Taxhelpline Case No. 154 of 2013

[INLAND REVENUE APPELLATE TRIBUNAL]

S.T.A. No.134/KB of 2012, decided on 7th November, 2012.
Date of hearing: 24th September, 2012

Before Syed Muhammad Jamil Raza Zaidi, Judicial Member and Zarina N. Zaidi, Accountant Member

Syed Irshad-ur-Rehman for Appellant. Dr. Aftab Imam, DR-RTO-Il for Respondent

Messrs TECHNO FABRIK (PVT.) LTD
Vs
C.I.R. UNIT-VIII, R.T.O., KARACHI

ORDER

ZARINA N. ZAIDI, (ACCOUNTANT MEMBER)---This Sales Tax appeal has been filed by the appellant, Messrs Techno Fabrik (Pvt.) Limited, Nooriabad, Hyderabad, against the Order-in-Appeal No.356 of 2012 passed on 30-6-2012 by the Commissioner Inland Revenue (Appeals-III) Karachi Camp @ Hyderabad, in appeal filed against Order-in-Original No. 10 of 2012 dated 5-5-2012 passed by the Deputy Commissioner, Enforcement- VIII, (IR) RTO., Hyderabad whereby the learned Commissioner Appeal has upheld the order-in-original, referred to above, and rejected the appeal of the appellant.

2. The brief facts of the case as narrated by the appellant in their memo of appeal and reiterated at the time of hearing are as under.

3. The appellant is a bona fide taxpayer registered with the FBR for Sales Tax vide STRN No.0101870800146 engaged mainly in the business of manufacturing and supplying of auto parts, uses steel sheets as its main raw material. In the tax period October, 2009 the appellant, amongst purchases from other suppliers, purchased Steel Sheets amounting to Rs.7,642,582 from its supplier Messrs Global

Trading Co., Ground Floor, Karimjee Building, Plot No.7/15, North Napier Road, Karachi having sales tax Registration No.1750720403228 with due diligence and care as to admissibility of input tax, after due verification from the web site of the FBR, in eight delivery, through eight (8) sales tax invoices showing total input tax of Rs.1,193,145 charged by the said supplier. In support of their contention the appellant annexed with the memo of appeal copies of the sales Tax Invoices and Weight Bridge receipts.

4. It is the case of the appellant that the above entire payment, inclusive of GST was made by the appellant through account payee crossed cheques in the name of the said supplier following the provisions of section 73 of the Sales Tax Act, 1990. In support of their contention the appellant annexed copies of the said cheques and bank statement showing clearing of the said cheque amounts from the declared bank account of the buyer/appellant.

5. It was further averred that the status of the said supplier was active even at the time of the filing of the monthly sales tax return for the month of October, 2009 by the appellant which was filed on 14-11-2009 and even thereafter until very recently. The said unit of the supplier was neither included in the list of risky, suspected, suspended, blocked or non-active, maintained by the FBR for the awareness of the common taxpayers. In support the appellant annexed/supplied copies of the sales tax return and its annexures, filed by the appellant and the said supplier showing the said supplies therein.

6. It is averred that the show-cause notice issued by the assessing authority was replied and in compliance to notice issued by the Deputy Commissioner all the relevant documents were supplied to film but the Deputy Commissioner without considering the same and on the basis of mere conjectures and surmises, ignoring the facts that the appellant has discharged his obligation under the Sales Tax Act, 1990 faithfully; without establishing that there was any collusion between the appellant and the said supplier; without discharging the burden shifted upon him, held vide Order-in-Original No.10 of 2012, the input adjustment by the appellant of

Rs.1,193,145 as unlawful and inadmissible.

7. An appeal was filed against the said order-in-original to the Commissioner Inland Revenue (Appeals)-III, Karachi alias Hyderabad which the learned Commissioner Appeal has decided by the impugned order against the facts of availability of proof of payments i.e., copies of cheques issued by the appellant in the name of the said Global Trading Co.; bank statement showing transfer of said cheques amounts from the bank account of the appellant; the certificate of the banker that the amounts of the above cheques have been transferred from the bank account of the appellant into the bank account of the Global Trading Co., the supplier, and proof of physical transfer of goods i.e., weigh bridge receipts, has highly and malafiedly held that the appellant has failed to substantiate submission with the documentary evidence they even did not provide any evidence as regard to the fulfillment of the provisions of section 73 of the Sales Tax Act, 1990. The appellant also failed to provide any documentary evidence as regard to the transfer of goods. It is also averred that the learned Commissioner IR (Appeals) has also purposely, deliberately and malafiedly did not adjudicate upon the issue of limitation of passing Order-in-Original which is barred by limitation by fifty eight (58) days.

The appellant has raised following grounds of appeal:

(1) That, the show cause notice issued is vague and has been issued without jurisdiction and by sailing in two boats, by invoking provisions of sections 11(2) and 36(1) of the Sales Tax Act, 1990 which cater for entirely different situations.

(2) That, the learned Commissioner IR (Appeals) has erred in law in holding that the appellant has failed to substantiate submissions with the documentary evidence they even did not provide any evidence as regard to the fulfillment of the provisions of section 73 of the Sales Tax Act, 1990 when copies of the cheques, bank statement and banker certificate were filed by the appellant with the appeal to the Commissioner (Appeals) and are available on the record.

(3) That, the learned Commissioner IR (Appeals) has erred in law in holding that the appellant has failed to provide any documentary evidence as regard to the transfer of goods when copies of Receipts of Weigh Bridge in respect of weight of the goods (Steel Sheet) purchased by the appellant from the said supplier i.e., the document of physical transfer of goods from the supplier to the appellant were filed by the appellant with the appeal to the learned Commissioner (Appeals) and are available on the record.

(4) That, the learned Commissioner IR (Appeals) has erred in law in not considering and appreciating the oral submissions made at the time of hearing on 28-6-2012 and written submission delivered by hand on 14-7-2012 and even through email at appealthreehyd2@yahoo.com that since the goods were sent to Nooriabad by the appellant from hiring vehicles privately and not through goods forwarding Company, accordingly, no document like bilties could be produced.

(5) That, the learned Commissioner IR (Appeals) has erred in law in not considering and not adjudicating upon that the order-in-original is barred by limitation by 58 days as per provisions of first proviso to subsection (1) of section 11 of the Sales Tax Act, 1990 and first proviso to subsection (3) of section 36 of the Sales Tax Act, 1990.

(6) That, the learned Commissioner IR (Appeals) has erred in not considering that the Deputy Commissioner has ordered for charging of default surcharge under section 34 and penalty under section 33(11) of the sales Tax Act, 1990 without establishing any mens rea upon the appellant.

Notice in the abovenamed appeal was issued and the pro and contra arguments advanced by the learned advocate for the appellant and the learned Departmental Representative were heard.

The learned advocate for the appellant argued that the show cause notice is vague since it was issued by invoking two provisions i.e.,

section 11(2) and section 36(1) of the Sales Tax Ordinance, 1990 simultaneously which cater for two different situations. The Assessing Officer has sailed in two different boats since for invoking section 11(2) there should be reasons of non-payment of tax due on supplies made or there should be short payment of tax the claim of input tax credit or refund would be inadmissible under the provisions of the Sales Tax Act, 1990. Whereas for the invoking of section 36 of the Sales Tax Act, 1990 there should be some charge of collusion and deliberate act for not levying tax or charge or short levied or erroneous refund. The show cause notice is thus null and void and hence the super structure raised on this Notice is liable to be demolished. The appellant's advocate relied on: 2012 PTD (Trib.) 350 (page 358 Para 9(1)).

The learned advocate for the appellant taken us to the page 3 of the impugned order and showed that sales tax invoices, weigh bridge receipts (the documents of transfer of goods), the cheques, bank statement and the certificate of transfer of funds from the bank account of the appellant in the name of the said Global Trading Co., has been annexed with the memo of appeal filed before the learned Commissioner Appeal and even with the Written Arguments filed with the learned Commissioner IR (Appeal). The said documents the appellant has also filed with the learned Tribunal and are available on record. The learned advocate submits that in such an obtaining situation the learned Commissioner IR (Appeals) has no occasion in holding that the appellant has failed to substantiate submissions with the documentary evidence they even did not provide any evidence as regard to the fulfillment of the provisions of section 73 of the Sales Tax Act, 1990.

The learned advocate argued that there is no occasion for rejecting the claim of input tax of Rs.1,193,145 under section 8(1)(d) of the Sales Tax Act, 1990:--

(i) when the Deputy Commissioner utterly failed to establish an iota of mens rea on the part of the appellant in purchasing the goods from the said active supplier, in October, 2009, who was an agent

of the FBR, under the Sales tax Act,1990. The learned advocate relied on: 2012 PTD (Trib.) 619 (page 626 para 11); 1984 PTD 216;

"we have no hesitation in holding that if the sales tax department had acted in a negligent manner and certain omissions are committed by its functionaries by issuing registration certificates to the bogus, fake or non-existent parties, then the respondent/ taxpayer should not be made to suffer for the acts or omissions of the sales tax functionaries. It is now well settled principle of law that a party should not be made to suffer on account of act/ omission on the part of the Court or other state functionaries.

(ii) when the learned Deputy Commissioner has failed to establish that the appellant was in the knowledge or had reasonable belief to suspect that tax in respect of above sales tax invoices/ supplies would go unpaid.

It has been held in ref: 2012 PTD (Trib.) 885 (page 890 para 5) by relying on GST 2004 CL 562:

"Bare reading of the above section, it clearly depicts that the mandatory condition precedent for tax fraud (section 2(37)) is that the registered person has acted knowingly, dishonestly or fraudulently and without any lawful excuse committed tax fraud. Whereas in the present case, there is not an iota of evidence on record where from it could be deduced that the appellant has intentionally, knowingly or dishonestly or fraudulently committed tax fraud by claiming input tax adjustment against the sales tax invoices issued by the so called fraudster gang. It is significant to state here that even that the audit/ contravention report coupled with it the show cause notice did not spell out or it could be proved by the department that the appellant had claimed illegal input tax adjustment with prior knowledge regarding fakeness of the sales tax invoices.

" Para 12...the registered person/ appellant, after verifying the status and genuineness of the suppliers made the payments of input

tax to the suppliers and fulfilled all the legal responsibilities on his part. So the appellant is neither jointly not severally liable for making payment of such unpaid amount of tax. For the foregoing discussion, we are of he view that the department was not within the ambit of law while invoking the provisions of sections 8 and 8A of the Sales Tax Act, 1990 against the registered person/ appellant".

It is also held in ref: 2012 PTD (Trib) 350 (pg.357 para 9)

"we have heard the arguments of the learned counsel and found that the appellant under the prescribed mechanism of VAT, made payment of the input tax to the suppliers and the appellant had no access to confirm that the supplier had made the payment in the Government treasury or not? In fact this was the duty of the Revenue to check as to whether the supplier has made payment of tax due to him especially when he was filing his monthly sales tax returns and summaries with the department.

(iii) and particularly when all the payments of Rs.7,642,582 inclusive of input tax of Rs.1,193,145 were made by the appellant complying the provisions of section 73 of the Sales Tax Act, 1990 and under section 21(3) of the Sales Tax Act, 1990 inserted by Finance Act, 2011, (which is a curative and remedial legislation to save a taxpayer form the burden of double taxation) the input claim could not be rejected.

Subsection (3) of section 21 reads as under "During the period of suspension of registration, the invoices issued by such person shall not be entertained for the purposes of sales tax refund or input tax credit, and once such person is blacklisted, the refund or input tax credit claimed against the invoices issued by him whether prior or after such blacklisting, shall unless the registered buyer has fulfilled his responsibilities under section 73 be rejected through a self-speaking appealable order and after affording an opportunity of being heard to such person."

It has been held in ref: 2012 PTD (Trib.) 619 (pg.625 para 9)

"In the instant case, provisions of section 73 of the Act for bank payments have duly been complied with by the respondent. Consequently, input tax credit against invoices of such black-listed persons cannot be denied and sales tax refunded thereon cannot be recovered after insertion of subsection (3) of section 21 to the Act wherein it has categorically been laid down that input tax shall be allowed if payments are made through banking channel irrespective of the fact that the suppliers units are either black-listed or their registration have been suspended.

(Para 10) ….. the said amendment of subsection (3) in section 21 of the Act being beneficial, remedial and curative legislative amendment is applicable in all pending cases and in the instant case as well."

Cases relied upon: "The Commissioner of Income Tax v. Shahwanaz Limited" reported as (1993 SCMR 73). The Commissioner of Income Tax/Wealth Tax v. Messrs Ellcot Spinning Mills Ltd" reported as 2008 PTD 1401 (H.C. Lah.); Army Sugar Mills Ltd. v. Federation reported as 1992 SCMR 1652; Anoud Power Generation v. Federation reported as PLD 2004 SC 340; Government of Pakistan v. Village Development Organization reported as 2005 SCMR 492"

That, the learned advocate for the appellant submits that that since the goods were sent to Nooriabad by the appellant from hiring vehicles privately and not through goods forwarding Company, accordingly, no document like bilties could be produced. The weigh bridge receipts are sufficient evidence of physical transfer/delivery of goods to the appellant. It is submitted by the learned advocate that the documentary evidence and the arguments advanced, though available on record, have been malafidely ignored by the learned Commissioner Appeal.

It is next argued by the learned advocate that the learned Commissioner Appeal has not deliberately adjudicated upon the plea of the appellant with regard to the limitation as the learned Deputy Commissioner has passed the order-in-original after 58 days of the

time period provided under first proviso to subsection (1) of section 11 of the Sales Tax Act, 1990 and first proviso to subsection (3) of section 36 of the Sales Tax Act, 1990. The learned advocate contended that as per para 23 of the Order-in-Original the time limitation for passing the order was expired on 8-1-2012. It is clear that the extension for further 60 days was applied after once limitation has already expired on 8-1-2012 as the learned Commissioner is said to extend the time upto 7-5-2012 which he could extend only for 60 days. The adjudicating authority has also failed to record the reasons for passing of order after prescribed 120 days. In all case the order-in-original has been passed after 238 days of the issuance of the show-cause notice dated 10-9-2011. Order-in-original has, thus, been passed much after the 180 days, including the statutory extended period of 60-days.

The order-in-original is thus, barred by limitation. The appellant had, thus, acquired the vested right of escaping assessment by lapse of time. It has been held in ref: 2012 PTD (Trib.) 846 (page 850 para 6 "...Even if the Collector had fixed any extended period the order-in-original being passed after lapse of 180 days would have become time barred. It is a settled principle of law that once limitation had started to run and had come to an end the assessee acquires a vested right of escapement of assessment by lapse of time.

Following case-law also relied on the point of limitation 2008 PTD 60 2008 PTD 60 (iii) 2009 PTD 1978 (iv) 2009 PTD 2004 (HC Lah) (v) 2009 PTD 762 (HC Lah) (vi) 2008 PTD 578 (vii) 2010 PTD 1522 (viii) 2010 PTD 2117 (ix) 2010 PTD 1469 (x) 2010 PTD 1636 and (xi) 2012 PTD (Trib.) 219.

The learned advocate further argued that the learned Commissioner Appeals has not considered that the demand of Rs.1,193,145, in the above circumstances, from the appellant would be tantamount to double taxation and that of default surcharge and penalty would be highly punitive and inappropriate particularly when no mens rea has been established by the Deputy Commissioner upon the appellant for charging of default surcharge under section 34 and penalty

under section 33(11) of the Sales Tax Act,1990. The learned Commissioner Appeal did not consider that the learned Deputy Commissioner has utterly failed to establish that the appellant has contravened the provisions of sections 2(37), 3, 6, 7, 8, 8A, 14, 22, 23, 26, and 73 of the Sales Tax Act, 1990.

It has been held in ref: GST 2004 --79 by the Hon'ble Supreme Court of Pakistan that "each and every case has to be decided on its own merits as to whether the evasion or payment of tax was wilful or mala fide, decision on which would depend on the question of recovery of additional tax.

On the other hand the Departmental Representative supported the order-in-appeal.

We have given our conscious considerations to the arguments advanced by the respective learned representatives of the parties, the documents available on record and the case-law cited.

It has been observed that the show notice dated 10-9-2011 has been issued on the basis of some F.I.R. under section 37-B of the Sales Tax Act, 1990 furnished by the Deputy Director/Investigation Officer Directorate & Investigation FBR, Lahore dated 26-3-2011 and on the basis that the appellant has purchased goods from Messrs Global Trading Co., who has been declared fake/fictitious unit and has claimed input tax credit of Rs.1193145.

The arguments of the learned advocate with regard to the illegality of the show-cause notice does not find any force and hence rejected.

It is found that the appellant has furnished documentary evidence with regard to the physical transfer of goods i.e., Weigh Bridge receipts. In the circumstances when goods have been transported through hiring trucks/vehicles from stands there seems to be no other documents like bilties. It has further been observed that the respondent has not doubted/ challenged these documents. All the

documentary evidence with regard to the transfer of the sale proceed from the bank account of the appellant including copies of account payee crossed cheques in the name of the supplier i.e., Global Trading Co., have been found to be already furnished by the appellant to the authorities below and we have no hesitation to hold that the appellant has fully complied with the provisions of section 73 of the Sales Tax Act, 1990. It is further held by relying in ref: 2012 PTD (Trib.) 619 (pg.625 para 9) that by virtue of the provisions of subsection (3) of section 21 of the Sales Tax Act, 1990, the adjustment of the input tax credit of Rs.1,193,145 in the month of October, 2009 in respect of the goods purchased from the said Global Trading Co., whose registration has been suspended with effect from 14-5-2012, could not be rejected/denied to the appellant who has already been held to have complied the provisions of section 73 of the Sales Tax Act, 1990. It is further observed that the order-in-original has been passed after a long period of the expiration of the limitation and even the statutory extended period of limitation which expires in all probabilities on 2-3-2012. The order-in-original has been passed after 238 days of the issuance of the show-cause notice dated 10-9-2011. Order-in-original has, thus, been passed much after the 180 days, including the statutory extended period of 60-days. The Order-in-original is thus, barred by limitation. The order-in-original has, thus, held to be a nullity in the eye of law.

For the foregoing reasons the order-in-original is hereby annulled and the order-in-appeal is set aside accordingly.

The appeal is disposed of accordingly.