Taxhelpline Case No. 126 of 2013

[INLAND REVENUE APPELLATE TRIBUNAL]

STA No. 203/IB/2011, Date of Hearing : 21.02.2013

MR. MUNSIF KHAN MINHAS, JUDICIAL MEMBER, IKRAM ULLAH GHAURI, ACCOUNTANT MEMBER

Appellant By : S.H. Gardezi, Advocate Respondent By : Mr. Imran Shah, DR

M/s. S.H.V. Energy Pakistan (Pvt) Ltd., 52, Margalla Road, F-8/2, Islamabad.---Appellant
Vs
Commissioner-IR (Appeals-ll), 2. Commissioner-IR (Zone-I), LTU, 3. Deputy Commissioner-IR (Audit-Ill), LTU, 4. Deputy Commissioner-IR (Audit-IV), LTU, Respondent

ORDER---The appeal has been filed by the appellant against the Order-in-Original No.2 of 2011 dated 29.11.2011 passed by Respondent No.3 and Order-in-Appeal No. DT-279/2011 dated 31.03.2012 passed by the Respondent No.1 on the following grounds:-

1. The Order-in-Original No.02 of 2011 dated 29.11.2011 and Order-in-Appeal No. DT-279/2011 dated 31.03.2012 are bad in law and opposed to the facts and circumstances of the case of appellant.

2. That the show cause notice, Order-in-Original No.02 of 2011 dated 29.11.2011 and Order-n-Appeal No. DT-279/2011 dated 31.03.2012 are based on self conceived interpretation of the documents available with the respondents.

3. The learned Commissioner-IR (Appeals-ll), Islamabad, failed to appreciate that the Order-in-Original No.02 of 2011 dated

29.11.2011 is time bared null and void. The impugned Order-in-Original ultra vires the mandatory provisions of S.36 (3) of the Sales Tax Act, 1990. The apex courts in number of cases decided similar issues that involve time limitation. It is held that the question of limitation being a matter of statute and the provision thereof being mandatory, same could not be waived and even by the court itself matter of limitation would not be left to pleadings of parties but a duty was imposed on the courts it self to decide limitation. We also plea our reliance on the following judgments: -

2006 PTD 271 (S.C) Question of limitation being a matter of statue and the provision thereof being mandatory, same could not be waived and^f waived could be taken up again by the party waving it and even by the court itself. Matter of limitation would not be left to pleading of parties but a duty was imposed on the courts it self to decide limitation. 2007 PTD 1458Collector Customs V. Achak Enterprises. "It is settled law that once the issued are taken to the Apex Courts and the issues are decided at that level then the controversy must be laid to rest. The judgments of Honorable Supreme Court are binding on all the judicial and administrative forums in the country.1 2001 SCMR 838 Assistant Collector Customs V. M/s Khyber Electric Lamp and others It is well settled principle of law that a thing required by the law to be done in certain manner must be done in the same manner as prescribed by law or not at all. 2007 SCMR 818. It is settled law that when basic order is without lawful authority then the superstructure build on it would have to fall on the ground automatically.

200 SCMR 1835

2011 PTD (Trib) 1978. M/s Dilpasand Hosiery, Faisalabad V. CIR, RTO Faisalabad Show Cause notice served upon the taxpayer by the adjudication officer was patently illegal and without lawful authority as neither the allegations as specified under subsection (1) and (2) of the Sales Tax Act, 1990 were leveled nor even the subsection (1) and (2) of S.36 of Sales Tax Act, 1990 itself had been invoked in the operative part of the show cause notice. As such, all the orders based there upon were liable to be set aside. Validity of the show

caused notice is fundamental to the assumption of jurisdiction by the revenue authorities to pass the impugned orders and thus, the impugned show cause notice and subsequent order have herein been held to be patently devoid of jurisdiction and lawful authority. GST 2004 CL 635; GST 2005 CL239; M/s. Inam Packages, Lahore V. Appellate Tribunal Lahore 2007 PTD 2265 and Assistant Collector Customs and Others V. M/s Khyber Electric Lamp and others 2001 SCMR 838.

V 1987 SCMR 1543 \ 2007 SCMR 834 "Order passed in violation of mandatory provisions of law... Validity Limitation No period of limitation would run for challenge such order.

-ii 2007 SCMR 729 r:,j'2007 SCMR 262 "Void and illegal Orders Limitation would not run against such orders /2003 PTD 628 Where no limitation is provided for certain actions, which impair vested rights, then court is empowered to impose reasonable limitation for carrying out such actions.

2010 PTD 993

i. Show cause notice was issue on 09.05.2011 and time limitation to decide the case was 120 days u/s 36 (3) of the Sales Tax Act, 1990. The said time can be extended on account of adjournments up to 1 month that could further be increased by couple of months if allowed by the Commissioner IR.

ii. The learned Commissioner-IR (Appeals-ll), Islamabad, failed to appreciate that petitioner have only availed or allowed extensions for 20 days. These are requested vide letter No. SHV/Fin.2011 dated 16.05.2011 requested for 15 days which was only allowed for 9 days as hearing was fixed on 25.05.2011 vide hearing notice No.684 dated 10.05.2011 we further requested for adjournment for 15 days vide our letter No. GLF-SHV/SCN-511 dated 25.05.2011 that was again allowed for 11 days only as next date of hearing was fixed on 05.06.2011 vide final hearing notice No. LTU/ST/Audit-V/SHV/73/2010/709 dated 28.05.2011. (Hearing

notices and our adjournments requests are attached as Annexure-D to the memo of appeal).

iii. The learned Commissioner-IR (Appeals-ll, Islamabad, failed to appreciate that hearing in the instant case were held on 17.05.2011, 25.05.2011 and 24.11.2011 and there is about 140 days time lag between last two hearings. No reason what so ever has been provided for such delay as required by the section 36 (3) for condonation of time. these practices are nullity in the eye of law and demand to quash the order of the lower for a as null and void.

iv. The Commissioner-IR (Appeals-ll), Islamabad, failed to appreciate that the extension in the instant case had been solicited after the expiry of original time limitation provided in law i.e. 120 days. Commissioner-IR can only grant extension before expiry of 120 days after providing reason why extension should be granted u/ s 36 (3) of the Sales Tax Act, 1990. Reliance could be acquired form the landmark judgment of the Lahore High Court reported as 2009 PTD 762.

2009 PTD 762 Tanveer Weaving Mills V. Deputy Collector and Others As is clear from the language of the provision of 36(3), it has limited the scope of the exercising of the jurisdiction after issuance of notice to basically 90 days or such extended period as the collector after duly recording proper reasons in writing has fixed. However, it is again subject to the limitation in the manner that the said extension also cannot be for more than 90 days. The period for deciding the order-in-original after issuance of a notice under section 36 (1) and (3) thus is maximum 180 days including earlier 90 and extended 90 days. Obviously if the extension has been given by the collector before the expiry of earlier 90 days (Emphasis ours)

v. That the learned Commissioner-IR (Appeals-ll), Islamabad, seriously erred in holding that extension of 60 days has been solicited form the Commissioner-IR (Zone-I), LTU, Islamabad under section 36 of the Sales Tax Act, 1990. Contrary to that, Order-in-Original No.02 of 2011 dated 29.11.2011 provides that extension in time has been acquired from Commissioner-IR (Zone-I), LTU,

Islamabad under section 74 of the Sales Tax Act, 1990. S.74 empowers board to condone any limit not the Commissioner-IR. Therefore, extension in time limit was awarded without lawful authority that makes the Order-in-Original No.02 dated 29.11.2011 illegal, null and void ab intio. We also place our reliance on the judgment of Honorable Supreme Court of Pakistan in the case of Assistant Collector Customs V. M/S Khyber Electric Lamp and others reported as 2001 SCMR 838.

2001 SCMR 838 Assistant Collector Customs V. M/s Khyber Electric Lamp and others. It is well settled principle of law that a thing required by the law to be done in certain manner must be done in the same manner as prescribed by law or not at all.

vi. The learned Commissioner-IR (Appeals-II), Islamabad, erred in accepting all the submissions of the respondent without going through the original case file that possesses important information regarding adjournments and extension allowed by the Commissioner-IR. As no one appeared from respondent side on sole hearing dated 01.02.2012. However, respondent only submitted on the appeal filed by the petitioner.

That the, Order-in-Appeal No. DT-279/2011 dated 31.03.2012 was passed in haste and even appellant has not been provided any opportunity to rebut the reply of the respondent "audi alterm partem". The case is decided in mere one hearing. This proves that a unilateral decision was passed against the appellant that deserves to be annulled a void ab initio.

That the learned Commissioner-IR (Appeals-II), Islamabad, has seriously eared in holding sales of vehicles as chargeable to sales tax. The said vehicles were acquired in 2005 and most of them were on lease purchase and disposed off in 2009 for Rs.5,358,955/-. Input tax paid on vehicles is not allowable under Sales Ax Act, 1990 vide SRO 490(l)/2004 dated 12th June, 2004 (SRO attached as annexure-E). Therefore, charging sales tax amounting to Rs.857,432/- on the ground that petitioner might have claimed

input tax on vehicles is by no means justified and rational. Had we adjusted the input tax on vehicles than respondent should confront us on inadmissible input tax adjustment in the show cause notice. Therefore, shifting the burden of proof from the revenue on to the taxpayer is also unjust and illegal. The principle has also been decided in the follows cases.

1987 SCMR 1840. Impugned order based on an illegal allegation not mentioned in the show cause notice is palpably illeqal and void.

2010 PTD(Trib) 451. Charge which was not framed in SCN could not adjudged.

Sales tax returns for the year 2005 and purchase documents of vehicles are also attached at annexure-F in support of our claim that petitioner has not availed any input tax adjustment on vehicles disposed off.

6. That the Commissioner-IR (Appeals-ll), Islamabad, has seriously erred in fact and law by holding that SHV Gas N.V as Franchiser and appellant being the Franchisee.

i. SHV Energy Pakistan (Pvt) Ltd is a wholly own subsidiary of SHV Calor Asia and our parent company is a subsidiary of SHV Holding N.V. Petitioner have not entered into agreement under discussion with neither SHV Calor Asia nor SHV Holding N.V. Therefore, an effort has been made to stretch and strain the language of law to make the relation ship of franchiser and franchisee between the petitioner and SHV Gas N.V. This is the settled principle of law that one cannot stretch and train the language of law to hatch presumed meanings. Apex courts also gave their strong views about the use of presumptions by the Revenue to impose tax. Following judgments of Supreme Court of Pakistan also support our view on the issue: -

1990 PLD 68 (SCPPak); In Taxing Act one has to look merely at what is clearly said. There is no room for any intendments. There is

no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.

1993 SCMR 1523; What is excluded by express words cannot be included on any principle of interpretation.
B.P Biscuits Factory; The honorable Supreme Court of Pakistan in the case of B.P Biscuits Factory Ltd, quoted supra categorically held that charge of tax cannot be extended by straining the language of the statute.

In the show cause notice rule 43A has also been invoked that deals with the "Special Procedure for Payment of Federal Excise Duty on Franchise Fee or Technical Fee or Royalty". The said rule also endorses that franchiser and franchisee relationship develops with only head office of any unit. As it sates that payment of FDE on the Franchise service will be made by the franchisee or the head office of the franchisee. In the instant case our had office is SHV Calor Asia and we entered into agreement with SHV Gas N.V. Therefore, show cause notice and disseminating orders have illegally established petitioner's relationship with SHV Gas N.V as of franchiser and franchisee that requires to be quashed.

The learned Commissioner-IR (Appeals-ll) has established following four features/pre-requisites for having relationship of franchiser and franchisee from the definition of franchisee and franchise provided by the FED Act, 2005 and rules made thereto;

a. The franchise is granted representational right to sell or manufacture goods or to provide service or undertake any process identified with the franchiser.

b. The franchiser provides concepts of business operation to franchisee, including know how, method of operation, managerial expertise, marketing techniques or training and standards of quality of control except passing on the ownership of all know how to franchisee.

c. The franchisee is required to pay to the franchiser, directly or indirectly, a fee.

d. The franchisee is under an obligation not to engage in selling or providing similar goods or services or process, identified with any other person.

Learned Commissioner-IR (Appeals-ll), Islamabad also holds that above conditions are fulfilled in the case of petitioner as follows;

a. M/S SHV Gas N.V. is providing technical services, know how and specific expertise under a consultancy agreement which clearly falls in the parameters of franchise.

b. It is evident from the records that services are provided by the SHV Gas N.V. relevant to SHV Energy Pakistan against a consideration as settled in the agreement.

The parameters identified by the learned Commissioner-IR (Appeals-II), Islamabad are self proclaimed and against settled principles of law. That in taxing act one has to look merely at what is clearly said. There is not room for any intendments as is held in the case reported as 1990 PTD 68 (SC Pak) and in the case of B.P Biscuits Factory. In the abovementioned parameters learned Commissioners-IR (Appeals-II), Islamabad seriously erred in holding that "the franchisee is required to pay to the franchiser, directly or indirectly, a fee". Whereas, definitions provided by statue of Federal Excise Act, 2005 do not have nay such provisions. Also parameters established in (b) and (c) are self proclaimed and out of statutory text. Secondly, learned Commissioner-IR (Appeals-II), Islamabad also confirmed that out of four parameters, petitioner only qualified for two of them. Therefore, statements provided by the learned Commissioner-IR (Appeals-II), Islamabad are self contradictory and out or jurisdiction and lawful authority. That deserves to be set aside as null and void ab initio.

That without prejudice to above grounds, FED on franchise services is chargeable on the services received from franchiser. Whereas,

SHV Energy Pakistan (Pvt.) Ltd is a body corporate incorporated in Pakistan under Companies Ordinance 1984. Therefore, we are not franchisee of any franchiser and have our own independent organization set up in Pakistan.

That the definition of franchise is inserted by the finance Act, 2008 through new section 2 (12a). According to the said section;

"franchise" means an authority given by a franchiser under which the franchisee is contractually or otherwise granted any right to produce, manufacture, sell or trade or do any other business activity in respect of goods or to provide service or to undertake any process identified with franchiser against a fee or consideration including royalty or technical fee, whether or not a trade mark, trade name, logo, brand name or any such representation or symbol, as the case may be, is involved. "

Above definition emphasizes on two points. Firstly, there should be an AUTHORITY known as franchiser, Secondly, their should be a grant of RIGHT to produce, manufacture, sell or trade in or do any other business activity in respect of goods or service. Whereas, our service agreement (Attached as Annexure-G) neither provide SHV Gas N.V. as AUTHORITY nor it represents any RIGHT to produce, manufacture, sell or trade in or do any other business activity in respect of goods or service.

Federal Excise Rules, 2005 under rule 43A, Special Procedure for payment of federal excise duty on franchise fee or technical fee or royalty under a franchise agreement, also rules out our service fee from the ambit of FED as the said rule is limited to only those who pays for the RIGHT to deal with "GOOD OR SERVICES". Whereas, we entered in SERVICE AGREEMENT with SHV Gas LTD N.V in 2005 after long time to our incorporation as SHV Energy Pakistan (Pvt.) Ltd and do not cover any clause for the utilization of any RIGHT TO PRODUCE, MANUFACTURE, SELL OR TRADE IN OR DO ANY OTHER BUSINESS ACTIVITY IN RESPOEC TOF GOODS OR SERVICE.

12. That the show cause notice C.N. LTU/ST/Audit-V/73/2010/657 invoked only one penalty u/s 33 of the Sales Tax Act, 1990. Whereas, in deciding the case ACIR has erred in by imposing five penalties u/s 33 of the Sales Tax Act, 1990, on each proceed of product. Section 11 (2) of the Sales Tax Act, 1990, also provides only penalty for any contravention. Order-in-Original No.02 of 2011 dated 29.11.2011 has un-authorisedly increased/imposed penalties that are not provided in show cause notice. Higher courts also decided the orders as null and void that decide on charges not invoked in the show cause notice. We place our reliance on the judgments reported as 1987 SMCR 1840 and 2010 PTD (Trib) 451.

Law laid down by the Honorable Supreme Court of Pakistan is binding on all the judicial and administrative forums of the country by virtue of Article 189 of the Constitution of Islamic Republic of Pakistan, 1973.

That the imposition of penalty and default surcharge is completely illegal as there is no mens rea involved.

That it is cardinal principal of law that no tax should be levied on presumptions and intendment.

The appellant craves leave to amend, alter, withdraw, add or delete any ground of appeal at the time of hearing or before the decision of the Honorable Appellant Tribunal Inland Revenue.

2. Brief facts of the case are that during the course of desk audit of financial statements submitted by M/S SHV Energy Pakistan (Pvt) Ltd for the ending on 31st December, 2009 certain audit observations were made related to non payment of sales tax on sales of property plant & equipment; the financial statements reflects sales proceeds received in respect of property plant & equipment but failed to deposit sales tax @ 16% of the proceeds i.e. 919, 040/- and the non payment of federal excise duty amounting to Rs. 1,354,300/- on account of franchise service.

Royalty or technical service fee identified with it's head as per 'Note' 20 of the financial statement for the year ending 31st December, 2009.

3. The hearing was held on 21.02.2013. The AR and DR agued their respective contentions with regard to the aforementioned grounds of appeal. One of the major issues contested by the appellant relates to the illegality of the order in original which according to the AR was time barred. Since there are several grounds of appeal, we will analyze arguments of the rival parties and enter our findings on each ground of appeal. Ground No.3.

The AR contented that the order in original No.2 of 2011 dated 29.11.2011 was passed after the expiry of the mandatory period of 120-days. The DR stated that the show cause notice was issued on 09.05.2011. The first hearing was fixed on 26.05.2011 but the appellant sought adjournment until 25.05.2011. The appellant sought 02-more adjournments and eventually the case was decided on 28.11.2011, mainly due to repeated requests of the appellant for adjournment. However, the learned Commissioner Inland Revenue had condoned the delay in ^adjudication before the expiry of the 120-days from the issuance of show cause notice. We have examined the contention of both the parties with regard to the limitation issue. It is our considered opinion that the delay in adjudication had been daily responded by learned CIR vide his order dated 24.09.2011, well within the period of 120-days laid down for the adjudication of the case. Be that as it may, the AR's contention of the adjudication being barred by time is without merit. Therefore, the learned CIR (A)'s order with regard to legality of the order-in-original is within the four corners of law, hence upheld. Ground No.5.

The AR argued that the sales tax amounting to Rs. 857,432/- was charged by the respondent on the basis of a conjecture that the appellant might have adjusted the input tax corresponding to the output in respect of the leased/owned vehicles sold by the appellant later. The AR contented that input tax adjustment could not be claimed by the appellant because the SRO 490(1)/2004 dated

12.06.2004 and SRO 578(1)/98 specifically precluded a claim of input tax adjustment in respect of vehicles. The DR argued that several opportunities were provided to the appellant to prove that no input tax adjustment was claimed by the appellant, but no such evidence was produced.

We have heard the respective contentions of the AR and the DR on this issue. The appellant claims that input tax adjustment in respect of leased/owned vehicles was neither claimed nor was admissible to the appellant in terms of the aforementioned SRO. The fact is that the respondent has also not specifically alleged that the appellant did claim input tax adjustment in respect of the vehicles in-question. The respondent had access to the appellant's sales tax returns and the DCIR could have figured out whether input tax adjustment was claimed by the appellant or not. In any case, the appellant could not have acquired the vehicles in-question without having paid the output tax and there is no evidence that the appellant claimed input tax adjustment in violation of SRO 490(1)/2004. Therefore, absent any clear evidence to the contrary, the respondent's demand of sales tax on the sale of vehicles that amounts to double taxation, as no input tax was adjusted by the appellant. We find the respondent's contention without substance, therefore, the learned CIR (A)'s order confirming the charging of sales tax on vehicles is set-aside. Ground No.6 to 11

The AR argued against the levy of federal excise duty on the franchise/technical fee paid by SHV Energy Pakistan to it's parent company i.e. SHV Gas N.V (Nether Land). On one hand the AR denied the existence of any business relationship or agreement between the appellant company and it's parent company but on the other invited the Tribunal's attention to Annexure-F of the paper book which is an agreement between the appellant and it's parent company. The AR contended that the appellant was paying a technical services fee to the SHV Gas N.V but there was no business or franchise relationship between the two.

We have perused the contract between the appellant and it's parent company. Its clause 6 provides that the appellant shall pay technical

services fee to SHV Gas N.V. The payment of this fee attracts application of Section 2 (12a) of the Federal Excise Act, 2005 read with Rule 43A of the Special Procedure for payment of Federal Excise Duty on franchise/technical fee or royalty. The relationship between the appellant and it's parent company in such that M/s. SHV Gas NV (Nether Land) is providing technical services, know-how and specific expertise to SHV Energy Pakistan under the consultancy agreement against a consideration as settled in the agreement.

Besides, section 12 (2) and Rule 43 of the Special Procedure for Payment of Federal Excise Duty on franchise the international Franchise Association defines franchise as "a contractual relationship between the franchise and franchisee in which the franchisee offers the franchiser a fee or is obliged to maintain a continuing interest in the business of the franchiser in such areas as know-how and training, wherein the franchisee operates under a common trade name, format or procedure owned or controlled by the franchiser, and in which the franchisee has or will make a substantial capital investment in his business from his own resources."

4. In view of above, the levy of federal excise duty on franchise/technical fee royalty is a chargeable. Even otherwise, the levy of federal excise duty fee paid by a subsidiary tot It's parent company is a settled issue. This Tribunal decided this issue in case of M/s: CM Pak Limited, Islamabad in F.E. No.11/IB/2011 dated 25.02.2011. The tax reference filed by the M/s CM Pak against the Tribunal's order in this case was upheld by the Honorable Islamabad High Court in T.R. No. 172 of 2011 dated 25.05.2011 and eventually by the Honorable Supreme Court of Pakistan in C.P. No.834 of 2011 dated 02.10.2012 also. Therefore, the learned CIR (A)'s order with regard to charging of federal excise duty on the technical services fee paid by the appellant to it's parent company follows the ratio settled on this issue. Therefore, the learned CIR (A)'s order charging federal excise duty on consideration paid by the appellant to it's parent company is upheld. The imposition of penalty or default surcharge in respect of federal excise duty on technical services is also upheld.

5. The appeal is disposed of accordingly. This order consists (10) pages and each page bears my signature.

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