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Judgment Sheet

IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

Case No: STR No. 242 of 2015.

Commissioner Inland Revenue. **Versus** M/s Ali Hassan Metal Works.

JUDGMENT

Date of hearing:	01.11.2017.
Applicant by:	Mian Yusuf Umar, Advocate.
Respondent by:	Nemo.

Shahid Jamil Khan, J:- Following questions are proposed for opinion under Section 47 of the Sales Tax Act 1990 **("Act of 1990")**, while assailing order dated 12.12.2014 passed by Appellate Tribunal Inland Revenue, Lahore **("Appellate Tribunal")**:-

"1. Whether on the facts and in the circumstances of the case the learned ATIR was justified to hold that the word "*prior*" used in Section 21(3) of the Sales Tax Act, 1990 does not cover the period beyond suspension of registration rather it means during currency of suspension of registration up to and after its blacklisting?

2. Whether the learned ATIR failed to appreciate the applicability of provisions of section 8(1)(ca), 8A and 21(3) of the Sales Tax Act, 1990, relevant to reject the input tax adjustment claimed on the basis of invoices issued by blacklisted/suspended units?

3. Whether on the facts and in the circumstances of the case the Learned ATIR was justified to hold that the order made by the Adjudicating Officer in view of provisions of sub-Rule (5) of Rule 12 of Sales Tax Rules, 2006 issued vide notification No.555(I)/2006 dated 05.06.2006 is an administrative order and cannot be given retrospective effect?

4. Whether on the facts and in the circumstances of the case, the case reported as 2005 SCMR 492 and 2004 PTD 2928 are squarely applicable to this case as contemplated by the Learned ATIR, since no vested rights had accrued to the registered person?"

2. Brief facts, as recorded in the impugned order, are that the email/first notice was served on the allegation that input tax was claimed on invoices issued by allegedly blacklisted or suspended registered person for the tax period July-2011, October-2011, November-2011, January-2012 and February-2012. Consequent Order-in-Original was passed on 06.02.2014, which, being assailed, was upheld by Commissioner (Appeals). Further appeal, filed by respondent registered person, was allowed by Appellate Tribunal through impugned order.

3. Operative part of Appellate Tribunal's order is reproduced hereunder:-

> "6. Keeping in view the facts of the case and after respectfully following the ratio settled in the above referred judgments we came to the conclusion that the Revenue has failed to prove the allegation leveled against the appellant that the appellant claimed inadmissible input tax adjustment on the basis of fake/flying invoices issued by the supplier due to which said supplier was blacklisted subsequent to the transactions. Consequently, the impugned order is set aside and Order-in-Original is hereby vacated."
>
> *(emphasis supplied)*

4. Learned counsel for the applicant department submitted that Section 21(3) of the Act of 1990 **and** Rule 12(5) of the Sales Tax Rules, 2006 **("Rules of 2006")** could be invoked retrospectively. He has laid emphasis on the words ***"prior or after such blacklisting"*** used in subsection (3) of Section 21 of the Act of 1990.

He was confronted with the findings given by Appellate Tribunal that the supplier was blacklisted subsequent to issuance of invoices in question and the Taxation Officer failed to establish that the supplier was suspended or blacklisted at the time of issuance of invoices in question or due to the alleged fake/flying invoices.

5. Heard at preliminary stage, record perused.

6. Subsection (3) of Section 21of the Act of 1990 was inserted by Finance Act, 2011 and sub-rule (5) of Rule 12 of the Rules of 2006, was substitution by Notification No. SRO 589(I)/2012 dated

01.06.2012. Section 21(3), being verbatim of Rule 12(5), is reproduced for examination:-

> "**Section 21(3).** 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 be rejected through a self-speaking appealable order and after affording an opportunity of being heard to such person."

This subsection deals, mainly, with the invoices issued during the period of suspension and after consequent blacklisting; the invoices issued by such registered person, '***whether prior or after such blacklisting***', shall be rejected, '***through a self-speaking appealable order***'. The subsection does authorize department to go behind the blacklisting to reject refund or credit against the invoices issued by the blacklisted supplier. Yet, it cannot be construed to have given power to reject the tax credit of all the previously issued tax invoices for simple reason that the supplier was blacklisted subsequently. The requirement of self-speaking appealable order, after affording an opportunity of being heard, has to be satisfied.

7. Section 3 of the Act of 1990, the charging section, is required to be read with Section 7 to determine the tax liability, in respect of taxable supplies made during a tax period. Subject to the conditions mentioned in Section 7, a registered person is entitled to deduct input tax from the output tax paid or payable. The deduction of input tax, under Section 7 is subject to the provisions of Section 8 of the Act of 1990; subsection (1) (ca) of which imposes restriction on reclaim or deduction of the input tax, if tax is not deposited in Government treasury against an invoice issued by the supplier.

8. To deduct tax, paid against a validly issued invoice by supplier, is right of a registered person, therefore, it cannot be taken away except in accordance with law. Provisions of Section 21(3) cannot be read in isolation for refusing to entertain an invoice issued prior to blacklisting of the supplier. The Taxation Officer has to establish,

through plausible evidence, that the invoice has some nexus with the cause of blacklisting. He has to rule out the possibility that the supplier was conducting his business in accordance with law, when the invoice was issued and that blacklisting order was passed due to some subsequent defaults. There is another possibility, required to be ruled out during adjudication, that order of blacklisting or suspension was reversed being challenged by the supplier subsequently. The reasons or cause of blacklisting is to be correlated with the invoices intended to be rejected for the adjustment of tax credit or its refund.

9. Intention of the Legislature; as is discernable from the provisions of Section 21(3) read with Section 8(1) (ca), is that reclaim (refund) or adjustment of input tax (tax credit) should not be allowed for an invoice against which sales tax has not been deposited in Government treasury. This clog appears to be logical because a tax not deposited in the Exchequer, cannot and should not, allowed to be withdrawn or adjusted. Claim of such refund or its adjustment amounts to rob the Exchequer and cheat upon the State. Conversely; to deny adjustment or refund of a tax deposited in the Treasury, if a registered person is entitled under that law, is against the legislative will.

10. The authorities, exercising *quasi-judicial* powers under a statute are bound to conduct a fair adjudication. To be dealt in accordance with law, due process and fair trial are inalienable fundamental rights guaranteed under Articles 4 and 10-A of the Constitution of the Islamic Republic of Pakistan 1973 **("Constitution")**. August Supreme Court of Pakistan in *The Province of East Pakistan v. MD. Mehdi Ali Khan* (**PLD 1959 SC 387**) held:-

> "The determination of every right or liability claimed or asserted in a legal proceeding depends upon the ascertainment of facts and the application of the law to the facts so found. It is a normal feature of the judicial process first to discover the facts and then to determine what rights and liabilities follow from the application of the law to the facts found."

11. While invoking/applying the provisions of Section 21(3), Commissioner or Taxation Officer has to ascertain the facts that the invoices were issued during suspended or blacklisted period. In case invoices issued prior to blacklisting, the cause or reason for blacklisting has some nexus with the invoices. Bottom line is that tax was not paid or deposited against the invoices. To prove these facts burden is upon the revenue, however, this burden can be shifted upon the registered person claiming adjustment or refund of tax, in cases of tax fraud, in accordance with the provisions of Section 2(37) of the Act of 1990. Not by confronting, merely, that the supplier was blacklisted subsequently, initial burden, before shifting, is to be discharged by the revenue, as is held in *Al-Hilal Motors Stores and another v. Collector, Sales Tax and Central Excise (East) and another* **(2004 PTD 868)**, relevant excerpt of which is reproduced for facility:-

> "A perusal of the show-cause notice as well as material produced before us further shows that ***no case of any tax-fraud has been made out whereby the burden of proof can be shifted to the appellants.*** The learned two forums below have misdirected in placing the burden of proof on the appellants in terms of the provisions contained in section 2(37) defining the expression "tax-fraud" without realizing that ***in order to attract the above provision, the initial burden lies on the Department to show*** that an assessee, knowingly, dishonestly or fraudulently and without any lawful excuse has done any act or has caused to be done or has omitted to take any action or has caused the omission to take any action in contravention of duties or obligations imposed under, this Act or rules or instructions issued thereunder with the intention of understating the tax liability or underpaying the tax liability. ***Once this burden is discharged by the Department, only then, the burden is shifted to the assessee to establish*** that the act done was without any knowledge on his part or without any intention of dishonesty -or fraud and was done with any lawful excuse."

12. The questions proposed are not couched in proper words to clinch the proposition of law arising from the impugned order, therefore, we intend to resettle the question in following words:-

> "Whether Taxation Officer was justified to invoke the provisions of Section 21(3) of the Sales Tax Act, 1990 or Rule 12(5) of the Sales Tax Rules, 2006 for not entertaining invoices, issued prior to blacklisting of supplier, for tax credit or refund, without establishing, through self-speaking order, that the invoices were

fake or flying because the claimed tax was not deposited in National Exchequer?"

13. Our answer to the resettled question is in ***Negative***.

Reference Application is ***decided*** against the applicant department.

14. Office shall send a copy of this order under the seal of the Court to the learned Appellate Tribunal Inland Revenue per Section 47(5) of the Sales Tax Act, 1990.

(Muhammad Sajid Mehmood Sethi) Judge

(Shahid Jamil Khan) Judge

APPROVED FOR REPORTING.

Judge Judge

A.W.