TaxHelpline Case No. 187 of 2013

[INLAND REVENUE APPELLATE TRIBUNAL]

S.T.A. No.656/LB of 2012, decided on 7th March, 2013.

Messrs SUPER IDEAL SWEETS AND BAKERS, FAISALABAD

VS.

C.I.R. (APPEALS), FAISALABAD

ORDER

The present appeal is directed against the Sales Tax Order-in-Appeal No. 155/2012 dated 3rd May, 2012 passed by the learned Commissioner Inland Revenue (Appeals), Faisalabad pertaining to the Tax periods July, 2009 to June, 2010 and Sales Tax Order-in-Original No. 8/2011 dated 31st October, 2011 passed by the Assistant Commissioner Inland Revenue, Audit-2, Zone-III, Faisalabad. The appellant feels aggrieved on following grounds:

(a) That the orders passed by both the authorities below are bad in and against the facts of the case.

(b) That the respondent No. 3 was coram-non-judice to initiate proceedings against the appellant and the respondent No. 1 was not justified to uphold his authority to proceed under the law.

(c) That the respondent No. 3 unlawfully initiated the proceedings in view of S.R.O. No. 555(I)/1996 dated 1st July, 1996 as amended by S.R.O. No. 1318(I)/98 dated 28th November, 1998 which held force at the time of issuance of show cause notice.

(d) That the respondent No. 3 was not justified to treat the appellant as a manufacturer instead of a retailer and the respondent No. 1 was not justified to uphold the treatment accorded by the respondent No. 3 to the appellant.

(e) That the respondent No. 1 has twisted the legal proposition put before him without properly appreciating relevant provisions of law.

(f) That the order-in-appeal passed by the respondent No. 1 is silent as to whether the respondent No. 3 was justified in bypassing the authority of the Central Registration Office (CRO).

(g) That the respondent No. 1 was not justified in holding that the order-in-original was passed within the limitation period provided under the law.

(h) That the learned respondent No. 1 was not justified to uphold the computation of turnover of the appellant.

(i) That the learned respondent No. 1 was not justified to narrate in the body of the order-in-appeal that AR of the appellant produced an unsigned list of own manufactured items and Third Schedule items.

(j) That the learned respondent No. 1 has ignored the judgments cited at bar as well as reproduced in the body of the order-in-original on completely wrong premises.

(k) That the learned respondent No. 1 was also not justified to confirm assessment of 41 % of the total sales as Third Schedule items by the respondent No. 1 and upholding charge of sales tax thereon after admitting that they were third Schedule items.

(l) That the learned respondent No. 1 was not justified to only allow margin of 20% of the goods as exempted goods out of the 59% alleged sales of manufactured goods on his own whims and wishes and ignoring the actual ratio of exempt sales.

Facts emanating from both the impugned orders as also the pleadings made at bar for the appellant are that originally the appellant was compulsorily registered as a "retailer" by the Central Registration Office at Sales Tax Registration No. 08-03-1704-006-

37 vide sales tax registration certificate issued on 30-6-2006. The appellant on receipt of certificate of registration originally applied for de-registration, before the local registration office, Faisalabad vide letter served on 9th August, 2006 on the ground that compulsory registration was made by the concerned authorities ignoring Rule 6 of the Sales Tax Rules, 2006 (the Rules). The original request was followed by another request letter dated 19th October, 2006 stating that annnual turnover was below the taxable threshold provided under the Sales Tax Act, 1990 (the Act) read with the Rules. After a lapse of Almost three years from the date of registration the appellant was directed to provide the records under section 25 of the Act, vide notice dated 28-3-2009. In reply thereto, it was contended that appellant was no more registered person for the reason that it had been de-registered since its registration was not appearing on the web-portal. In this view of the matter it was further contended that neither sales tax invoices were issued nor record maintained under the Act.

2. Later on, the Revenue authorities statedly on the basis of alleged credible information that the appellant was involved in massive tax evasion, involving provisions of section 40-B of the Act were invoked to monitor sales of the appellant for the period from 3rd March, 2009 and 2nd April, 2009. It was also observed that sui gas connections and electricity meters were installed at the premises of the appellant and he was found involved in manufacturing and liable to registration under Rule 4(a) of the registration, compulsorily registration and de-registration Rules, 2006 notified under S.R.O. No. 555(I)/2006 dated 5th June, 2006 as a "manufacturer". During the course of monitoring sales for the month of "March, 2009" it was noticed by the Revenue authorities that out of the total sales, 59% of the taxable goods were manufactured in-house, whereas 41% of the sales fell under Third Schedule of the Act. Accordingly, on the basis of one month's data of sales monitored in the report under section 40-B, turnover for the period July, 2009 to June, 2010 was worked out by applying the average sales formula as under:--

Total turnover 2009-2010 Rs.88,774,512 59% being manufactured Rs.52,376,962 16% Sales Tax Rs.8,380,314

41% being third schedule items Rs.36,397,550 16% Sales Tax Rs.5,823,608 (subject to production of sales tax invoices for the purchase of items) Total Sales Tax recoverable Rs.14,203,922

3. On the basis of the above referred facts, the appellant was charged with the violation of sections 3, 6, 7, 22, 23, 25 and 26 of the Sales Tax Act, 1990 read with sections 2(17) and 11(1)(5) of the Act read with Rules 4(a), 5, 6, 7 and 8 of the Rules, notified under S.R.O. No. 555(I)/2006 dated 5th June, 2006 and was called upon as to why it may not be registered as a manufacturer w.e.f. the initial period of registration viz; 30-6-2006. A show-cause notice dated 25-6-2011 in this regard was issued to the appellant. Series of hearings followed. The appellant raised legal and factual objections to the show cause notices, however the contentions raised by the appellant did not find favour of the adjudication authority which culminated into passing of the Order-in-Original dated 31st October, 2011. In addition to the principal liability of Rs.14,203,922 and default surcharge under section 34, penalty equal to 5% of the tax involved and an additional penalty of Rs.5,000 per month for non-filing of the sales tax returns under section 33 of the Act were imposed.

4. The appellant impugned the order passed by the adjudication authority before the learned CIR(A), Faisalabad who vide Sales Tax Order-in-Appeal No. 155 of 2012 dated 3rd May, 2012, being impugned before us, upheld the treatment to the extent of 41% of the Third Schedule items, whereas relief was allowed on exempt items falling in Sixth Schedule to the extent of 20% of the own manufactured sales (59%). Consequently, the liability of sales tax was reduced in the following manner:--

Total turnover 2009-2010 Rs.88,774,512 59% being manufactured Rs.52,376,962 20% exempt items of (59% of being own manufactured) Rs.10,475,392 Balance amount of manufactured items Rs.41,901,570 16% Sales Tax Rs.6,704,251 41% being third schedule items Rs. 36,397,550 16% Sales Tax Rs. 5,823,608 Total recoverable amount Rs. 12,527,859

5. The appellant being aggrieved of the order passed by both the authorities below has impugned the same in appeal before us.

6. The learned counsel appearing on behalf of the appellant at the very outset contends that the learned first appellate authority was not justified to uphold the treatment accorded by the adjudicating authority on the ground that the concerned authorities registered the appellant compulsorily beyond the mandate enshrined in Rule 6 of the Sales Tax Rules, 2006. It is pointed out that neither any notice to the appellant on prescribed form STR-6 was served as mandated under sub-rule (1) of Rule 6 of the Sales Tax Rules, 2006 nor any opportunity of hearing was allowed to the appellant. Nevertheless, he continuous, the appellant applied for de-registration before the competent authorities under Rule 6 the Sales Tax Rules, 2006. He points out that it was responsibility of the concerned authorities to de-register him within a specific time frame. The learned counsel refers to Rule 11 of the Rules, in this regard whereby on receipt of an application for de-registration, the LRO was duty bound to recommend to the CRO for cancellation of the registration of appellant. He informs that the time limitation for making such recommendation was three months. He further argues that the concerned authorities failed to discharge their statutory obligations. The learned counsel also produces online verification against the said sales tax registration number obtained from the web-portal in support of the claim for de-registration. It was further agitated that the learned adjudicating officer was not justified to treat appellant as a "manufacturer" bypassing the authority of the CRO as according to the relevant rules the LRO could only send a report to the CRO for approval on the corresponding changes and such changes if approved by the CRO could then be implemented.

7. It is contended by the learned AR during the course of hearing that Central Registration Authority (CRO) has now registered "Super Ideal Sweets and Bakers" at NTN 3775459-9 and STRN 2400377545916. Perusal of the online verification reveals that w.e.f. 16th June, 2011; an entity has been registered by the Central Registration Office at the same premises. According to the present sales tax registration procedure and rules two registrations cannot

be allowed for one premises, therefore, mere registration of Super Ideal Sweets and Bakers in the status of an AOP at the same address is sufficient evidence of the fact that no sales tax registration existed at the said address earlier.

8. It is further argued by the learned counsel that if for sake of arguments it is considered that the appellant was liable to registration considering the nature of business of the appellant, the same could only be registered as a retailer as done by the CRO on 30th June, 2006, therefore the learned adjudicating officer and the first appellate authority were not justified to uphold that the appellant was liable to registration as a "manufacturer". The learned AR draws our attention towards Rule 3 of Chapter-II of the Sales Tax Special Procedure Rules, 2007 which reads as under:

"3. Application.---The provisions of the Chapter shall apply to the registered persons, including jewellers, who make supplies from retail outlets to final consumers and such persons shall be deemed to be retailers in respect of such supplies for the purposes of this Chapter.

Provided that the provisions of this Chapter shall not be applicable to dealers of motorcycles and specified electric goods who shall pay sales tax as prescribed in Chapter VIII and XIII, respectively and shall also not be applicable to manufacturer-cum-retailers who sell their products through retail outlets."

He explains that the words "and shall also not be applicable to manufacturer-cum-retailers who sell their products through retail outlets" were added in the above referred rule through S.R.O. No.1(I)/2011 dated 1st January, 2011 which specifically excluded "manufacturers-cum-retailers" from the scope of its application. This clearly shows, he submits, that prior to date of insertion of these words manufacturers-cum-retailers fell in Chapter-II of the Sales Tax Special Procedure Rules, 2007. It is vehemently contended that the event which determines the taxability of a registered person is the activity undertaken by that person at the time of supply. According to the learned counsel, a person may manufacture huge

bulk of commodity but taxable activity would only take place when such manufactured goods were actually supplied. In the present case, he explains, since supply of goods had admittedly been made through the retail outlet to ultimate consumers, the appellant could not be charged to tax at standard rates provided in section 3 of Sales Tax Act, 1990 by treating him as a "manufacturer". Also that at the best special rates provided wider Rule 5 of the Sales Tax Special Procedure Rules, 2007 could have been applied. In the stated back drop, it is pleaded that the adjudicating officer has erred in applying the rate of sales tax @16% of alleged own manufactured goods. According to the learned counsel the Revenue himself accepts that the appellant has made sale of 41% of items which fall within Third Schedule to the Sales Tax Act, 1990. He argues that the adjudicating officer has quite illogically ignored that Third Schedule items have inbuilt sales tax mechanism, therefore charge of sales tax @ 16% of the alleged turnover on account of Third Schedule items was unlawful and unwarranted.

9. It is contended on behalf of the appellant that show cause notice in the present case was admittedly issued on 25th June, 2011 by Assistant Commissioner Inland Revenue, Regional Tax Office, Jail Road, Faisalabad. The respondent adjudicating officer did not have pecuniary jurisdiction over the appellant in view of S.R.O. No. 555(I)/ 1996 dated 1st June, 1996. He points out that pecuniary limit of "Assistant Collector" according to the said S.R.O. read with section 72A of the Sales Tax Act, 1990 was Rs.500,000, whereas in the instant case even the original show cause notice involved sales tax amount of Rs.13,316,176 as amended by a subsequent corrigendum dated 3rd October, 2011 to Rs.14,203,922. It is pointed out that the aforesaid SRO was rescinded vide S.R.O. No. 494(I)/2012 dated 1st June, 2012 w.e.f. 2nd June, 2012, which clearly shows that S.R.O. providing pecuniary limits of officers remained operative till 2nd June, 2012. He emphasizes that the show cause notice, being issued much prior to the date of its rescinding the earlier S.R.O., the same was not validly and lawfully issued. Consequently, it is pleaded, the entire super structure and edifice built on the basis of the show-cause notice issued without jurisdiction shall fall down to earth on the principle that defect in jurisdiction being inherent is not curable and if initiation was bad in

law, whatsoever follows thereto, shall also be bad in law,

10. Lastly, it is argued by the learned counsel that annual sales have been worked out on a self devised and self concocted formula in a mechanical fashion which is not admissible under the law for the reason that a subject cannot be burdened with the liability of tax on whims, surmises, estimations and conjectures. It is urged that since sales tax is an indirect tax and has to fall on the ultimate consumer, it cannot be assessed at presumptions. He further agitates that the sales alleged to have been recorded by the learned officer during posting under section 40B of the Sales Tax Act, 1990 have no foundation and basis for the reasons that the same have not been recorded in accordance with law. The learned counsel drew our attention towards the fact that most of the bakery items are exempt from tax under section 13 read with Sixth Schedule to the Sales Tax Act, 1990, however, the so called sales recorded by the respondent during action under section 40B of the Sales Tax Act, 1990 do not provide any such breakup. Also that the learned first appellate authority has, however, excluded 20% sales of own manufactured items on the basis of presumptions which tantamount to substitution of and estimate with another.

11. Finally, he argues that the respondent adjudicating officer was not legally justified in levying additional surcharge in terms of section 34 of Sales Tax Act, 1990 and penalty in the sum of Rs.5,000 per month for failure to furnish sales tax return ever since the compulsory registration along with further penalty equal to 5% of the tax involved under section 33 of the Sales Tax Act, 1990. He pleads that the punitive action has been taken in a casual manner, without fulfilling the legal requirements warranting invocation of such punitive action. He further states that the impugned order-in-appeal passed by the learned first appellate authority is completely silent on the issue of penalty and default surcharge despite the fact that the appellant raised specific ground and contention of the appellant was recorded in the order in appeal, however the learned first appellate authority has failed to pass any order on the issue.

12. The learned DR, on the other hand, while opposing the arguments advanced by the learned counsel of the appellant

supports the impugned orders and contends that the sales have properly been calculated during action under section 40B of the Sales Tax Act, 1990 and turnover for the corresponding year was properly worked out, therefore, the first appellate authority was right in upholding the turnover and charge tax thereon. While commenting on arguments of the learned counsel regarding pecuniary jurisdiction of the respondent, she argues that the ground of pecuniary jurisdiction was not raised at the first appeal stage, therefore should not be entertained at this stage. She further contends that the S.R.O. No. 555(I)/1996 dated 1st June, 1996 was only issued in respect of officers of Collectorate and not the officers of Inland Revenue and on omission of section 45 from the Sales Tax Act, 1990 every officer of Inland Revenue was competent to issue show-cause notice and adjudicate the cases irrespective of pecuniary jurisdiction.

13. In rebuttal the counsel for the appellant argues that since the ground raised is legal in as much as it deals with objection to the jurisdiction and therefore goes to the root of the case, the same can be raised and agitated at any stage of proceeding. In this behalf reliance is placed on a judgment of the Hon'ble Lahore High Court, Lahore and of this Tribunal reported as 2002 PTD 541, 2012 PTD (Trib.) 1123 in which it was held that when a lis is pending before a court or judicial forum entertainment of additional ground should be a rule and not an exception. He draws our attention towards certain principles settled in the cases relied upon by him that rules of procedure are meant for the cause of administration rather than to thwart the same. Further, any additional legal ground filed by a taxpayer could be taken, raised and urged, if the same was not raised and agitated before the authority below and even not raised in grounds of appeal filed before the first appellate authority provided it goes to the root of the case.

14. We have heard the learned counsel for the appellant as well as the learned DR, perused the record and benefited from the case-law cited during the course of hearing. The primary question which crops up from the appeal is that the respondents did not have pecuniary jurisdiction in respect of the appellant in view of S.R.O.

555(I)/1996 dated 1st June, 1996. Since the ground is purely legal, hence we allow the appellant to raise it at this stage. Regarding action of the learned adjudicating authority beyond its pecuniary jurisdiction we have in hand a most recent judgment of the Tribunal bearing S.T.A. No. 579/LB/2012 dated 18th October, 2012 wherein a learned Division Bench have thrashed out the entire controversy, finally accepted the appeal and declared the orders passed by both the authorities below as null and void and of no legal avail. The judgment applies on all fours on the instant case for the reason that show cause notice providing for the initiation of proceedings against the appellant was originally issued on 25th June, 2011 and was subsequently amended through a corrigendum dated 3rd October, 2011. In the appeal before us, the show cause notice was incompetently issued by the Assistant Commissioner Inland Revenue, who had powers under S.R.O. No.555(I)/1996 1st June, 1996 to deal with cases not involving sales tax amount exceeding a pecuniary limit of Rs. 500,000, therefore, the very foundation on the basis of which proceedings in hand were initiated were without jurisdiction and wrongful premises, therefore the same were not sustainable in the eye of law and we hold the same to be unlawful and without jurisdiction.

15. Now coming towards the merits of the case the respondents initiated proceedings against the appellant by alleging posting officer on the premises of the appellant in terms of section 40B of the Sales Tax Act, 1990. It has been observed that the sales have not been properly monitored and recorded by the officials so appointed at site. Further the learned DR appearing on behalf of the department has miserably failed to produce any documentary evidence in support of the claim showing signatures of the appellant on any document wherefrom it could be gathered that sales mentioned or alleged in the report were monitored at business premises of the appellant and were related to the appellant before us.

We agree with the learned counsel for the appellant that sales tax is an indirect tax with its ultimate impact on the consumer, therefore, liabilities under the Sales Tax Act, 1990 cannot be worked out in a fanciful manner based on mere surmises, estimates and conjectures

and by adopting self devised formulas having no legal support, hence it is declared that sales have not been properly worked out. Moreover, no breakup of exempt and taxable sales has been provided, broadly sales have been classified into own manufactured goods and Third Schedule items. Surprisingly, the learned adjudicating authority has again charged sales tax on items which admittedly fall under the Third Schedule to the Sales Tax Act, 1990. According to section 3(2)(a) of the Sales Tax Act, 1990 goods specified in the Third Schedule bear retail price thereon including amount of sales tax and sales tax is built into the price mentioned on the goods. At one hand accepting that the goods which were alleged to be supplied by the appellant are Third Schedule items, sales tax has again been charged on the value inclusive of sales tax. In this way the learned officer has erred in two ways, firstly he has twice charged sales tax on goods which are admitted to be Third Schedule items. Secondly, the learned officer has charged tax on tax which is prohibited under the law. In nutshell and concluding this aspect, since sales have not been properly worked out and in as much as tax having been illegally charged on Third Schedule items, the basis for charge of sales tax in the manner of order-in-original is not sustainable.

16. The respondents have also erred in according the appellant, treatment of a manufacturer for the reason that firstly, CRO registered the appellant on 30th June, 2006 as a "retailer", secondly, in view of the amendments made in Rule 3 of Chapter-II of the Sales Tax Special Procedure Rules, 2007, "manufacturer-cum-retailers" were to be treated under the Sales Tax Special Procedure Rules, 2007 till 31st December, 2010. Since the appeal in hand encompass tax periods "July, 2009 to June, 2010" even otherwise the treatment accorded by the learned officer to the appellant by applying rate of 16% on alleged sales by treating him as a manufacturer is unjustified. It is important to point out here that the first appellate authority has also vogued into ignoring the contention of the appellant and an effort without application of judicious mind on estimate ought to be replaced by another estimate, without providing suitable and justifiable basis for according such treatment. We therefore agree with the learned AR that the event which determines taxable activity of a person is the

activity at the time of supply. Therefore, without commenting on the legality of the amendments in the subordinate legislation we are inclined to hold that prior to amendment through S.R.O. No. 1(I)/2011 dated 1st January, 2011 manufacturer-cum-retailers who sells their goods through retail outlets were to be governed by the Sales Tax Special Procedure Rules, 2007. Therefore, the computation of sales and charge of sales tax thereon is prima facie unlawful and we accordingly hold the same illegal and void ab initio.

17. The levy of penalty and default surcharge being consequential to the illegal determination and unlawful treatment accorded by the department, the same also falls down to the earth.

18. Keeping in view the aforementioned facts and circumstances of the case, we have no ambiguity in our mind to declare the orders passed by both the authorities below as illegal and to cancel the order-in-original and order in appeal impugned before us.

As a result the appeal filed by the appellant succeeds in the manner commented above.