

Form No: HCJD/C-121
ORDER SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

STR No.77498/2022

Commissioner Inland Versus M/s Rasool Nawaz Sugar
Revenue, Legal-Zone-LTO, Mills Ltd.
Lahore.

S.No. of order/ Proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of parties of counsel, where necessary
-------------------------------	------------------------------	---

26.09.2023 Syed Zain-ul-Abidien Bokhari, Advocate for
the Applicant-department.
Mr. Waseem Ahmad Malik, Advocate
assisted by Ms. Najia Noreen Maitla,
Advocate for respondent-taxpayer.

This Sales Tax Reference Application under
section 47 of the Sales Tax Act, 1990 (**‘Act, of
1990’**) arises out of order dated 21.06.2022,
whereby Appellate Tribunal Inland Revenue,
Lahore Bench, Lahore (**Appellate Tribunal**)
allowed Sales Tax appeal, preferred by the
registered person, and set-aside the orders
concurrently passed by the Commissioner Inland
Revenue (CIR) and CIR (Appeals).

2. Following questions of law, statedly arisen
out of the order of Appellate Tribunal, are
proposed for soliciting an answer thereto,

“(a) *Whether in the facts and circumstances of the
case, the learned ATIR was justified to reply on
the judgment of the ATIR in STA 262/KB/2018
which holds that the provision of section 11(1) of
the Act do not allow recovery and imposition of
penalty and default surcharge alone where
liability on account of principal amount of tax
stands discharged voluntarily prior to initiation
of proceedings under section 11(1) of the Act,*

ignoring the express provisions of law that there is no amnesty from penalty u/s 33 and default surcharge u/s 34 in the proceedings initiated under section 11(1) of the Sales Tax Act, 1990?

- (b) *Whether in the facts and circumstances of the case order passed by learned ATIR is against the ratio settled in the reported judgment cited as 2016 PTD 643 Lahore which holds that irrespective of the fact whether tax has been paid or not, filing of return is mandatory and non-submission of return within due date would amount to commission of an offence and same would hold the registered person liable under the provisions of section 33 of the Sales Tax Act, 1990?"*

3. Learned counsel for applicant department submits that reliance of the Appellate Tribunal on its earlier decision is misplaced, unwarranted, and contrary to the decision made in the case of Commissioner Inland Revenue vs. Madina Cotton Ginners and Oil Mills (2016 PTD 643). Submits that show cause notice was issued under section 11 of Act of 1990 on the allegation of delayed filing of tax returns and delayed payment of tax due and payable, whereby the factum of delay in filing returns and non-payment of tax on due dates was acknowledged, which situation attracts incidence of penalty and default surcharge. Learned counsel has placed reliance on cases reported as Messrs Attock Refinery Limited and others vs. The Collector of Sales Tax and others (2021 PTD 1680), Messrs Punjab Small Industries, Rawalpindi vs. Deputy Collector Adjudication and others (2021 PTD 871), Dhan Fibers Ltd. vs. Central Board of Revenue, Islamabad and others (2006 PTD 2683).

4. Conversely, learned counsel for the taxpayer defended the order and placed reliance on decision handed down by learned Division Bench of Hon'ble Balochistan High Court in STR No.05/2021, titled as The Commissioner Inland Revenue Zone-I, Regional Tax 643 Office, Quetta vs. Messrs Quetta Electric Supply Company Limited, Zarghoon Road, Quetta, decided on 6th June 2022, who precisely relied on paragraphs No.11 and 12 of the decision.

5. Submissions Heard.

6. We have examined the decision referred in the case of Messrs Quetta Electric Supply Company Limited, (supra), and do not, respectfully, subscribe to the interpretation proposed to sub-section (1) of section 11 of Act of 1990, and proviso thereto. There is no cavil that sub-section (1) of section 11, *ibid*, entitles the Officer Inland Revenue, after notice and upon happening of event(s) of default as identified therein, to 'make an order of assessment of tax including imposition of penalty and default surcharge in accordance with section 33 and 34'. Proviso to sub-section (1) of section 11 of Act of 1990 provides an eventuality of abatement of order, if passed, and the notice, provided default is addressed upon payment of

tax along with default surcharge and penalty and filing of return(s) after due date. To distinguish the *ratio* laid, it is appropriate to reproduce paragraphs 11 and 12 of the case of Messrs Quetta Electric Supply Company Limited, (supra), which read as,

“11. In both the above cases the Officer of Inland Revenue shall issue a show-cause notice and impose penalty and default surcharge under sections 33 and 34 of the Act. The Officer can issue show-cause notice if no return is filed or if return is filed but tax payable is not fully paid. Perusal of order-in-original shows that the registered person had already filed return, although after due date, before issuance of show-cause notice. Therefore at the time of issuance of show-cause notice the above two eventualities were nonexistent. Therefore the officer was not justified to issue show-cause as such to impose penalty and default surcharge when the registered person had already filed return and paid tax. At best the Officer could have issued a show-cause if tax paid by the registered person was less than the tax actually payable. Even if show-cause notice is issued in case of said two eventualities then the moment the registered person files return and pay tax as well as penalty and default surcharge then such show-cause notice stands abated as provided in Proviso to subsection (1) of section 11 of the Act. Proviso to subsection (1) of section 11 of the Act provides that where a person required to file a tax return files the return after the due date and pays the amount of tax payable in accordance with the tax return along with default surcharge and penalty, the notice to show-cause and the order of assessment shall abate. It means that even if a registered person falls in any of the aforesaid two eventualities and the Officer issues a show-cause notice or pass an assessment order under subsection (1) of section 11 but thereafter the registered person files return after due date and also pays tax on the basis of such return along with default surcharge and penalty then show-cause notice as well as assessment order under subsection (1) of section 11 shall abate.

12. In the light of above legal and factual aspects of the case it is evident that for imposition of penalty under section 33 and default surcharge under section 34 of the Sales Tax Act, 1990 an Officer of Inland Revenue may invoke provisions of subsection (1) of section 11 and issue show-cause notice and pass an assessment order if the registered person has either failed to file return by due date or having filed return by due date pays an amount which, for

some miscalculation is less than the amount of tax actually payable. Since both the eventualities triggering action under subsection (1) of section 11 of the act were nonexistent hence show-cause notice and subsequent order in original passed by the Officer of Inland Revenue are not sustainable and the learned Tribunal has rightly annulled orders of the Officer of Inland Revenue and the Commissioner (Appeals)."

7. Matter calls for interpretation of sub-section

(1) of section 11 of Act of 1990 and proviso

thereto, which are reproduced hereunder as,

Section 11. "Assessment of Tax & Recovery of Tax not levied or short levied or erroneously refunded] .– (1) Where a person who is required to file a tax return fails to file the return for a tax period by the due date or pays an amount which, for some miscalculation is less than the amount of tax actually payable, an officer of Inland Revenue shall, after a notice to show cause to such person, make an order for assessment of tax, including imposition of penalty and default surcharge in accordance with sections 33 and 34:

Provided that where a person required to file a tax return files the return after the due date and pays the amount of tax payable in accordance with the tax return along with default surcharge and penalty, the notice to show cause and the order of assessment shall abate.

(2)

(3)

[Emphasis Supplied)

8. Omission / inaction on the part of registered

person in filing return by prescribed date or upon

short payment of the tax due, entitles the Officer

of Inland Revenue, subject to notice, to 'make an

order of assessment including imposition of

penalty and default surcharge in accordance

with section 33 and 34'. Proviso to sub-section

(1) of section 11 provides an opportunity to the

registered person to address an event of default, by filing return after the due date and upon payment of tax payable according to the return along with default surcharge and penalty, whereupon show cause notice and order of assessment, if any made, would abate. Provision of law under reference neither contemplates nor absolves the registered person from the consequence of default, triggered upon failing to file return for the tax period by due date or short payment of tax.

In terms of section 11(1) of Act, consequence of incidence of default is a default surcharge and penalty, even if no tax is payable as per the tax return. Default position can only be reversed / addressed by opting for concession prescribed in proviso to sub-section (1) of section 11 of Act, 1990, subject to fulfillment of conditions – upon filing of tax return after due date and making payment of tax along with default surcharge and/or penalty, depending upon the nature of default. Mere filing of delayed return of tax, before issuance of notice, would not be considered an act of compliance, especially when default had triggered, which can be reconciled upon voluntarily meeting the conditions prescribed in proviso to section 11(1)

of Act. It is inconceivable how a default, once accrued, would stand reconciled without fulfilling the requirements provided in proviso. Proviso must be given effect, which does not indicate or refers to incidence of any order of assessment of tax or notice, as condition precedent for claiming default surcharge and penalty. Default situation could only be addressed by invoking assistance of the proviso, upon meeting the conditions prescribed. Creating a novel situation, other than the one provided under the provision of law, tantamount to legislate, through a judicial verdict. This is unwarranted. Assumptions reached and hypothesis drawn cannot alter the scope, effect and consequences provided in sub-section (1) of section 11 of Act of 1990 and proviso thereto. Coupling the necessity of having underlaying tax liability for the purposes of defining the scope of '*order of assessment of tax*' manifests misreading of sub-section (1) of section 11, *ibid*, and otherwise tantamount to undermine the individuality and significance of section 34 of the Act of 1990, which opens with a '*non-obstante*' expression - '*Notwithstanding the provisions of section 11*'. Effect of *non-obstante* status of section 34 of the Act, 1990 was neither

considered nor dilated upon in the case of Messrs Quetta Electric Supply company Limited, (supra). Even if upon filing of return after due date no tax – defined in terms of section 2(34) of Act, 1990 and subject to the context - is payable, still penalty and default surcharge could be ordered and claimed. Restrictive interpretation of the scope of “order of assessment of tax” would nullifies the disciplined compliance envisaged in law and otherwise render sections 33 and 34 of Act, 1990, redundant. This redundancy needs to be avoided upon harmonized reading of applicable provisions. Notably, decision in the case of Messrs Quetta Electric Supply Company Limited, Zarghoon Road, Quetta (supra) has not appreciated earlier decisions made in the cases of Madina Cotton Ginners and Oil Mills (supra), Messrs Attock Refinery Limited and others, (supra).

10. The question at serial (a) is answered in negative. And question at serial (b) is answered in the affirmative. Order of Appellate Tribunal is found legally defective. Matter is remitted to Appellate Tribunal for *de novo* determination. Appeal of the registered person shall be deemed pending and same be decided afresh, after affording opportunity of hearing the parties.

11. Office shall send a copy of this order, under seal of the Court, to learned Appellate Tribunal, in terms of sub-section (5) of section 47 of Sales Tax Act, 1990.

(Muhammad Sajid Mehmood Sethi)
Judge

(Asim Hafeez)
Judge

M.S.Aleem

Approved for reporting.

Judge
Signed on 17.11.2023