or under mind by narrow interpretations. This follows certain scheme of law as per legislative directives; the fundamental rights regarding sale tax collection method in VAT mode, the right of RPs are not affected. The sales tax is a consumer tax and only consumer can clamor for breach of their rights if they thing regarding certain levy of sales tax. Reliance is places on **2016 LHC 1045.**
Written argument No 1&2.	The withholding tax is not applicable on purchases for whole sale.	The argument is flawed. The input tax credit does not always result in refund because refund is generally possible in the RP being for Zero rate supplies. Had it been the case, there could not have been the company or NPO or governments, as prescribe persons. **From "persons registered as exporter" means "persons registered as exporters" only and not "exporters".** The tax to be with held is in respect of "taxable supplies" made to purchasers, for whatever purposes including self consumption, taxable supplies or zero rated supplies.
Written argument No 8	Default surcharge is not applicable	<u>Denied:</u> The withholding tax @ 20 % becomes tax due under sales tax law because the same is required to be paid as part of the return (entry at serial / row number 22).
Written argument No 9	Order u/s 11(2) is not legal	The reliance is misplaced. The decision is not a traceable. <u>As a matter of fact the case under reference is first before this tribunal hence the facts of the said case cannot be identical.</u> On legal footing section 11(2) contains therein the phrase "where a person has not paid tax due on supplies made by him or **<u>has made short payment……..".</u>** Further, there could have been an infirmity had there been prescribe section Law or Special rules for recover of defaulted amount. As there is no such other specific law and the tax due has also to be paid with the return (as explained above) therefore, the same is

		recoverable u/s. 11(2) of the STA, 1990. It is also relevant that the whole sales Tax Special procedure (with holding) Rules, 2007 mentions repeatedly about the detailed procedure of payment with return for buyer being withholding agent and taking credits as recipients of payments as withholding agents (supplier). The modes of recovery and payment of sales tax is same as per general scheme of law on accrual basis. It has nothing to do with the time of payment for purchasers or time of receipts for supplies. There is no exception to section 11(2) in this regard.

06. On the Other hand, Learned A.R appearing for Respondent Taxpayer has supported impugned order passed by Learned CIR(A) and also filed the following written/counter arguments in reply of DR's arguments:

*1) It was contended by the Appellant (Department) that **"person registered as exporters"** are covered as withholding agent for the purpose of sales tax, irrespevite of the fact that no export is ever made by taxpayer. The law is to be construed as the plain meaning of words of enactment suggest i.e., golden rule of interpretation.*

*In this connection, it is stated that Sales Tax law is a transaction based law. If the transaction occurs then the chargeability applies. If no transaction took place then no chargeability applies. In this instant case, in fact taxpayer has made wholesale activities only and **no export activity has ever taken place sine its registration**. Moreover, days have gone when courts were only up to plain meaning rule, now a days, courts prefer intention of legislature in addition to plain meaning rule. Hence the essence of purposive construction is given as under:-*

Purposive Interpretation –Essence

The purpose of interpretation is to discover the intention of legislature. If such interpretation is not clear from language used, the literal method is now completely out of dated. The cold logical and soulless approach defeats not only justice but also the intention of the parliament. The construction, which achieves the legislative intent, should be favored.

MISCHIEF RULE ; HYDEN CASE 1584

For sure and true interpretation of all statutes in general four things are to be considered:-

1) *What was the common law before making of the Act?*
2) *What was the mischief and defect which common law did not provide?*

3) *What remedy parliament has resolved and appointed to cure the disease of common wealth; and*
4) *The true reason of the remedy.*

And then office of all judges is always to make such construction as shall suppress the mischief and advance the remedy, add force and life to the cure and remedy according to the true intent of the maker of the Act.

In this instant case, the mischief is ***"person registered as exporter"*** *for instance, some taxpayers who have actually made exports but their Sales Tax Profile does not show their category as an exporter. The following question of law arises from the above situation while adopting plain meaning rule.*

Whether those taxpayers who have actually made exports but their sales tax profile does not indicate category as an exporter would be withholding agent or not?

In the light of purposive construction, the intention of legislator was to bring in the ambit of withholding agent actual exporters to safe guard the fake refund, rather than playing the mischief while adopting plain meaning "persons registered as exporters".

2) It was contended by the Appellant (Department) in response of plea of double taxation raised by the Respondent (Taxpayer). That sales tax law is a procedural law which requires something to be done in certain ways.

In this connection, if it assumed that respondent have to deduct withholding tax but failed to deduct the same, however, those suppliers of Respondent, whose tax was to be deducted, have already discharged their tax liability by filing of monthly sales tax return and paid their tax accordingly. Hence, no revenue loss is observed. We are fortified in our opinion by the following findings of Appellate Tribunal Inland Revenue:

[Commissioner RTO-I Lahore vs Nam International 2012 PTD 122(Trib.)]

if the amount of tax, required to be deducted, is paid meanwhile by the person, who's tax was to be deducted, then the taxpayer proceeded under section 161 shall pay only default surcharge of the period, he failed to deduct tax till it was paid by that person. 2012 PTD 122(Trib.)

3) Moreover, Appellant (Department) has invoked section 11(2) in impugned order for procedural default of withholding taxes.

In this connection, it is stated that Section 11(2) does not cater to operate the mechanism of withholding taxes. We are fortified in our opinion by the following case law (2015) 112 TAX 139 (Trib.) wherein Appellate Tribunal Peshawar Bench has declared that Section 11(2) does not cover withholding taxes default in the following words:-

[(2015) 112 TAX 139(Trib.) Peshawar Bench]

[(2015) 112 TAX 139(Trib.) Peshawar Bench]

"Whereas there is not parallel provision in the Sales Tax Act, 1990 to declare an assessee in default and the language of Section 11(2) does not cover this situation. Similarly any default has not been covered in section 11(2) convincing. The adjudicating authority has invoked section 11(2) of the Sales Tax Act which was not applicable at all and adjudication under wrong provision of law is not sustainable in eye of law" ..... I have declared in pre-paras of the order that section 11(2) of the Act does not deal with the default of withholding tax. [Placitum J of the case Law [(2015) 112 TAX 139(Trib.)

That it is very important to bring in the knowledge of this Hon'ble Tribunal that to remove the above said lacuna of Section 11 i.e., to cover the withholding taxes default, the Federal Govt. proposed the new amendment by Finance Bill 2016 and through Finance Act, 2016 passed such proposed amendment by adding new sub section 4A after sub section 4 of Section 11 which is reproduced as under:-

"(4A) Where any person, required to withhold sales tax under the provisions of this Act or the rules made thereunder, fails to withhold the tax or withholds the same but fails to deposit the same in the prescribed manner, an officer of Inland Revenue shall after a notice to such person to show cause, determine the amount in default.";

Hence it is crystal clear that prior to Finance Act 2016 Section 11 itself does not cover the withholding taxes.

4) Finally, Appellant (Department) has written some comments on page No.1 and 2 of its Comments filed on 03-06-2016, which enumerates departmental policy for some procedures and emphasized Section 8(I)(d), Section 8(1)(ca), Section 8(A), Seciton 8(B), Section 21(2) and Section 8(1)(caa).

In rebuttal of the above, it is stated that all above mention sections are irrelevant to the factual as well as legal position of the case. Moreover, the Appellant (Department) has also mentioned plethora of case laws in support of above irrelevant sections which do not have nexus with our instant case of withholding taxes matter.

07. We have considered the arguments of Learned Representatives of both sides. The controversy is that the Respondent taxpayer failed to withheld tax as provided under Special Procedure (withholding) Rules 2007 amended vide SRO 98/2013, during the periods under consideration to which the Respondent Taxpayer was show caused by the Appellant department for the recovery of the same, however, reply filed by the registered person did not find favour of the adjudicating authority and resulted in imposition of tax declaring the tax recoverable u/s 11(2) of the Act as detailed in the show cause notice. The appeal filed by the taxpayer before the first appellate authority was successful wherein CIR(A) held that the taxpayer has not carried out any business or taxable activity as exporter since its registration. It would be unjust to make responsible a taxpayer to withhold tax against its wholesale business activity which is not the intent of amendment in the subject Rules.

08. After hearing the parties and going through the record as well as case law cited, we are of the view that In this instant case, the mischief is *"person registered as exporter"*. While taking into account the rule of purposive interpretation, the intention of legislator is to bring in the ambit of withholding agents the real exporters to safe guard the fake and non genuine refunds, rather than playing the mischief while adopting plain meaning "persons registered as exporters".

09. The Appellant department contended that the taxpayer should be penalized being non compliant of Sales Tax Special Procedure (withholding) Rules, 2007 amended vide SRO 98/2013. The A.R of the Respondent taxpayer submitted that taxpayer's profile was showing a surplus activity "exporter" in addition to its principal activity "wholesaler" which was duly removed by filing change in particular application on 24-04-2014 before passing date of order in original dated 29-04-2014 as taxpayer does not need this surplus activity "exporter". Considering the record i.e. change in particular application and on line verification and date of order in original we are of the view that means rea on the part of the respondent taxpayer is missing in the instant case which is condition precedent to invoke any penal provision of the act. Appellant department has also failed to prove the mal intention of the taxpayer in this score.

10. On the factual side A.R submitted with utmost vehemence that the Respondent Taxpayer had paid the full amount of Sales Tax to its 44 suppliers who have filed their returns well in time. The sales tax returns of the said 44 suppliers were scrutinized wherein all suppliers filed their returns and paid whatever liability was required to be paid. Therefore, if any tax was to be withheld and the same has not been withheld but the supplier has paid its liability in its monthly sales tax return, then the imposition of tax again would be double taxation as who would get credit of tax imposed by order in original. The Appellant department has failed to answer the factual position as well as default surcharge u/s 34 of the act is also not applicable as all 44 suppliers have also filed their sales tax returns in time, hence, Appellant department failed to show any loss of revenue involved, therefore, appeal failed on this score.

11. Accordingly, we deem appropriate to confirm the order passed by CIR(A) and the appeal filed by the Appellant department being devoid of merits is hereby dismissed.

12. The appeal is decided in the manner indicated above.

Sd/-
(AHMED SAEED)
ACCOUNTANT MEMBER

Sd/-
(SEEMA IMRAN)
JUDICIAL MEMBER