JUDGMENT SHEET

IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

W.P No.28780 of 2014

Almoiz Industries Limited and another

Versus

Federation of Pakistan & others

J U D G M E N T

Date of Hearing.	20-04-2018
PETITIONERS BY:	M/s Salman Akram Raja, Malik Ahsan Mehmood, Usman Ali and Bilal Bashir, Advocates.
RESPONDENTS BY:	Mr. Tahir Mahmood Ahmad Khokhar D.A.G. Mr. M. Zafar Iqbal, Advocate for the respondents. Mian Ashiq Hussain, Advocate for applicant in C.M No.4100 of 2014.

Shahid Karim, J:- This petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 primarily seeks the following relief:-

> *In view of the foregoing, it is respectfully prayed that the provisions of Chapter XI of The Sales Tax Special Procedure Rules, 2007 except the Impugned Provisions (i.e. First Proviso to Rule 58H, Rule 58Ha, Rule 58Hb and Sales Tax General Order No.1 of 2013) be held to be applicable to the Petitioner Company and the exclusions sought to be made by Rules 58H (First Proviso) 58Ha, 58Hb and 58MC of the Sales Tax Special Procedure Rules, 2007 read with Sales Tax General Order No.1 of 2013 dated 3 January, 2013 be declared to be without lawful authority and struck down.*

2. As adumbrated, the challenge in this petition is to proviso to rule 58H, rules 58Ha, 58Hb, 58MC and paragraph 3 of the Sales Tax General Order No.1 of 2013 dated 03.01.2013. These provisions are necessary to be reproduced in order to understand the controversy at the heart of this petition.

> *"**58H. Payment of tax.**--(l) Every steel-melter, steel re-roller composite units of melting, re-rolling and MS cold drawing and composite unit of steel melting,*

re-rolling (having a single electricity meter), excluding units operated by sugar mills or other persons using self-generated electricity shall pay sales tax at the rate of seven rupees per unit of electricity consumed for the production of steel billets, ingots and mild steel (MS) products excluding stainless steel, which will be considered as their final discharge of sales tax liability.

Provided that the rates of sales tax on the basis of electricity consumption prescribed in (1) and (2) shall only be applicable to units consuming electric power supplied by public sector electricity distribution companies [61][and M/s. K-Electric Limited.

***"58Ha. Steel melters and re-rollers operating on self-generation basis**.-- (1) Subject to permission by the Chief Commissioner, the facility to pay sales tax liabilities on the basis of gas bill shall be allowed to the registered persons who have requisite permission, for producing electricity with the help of gas generators, from the gas distribution companies or Oil and Gas Regulatory Authority or any other Government authority authorized to grant such permission.*

(2) Steel melters and re-rolling mills] producing electricity with the help of gas generators shall discharge their sales tax liability on the basis of the gas bill for the relevant month as per the following formula:--

Sales tax payable = [HM3 (or hundred cubic meter) x Rs. [1,633] less sales tax paid on gas bill:

Provided that adjustment shall be allowed as provided in second proviso to sub-rule (2) of rule 58H.

(3) Steel melters and re-rolling] mills operating on self-generated electricity shall discharge their tax liability on monthly basis, in the following manner:--

Sales tax payable = mill size (in inches) x Rs.

[82][45,458]

Provided that if a [83][steel melters or re-rolling] mill operating on self-generation basis remains closed for seven or more days consecutively during a tax period, the registered person shall inform through telephone or fax to the respective Commissioner and the representative of the Association prior to the closure of the mill. A survey report shall accordingly be prepared by the monitoring committee comprising of one or more inland revenue officers nominated by the concerned Commissioner and representatives of Pakistan Steel Re-Rolling Mills Association and the tax liability of the said mill shall be determined on the basis of above formula for the number of days the mill remains in operation during the month.]

***58Hb. Steel mills operated by sugar mills or other persons using self-generated electricity.**—(1) Sugar mills or any other persons operating steel melting or*

steel re-rolling mills using self-generated electricity produced from bagasse or other means except those specified in rule 58Ha, shall pay sales tax on the steel products manufactured by them at the rate specified in sub-section (1) of section 3 of the Act, and shall observe all the applicable provisions of the Act.

(2) Such sugar mills or other persons shall—

(a) declare to the Commissioner having jurisdiction their installed transformer capacity for steel melting and re-rolling, which would be subject to verification; and

(b) install a tamper proof electricity meter on the transformer used for steel melting or re-rolling, alongwith a check meter outside the mills premises, on the recommendations and under supervision of one representative each from the RTO or LTU having jurisdiction and the electricity distribution company operating in the area.

(3) In case of failure to comply with the requirements of sub-rule (2) within thirty days of the commencement of this rule or prior to commencement of operations of a new unit, besides any other legal action, the respective RTO or LTU shall invoke the provisions of section 40B of the Act to monitor production, supplies and stocks so that sales tax payable on the steel products being manufactured and supplied may be properly assessed and recovered."

58MC. Treatment for Composite units.— *Steel melters and re-rollers who also supply stainless steel products or products other than billets, ingots, MS cold drawing products and re-rolled MS products shall follow standard sales tax procedure. The fixed taxes and values prescribed under this Chapter shall not be applicable to supplies of such registered persons]*

3. The necessary facts from which this petition arises are as follows:

- *The petitioner-company Almoiz Industries Limited (**Almoiz**) established a steel melting plant at a cost of over Rs.800 Million in early 2014. The commercial production was to be commenced by 01.04.2014.*
- *The original Chapter XI of the Sales Tax Special Procedure Rules, 2007 (Chapter XI) made no discrimination between supplies made by manufacturers of steel billets on the basis of*

*cost of procurement of electric power. These Rules of 2007 were notified vide SRO 480(I)/2007 dated 09.06.2007. Chapter XI of the Rules, 2007 related to the Special Procedure for Payment of Sales Tax by Steel-Melters, Re-Rollers and Ship-Breakers. The Rules, 2007 were amended through SRO 1486(I)/2012 dated 24.12.2012. According to the learned counsel for Almoiz of particular relevance is the amendment made to sub-rule (7) of rule 58H. Prior to the amendment there was inconsistency between second proviso to sub-rule (2) of rule 58H and sub-rule (7) of rule 58H. While the second proviso to rule 58H allowed adjustment of sales tax paid on imported goods procured by steel melters and re-rollers, sub-rule (7) appeared to bar any input tax adjustment. However, the important feature was that no differentiation or discrimination between steel melters or re-rollers was put in place by the aforesaid notification dated 24.12.2012. Subsequently, the Federal Board of Revenue (**FBR**) proceeded to issue a Sales Tax General Order No.1 of 2013 dated 03.01.2013 (impugned herein) whereby inter alia the following direction was issued purportedly in relation to the adjustment procedure mentioned in SRO 1486(I)/2012 dated 24.12.2012:*

> *"3. The adjustment Procedure will not be applicable to those steel melting units and/or re-rolling mills operating on baggasse and/or other waste products within sugar mills and to those units who have not opted for Special Procedure."*

4. However, the real controversy has its provenance in SRO 421(I)/2014 dated 04.06.2014 (**"SRO421"**) whereby Chapter XI of Rules, 2007 was consequently amended. The relevant amendments

have been reproduced hereinabove. The sales tax payable by steel melters and re-rollers was expressly made applicable only to goods produced by consuming electric supply by public sector electricity distribution companies. A new rule 58H(b) was added which was directed at Almoiz and others similarly situated by providing that sugar mills or other persons operating steel melting or re-rolling mills using self-generated electricity produced through baggase or other means were required to pay sales tax on the steel manufactured by them at the rate specified in sub-section (1) of section 3 of the Sales Tax Act, 1990 (**Act, 1990**). Simultaneously rule 58H(a) allowed the said procedure and special rate of sales tax in terms of Chapter XI of the Rules, 2007 to apply to units that operated on electricity produced by the use of gas generators subject to permission from the gas distribution companies from the Oil & Gas Regulatory Authority (**OGRA**) or any other government authority authorized to grant such permission. It is the case of Almoiz that a combined reading of sections 58H, 58H(a) and 58h(b) leads to the ineluctable conclusion that the highly beneficial rate of sales tax along with special procedure was available only to steel melting or re-rolling units that consume electric power supplied by public sector electricity distribution companies or by gas generators operating under permission granted by an authority. All other steel melting and re-rolling units and in particular those

operated by self-generated electricity produced from beggase stood excluded from the benefit Chapter XI of the Rules, 2007. This, according to Almoiz, works discriminately against the petitioner and impinges upon the rights of Almoiz to be treated equally with those steel-melting and re-rolling units which operate on electric power supplied by public sector electricity distribution companies. Additionally, the benefit provided to those units included the adjustment of sales tax paid on imported goods/ raw materials in terms of second proviso to sub-rule (2) of rule 58H. In a nub, the case of Almoiz is that the discrimination which permeates the provisions under challenge and brought about by the notification impacts the petitioner in such a way that it has become financially unviable and well-nigh impossible for Almoiz to operate on an even keel with steel melting and re-rolling units which have been extended the benefit of the amendments brought by the notification and puts an unbearable additional financial burden on Almoiz. In such conditions, Almoiz is likely to become an unfit competitor and will be driven to shutdown its operations.

5. The case of the FBR is encapsulated in the reply filed and the relevant portions are reproduced as under:

> *"Special Tax Regime has been extended by the legislature to only those manufacturers of steel products who are fed by electric power/ gas supplied by public sector utilities as their consumption of electric power/gas is recorded by an independent third party and the cost of electric power incurred by them is comparatively higher. That regime has justifiably not been extended to the*

steel products manufacturers, whose use electric power produced by themselves, which is comparatively cheaper and no independent & reliable mechanism of recording their power consumption exists. Accordingly, different tax treatment to both the afore-said classes of steel manufacturers is based on an intelligible differentia having nexus with the object sought to be achieved by law i.e, ease of administration of a taxing statute and ensuring a level playing field for the market.

The averment of the petitioner that he is engaged in "identical supplies" of goods is not well-based. Supplies shall not be legally labeled as "identical" unless all the inputs and the circumstance under which there are purchased are also identical. For arguments' sake, even if it is accepted that the sales tax regime for the petitioner is relatively harsher, the same cannot be termed as a lawful excuse to avail the remedy sought by the petitioner because it is cardinal principle of interpretation of fiscal statutes that there is no room for intendment, equity and presumption while interpreting the fiscal statutes (1989PTD909)."

"(i) Denied. As submitted in para (a) above, the legislation has been done keeping in view multiple factors i.e cost of production of steel products though different sources of energy distinguishable by different ways of recording and providing the level playing field to all manufacturers. In case the petitioners, as well as other few manufacturers of steel products using baggase-generated electricity, are allowed taxation under special procedure, they may get unprecedented advantage in the market and may create a market distortion. Needless to highlight, taxation has all-along been used as an instrument of fiscal policy to ensure desirable market trends. The legislation intended to benefit a special class, will cause utter discrimination and may lead to an unending litigation on the subject. The assertion of the petitioner that financial impact of discrimination in its case works out to Rs.220 (M) remains unsubstantiated on the one hand and requires this Honourable Court to conduct factual inquires which is not permissible in the writ jurisdiction, on the other. As demonstrated in the working enclosed at Annex-AA, the petitioner is much favourably placed in financial terms when compared with other competitors in the market."

(The underlining has been supplied for emphasis)

6. As stated above, SRO 421 brought about a number of amendments in the Rules, 2007. The Rules, 2007 and in particular Chapter XI has been enacted by

virtue of the powers conferred by section 71 of the Act, 1990, which provided (at the relevant time) that:

> ***71.*** *Special procedure.– (1) Notwithstanding anything contained in this Act, the Federal Government may, by notification in the official Gazette, prescribe special procedure for scope and payment of tax, registration, book keeping and invoicing requirements and returns, etc. in respect of such supplies as may be specified therein.*
>
> *(2).....*
>
> *(3) Notwithstanding anything contained in this Act or any other law for the time being in force or any decision of any court, the trade enrolment Certificate Schemes immediately in force before the commencement of the Finance Act, 1999, shall be deemed to be validly made under this Act."*

7. As is evident, a delegation of powers had been made by the legislature upon the Federal Government to prescribe special procedure for scope and payment of tax, registration, book keeping etc in respect of such supplies as may be specified therein. (By Finance Act, 2017, the words "Federal Government" have been substituted with the words "Board with the approval of the Federal Minister-in-Charge"). Therefore, the special procedure to be provided must be in respect of supplies which are specified in that special procedure. This is of crucial importance as the entire emphasis of the learned counsel for the petitioner during the oral arguments was that the special procedure as well as the fixation of price is in respect of taxable supplies and not with reference to the source of energy on which the plant or unit is being operated.

8. A word about other provisions relied upon during the course of the arguments Rule 58F which makes the Chapter applicable to certain category of

registered persons may also be alluded to as this serves as a preface to the following provisions of the Chapter. Rule 58F so far as relevant reads as under:

> *"**58F. Application.**-- The provisions of this Chapter shall apply to—*
> *(a) steel melting units, steel re-rolling units, composite units of melting and re-rolling and composite units having complete facility of melting, re-rolling and MS cold drawing, whether operating on electric power, natural gas or any other source of energy and regardless of the type of electricity connection;*
> *(aa) commercial importers of re-meltable iron and steel scrap;*
> *(b) supplies of electric power and natural gas to the units specified in clause (a);*
>
> *(c) furnaces or steel mills operated by sugar mills or other persons using self-generated electricity from bagasse or other means;*
>
> *(d) Pakistan Steel Mills, Karachi, Peoples Steel Mills, Karachi and Heavy Mechanical Complex; and*
>
> *(e) ship breakers.*

9. Therefore, in the exercise of delegated powers conferred on the Board, special procedure has been prescribed in Chapter XI and is made applicable to steel melting units, steel re-rolling units, composite units of rolling and re-rolling and composite units…..whether operating on electric power, natural gas or any other source of energy and …….. type of electricity connection. Thus, the application of the special procedure prescribed in Chapter XI applies across the board and without any categorization vis-à-vis the source of energy being employed by a unit. It will be noticed that while 58F makes the provisions of Chapter XI applicable to all steel melting units etc. without regard to the source of energy being used by them, rule 58H has carved out an exception in respect

of steel melting units such as the petitioner and others similarly situated on the basis of the source of energy being used by them. This in itself is a contradiction which is difficult to reconcile.

10. Before substitution, rule 58F read as follows:

> *"**58F. Application.--** The provisions of this Chapter shall apply to all steel melting, steel re-rolling, ship breaking units, composite units having complete facility of melting, re-rolling and MS cold drawing, and to Pakistan Steel Mills, Heavy Mechanical Complex and Peoples Steel Mills, wherever applicable."*

11. It can be teased out upon juxtaposition of rule 58H prior to and after the amendment that originally rule 58 applied to certain class of registered persons vis-à-vis the taxable supplies being made by them which was the determining factor. By the substitution brought about, the focus shifted from the supplies to the source of energy being employed and a separate class of registered persons was created thereby. This was a paradigm shift in the entire scheme and, *prima facie*, impermissible under the law.

12. Rule 58H concerns with the payment of tax and prescribes a rate of sales tax to be paid by the steel melters and steel re-rollers etc. It is interesting to note that the words "excluding units operated by sugar mills or other persons using self-generated electricity" have been added by the impugned notification and could only have been inserted by the exercise of powers under Section 71 of the Act, 1990. On the other hand, the rate which has been fixed to be paid by the steel melters etc in rule 58H has been determined and fixed

by virtue of powers conferred by sub-section (6) of section 3 of the Act, 1990. For our purposes sub-section (6) reads as follows:-

> *"3 (6) The Federal Government or the Board may, in lieu of the tax under sub-section (1), by notification in the official Gazette, levy and collect such amount of tax as it may deem fit on any supplies or class of supplies or on any goods or class of goods and may also specify the mode, manner or time of payment of such amount of tax."*

13. The Federal Government also invokes section 3(2)(b) for the settlement of a different rate through the notification. Section 3(2)(b) provides that:

> *"(b) the Board with the approval of the Federal Minister-in-charge may, subject to such conditions and restrictions as it may impose, by notification in the official Gazette, declare that in respect of any taxable goods, the tax shall be charged, collected and paid in such manner and at such higher or lower rate or rates as may be specified in the said notification."*

14. It is apparent from a reading of sub-sections (6) and 2(b) reproduced above that the Federal Government (or the Board now) had been conferred the power to levy and collect such amount of tax as it may deem fit on any supplies or class of supplies or any goods or class of goods. Once again, the amount had been left to be determined by the Federal Government and is relatable to supplies or class of supplies or goods or class of goods. Therefore, the mandate of these provisions is directed towards levy of amount of tax on the supplies or goods and not on the persons. The impugned notification mentions a number of provisions of the Act, 1990 under which purportedly the said notification has been issued in

exercise of the powers conferred upon the Federal Government. But, in my opinion, while the levy of an amount of tax in respect of a class of supplies has been done under Section 3(6) of the Act, 1990, the words "excluding units operated by sugar mills or other persons using self-generated electricity" as well as the proviso to rule 58H (and other rules brought under challenge herein) has been done by virtue of the powers conferred by section 71 of the Act, 1990. However, by doing so, the Federal Government has, through the impugned notification, created two different classes of persons on which different rates of sales tax have been imposed. That distinction has been drawn purely on the basis of the source of energy being used by those persons. It is to be noted that the two classes of persons make the same taxable supplies and the distinction has not been drawn on that basis. This course of action is not countenanced by a combined reading of the various provisions of the Act, 1990 and which provisions have been used to promulgate the amendments through the impugned notification. To reiterate, section 71 of the Act, 1990 as well as sub-section (6) of section 3 empower the Federal Government or the Board to prescribe a certain special procedure in respect of supplies and not in respect of persons. There is a marked difference between the two concepts, in that, the entire structure of the Act, 1990 is based on imposition of sales tax on taxable supplies being made by a registered person. It

is indeed a novel method of imposition of sales tax for the Federal Government to do so by reference to the source of energy and not by reference to the taxable supplies or class of goods. Both section 3(6) as well as section 71 of the Act, 1990 do not permit this course to be adopted by the Federal Government in the exercise of its delegated powers and the Federal Government has clearly exceeded its powers in enacting the impugned notification and to create a distinction on the basis of source of energy in respect of persons who indeed make taxable supplies of the same nature. The intention of enacting a special procedure through Chapter XI can also be gleaned from rule 58F, reproduced above which specifically applies the Chapter to similarly placed steel melting units etc. irrespective of the source of energy on which they are being operated. Thus no distinction can be made on this basis and any such distinction brought about by the impugned notification and challenged herein is *ultra vires* and outwith the authority of the Federal Government.

15. The learned counsel for Almoiz argued that the impugned notification and the amendments brought in the said procedure work discriminately against Almoiz. Through C.M No.3 of 2014, material has been placed on record which shows that Almoiz had to shut down its operations on account of being commercially unviable in view of the amendments which are under challenge. A letter of protest was also

written to FBR. The *raison d'etre* for excluding Almoiz and others similarly situated put forth by the Federal Government in the reply as well as oral arguments is that since the rate of sales tax is based on the unit of electricity consumed for the production of the goods, the said method cannot be made applicable to Almoiz as there is no criteria on the basis of which per unit electricity consumed by Almoiz can be measured since Almoiz uses self-generated electricity. Thus, the real factor which weighed with the Federal Government and FBR in excluding the petitioners from the purview of special procedure was the inability of FBR to measure per unit of electricity consumed by Almoiz and this is the reason which compelled the Federal Government to treat Almoiz and others as a different category. This basis of creating a distinction forming different categories has no legal legs to stand upon. The learned counsel for Almoiz retorts that a meter has indeed been installed at the premises of Almoiz for which electricity supply can be measured and this meter has been in place since the last three years and that the distinction drawn on this account belies all logic. At best, it can be said that the cost of energy being produced by Almoiz is perhaps lesser as compared to other units who do not use self-generated electricity by using baggase. However, the fact remains that the manufacture of the products and goods being done by Almoiz is of the same nature as other steel melters etc. and for a similar quantity of

goods produced, the electricity used would also be similar and can be measured too. The sales tax has to be paid at the rate of Rs.7 per unit on electricity consumed and, therefore, the rate of sales tax to be charged from both the categories will not vary as it will be based upon the measurement on the basis of units of electricity consumed. Therefore, the real reason for excluding Almoiz and others similarly placed seems to be the lack of capacity of FBR to gauge the exact units of electricity being consumed by them. Quite clearly, such a basis cannot be used as a yardstick to create a category apart and to disentitle Almoiz from taking benefit of the rate of sales tax levied under Section 3(6) of the Act, 1990.

16. As adumbrated, the reply sheds light on the reasons which compelled the Federal Government to oust Almoiz from the application of special rate of tax. The recording of consumption of electric power is one. This is not a sound basis as explicated above. The second reason put forth is that the cost of electric power is cheaper for Almoiz than other steel-melters. This reason is whimsical and tendentious, to say the least. The Federal Government is not in the business of giving advantage to certain producers of goods over others simply because the other is more efficient and uses a different source of energy. By way of illustration, what if a number of steel-melters begin to use solar power as a source of energy? Will the Federal Government enact another exception for them

too? More importantly, there is no data available with the Federal Government (and none was produced) to show that the electric power used by Almoiz is comparatively cheaper and the said statement has no basis. Also there is no verifiable information with the Federal Government to establish conclusively that all other steel-melters etc. do not use other sources of energy. Another significant aspect which escaped the attention of the Federal Government was that in doing so, Federal Government was probably making Almoiz and others commercially unviable and its products uncompetitive in the free market. How did the Federal Government gauge that the difference in the rate of sales tax was sufficient to offset the advantage (purported) which Almoiz enjoyed. Not only that the impugned notification is discriminatory, it also offends the right guaranteed by Article 18 of the Constitution, too. It has the unsavory result of driving Almoiz out of business. Surely the Federal Government did not intend this to be the outcome of the impugned notification. It is now well-entrenched as a rule that the classification, if it is not to offend against the constitutional guarantee must be based upon some intelligible differentia bearing a reasonable and just relation to the object sought to be achieved (*Pakcom Limited and others v. Federation of Pakistan and others* (**PLD 2011 SC 44**). Thus classification on the basis of source of energy must be clearly spelt out and must have a reasonable basis supported by a feasibility

study which establishes the lopsided advantage Almoiz allegedly enjoys.

17. C.M No.4100/2014 was filed on behalf of Steel Melters Association for being impleaded as a party. The applicant is a trade organization within the meaning of clause (9) of section 2 of the Trade Organization Ordinance, 2007. the applicant was deemed a necessary party and was heard at length. This application is formally allowed and the applicant is impleaded as respondent No.5. The stance of respondent No.5 has been brought forth in the written arguments and primarily consists of the following:

> *"The object of the Act is charge of Sales Tax on the value of supply and not on the quantity of supplies. The point emphasized by the petitioner that Sales Tax should be charged equally on equal supply of goods is, therefore, contrary to the charging Section and the object of the Act. The allegation of discrimination in view of the supply of equal amount of good has no link with the object of the Act to charge tax on the value of supplies of goods which vary according to the facts and circumstances of different registered persons. The allegation of discrimination is, therefore, baseless."*
>
> *"The prayer of the petitioner that its case of self-generated electricity with the raw material of bagasse should be bracketed with the members of the Steel Melters Association, who incur heavier cost/value of supplies on account of higher cost of electricity purchased from DISCOs, is contrary to the charging Section of the Act as incidence of the tax would not be on the value of supply of goods but on the goods. The difference between the cost of self-generated electricity and the electricity purchased from public Distribution Companies would be saving/subsidy earned by the petitioner through misapplication of law."*
>
> *"Due to difference in cost/supply of goods, the two classes: steel mills using self-generated electricity and the other steel mills purchasing electricity from public DISCOs constitute two different unequal classes and treating them equal would itself be discrimination. Both the classes, therefore, cannot be treated alike in the charge of Sales Tax under the Act. The allegation of discrimination leveled by the petitioner is, therefore, misplaced."*

18. The issues raised by the Steel Melters have largely been answered heretofore. Once again, the association has failed to provide a justification for the discrimination perpetrated against Almoiz or that if treated equally, would hand Almoiz with a subsidy which is iniquitous. The contention of the association (as well as the Federal Government) that "every rupee incurred in the production—distribution chain is to be accounted for" is misplaced and runs counter to the essence of a value-added tax such as sales tax. Section 3 levies sales tax on the "value of taxable supplies…., and "goods imported into Pakistan". Value of supply, according to section 2(46) means:

> *(46)* ***—value of supply‖*** *means:--*
> *(a) in respect of a taxable supply, the consideration in money including all Federal and Provincial duties 4[and taxes, if any, which the supplier receives from the recipient for that supply but excluding the amount of tax:*
>
> *Provided that –*
>
> *(i) in case the consideration for a supply is in kind or is partly in kind and partly in money, the value of the supply shall mean the open market price of the supply excluding the amount of tax;]*
>
> *(ii) in case the supplier and recipient are associated persons and the supply is made for no consideration or for a consideration which is lower than the open market price, the value of supply shall mean the open market price of the supply excluding the amount of tax; and*
>
> *(iii) in case a taxable supply is made to a consumer from general public on installment basis on a price inclusive of mark up or surcharge rendering it higher than open market price, the value of supply shall mean the open market price of the supply excluding the amount of tax.*

19. The power conferred on the Federal Government f to levy a different rate of tax etc. has

been carved out of the basic power to levy tax on taxable supply. However, the words go on but the spirit remains the same.

20. To reiterate, the original notification SRO 480(I)/2007 prescribed a special procedure for payment of sales tax by steel-melters etc. and did comport with the purpose of law viz. levy on the taxable supplies. The setting up of a plant by Almoiz triggered the insertion of the disputed clauses. Thus Almoiz is being punished for its innovation and ingenuity. *Arguendo*, what if some of the steel-melters have greatly more efficient plants which incur less cost as compared to others and which may, in turn, impact the value of their supplies, though of a similar nature? Thus the means employed for production and manufacture and the processes involved have never been considered as the yardstick for making a distinction for levying different rates of tax.

21. The impugned notification is *ultra vires* on another ground too. It offends the holding of the Supreme Court of Pakistan in *Messrs Mustafa Impex, Karachi & others v. Government of Pakistan through Secretary Finance, Islamabad & others* (**PLD 2016 Supreme Court 808**) and no evidence was produced to establish that the procedural formalities were complied with.

22. Although challenges were laid to rule 58MC and 58Ha but these rules have no application to the petitioner's case and do not impact the petitioner alone

to its detriment. It is thus not required to dilate upon the constitutionality of these rules in these proceedings.

23. In view of the above, it is held that:

i. *The words "excluding units operated by sugar mills or other persons using self-generated electricity" in rule 58H, proviso to rule 58H, rule 58Hb (as amended by SRO 421) of Rules, 2007 are without lawful authority and of no legal effect and are struck down.*

ii. *Clause 3 of Sales Tax General Order No.1 of 2013 dated 03.01.2013 is ultra vires and is struck down, too.*

(SHAHID KARIM)
JUDGE

Announced in open Court on 21.05.2018

Approved for reporting

JUDGE

*

Rafaqat Ali