

ORDER SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

I.T.R. No. 112167 of 2017

M/s Fatima Sugar Mills Ltd. **Versus** Appellate Tribunal and 3
others

Sr. No. of Order/ Proceeding	Date of Order/ Proceeding	Order with Signature of Judge, and that of parties or counsel, where necessary
	08.10.2024	Mr. Salman Zaheer Khan, learned Advocate for the applicant. Barrister Muhammad Saram Israr, learned Advocate for respondents No. 2 to 4.

Sultan Tanvir Ahmad, J.:-Through this reference-application filed under section 133(1) of the Income Tax Ordinance, 2001 (the ‘**Ordinance**’) the applicant has requested to answer the following questions arising out of order dated 09.11.2017 passed by the learned Appellate Tribunal Inland Revenue, Lahore (the “**Tribunal**”):-

- “A. Whether the Appellate Tribunal has erred in law to hold that in terms of Section 2(47) of the Sales Tax Act, 1990 (the “ST Act”) read with Rule 4 Chapter 1 of the Sales Tax Rules 2006 (the “ST Rules”) a person could only be treated as wholesaler if he has been authorized to act as an agent for sale?
- B. Whether, based on the facts and circumstances of the case, the Appellate Tribunal has erred in

law to hold that unregistered persons/buyers under the ST Act must be treated as retailers and cannot be treated as wholesalers?”

2. Mr. Salman Zaheer Khan, learned counsel for the applicant has submitted that the definition of the term "*wholesaler*" in section 2(47) of the Sales Tax Act, 1990 (the '**Act**') shows that the respondent-department reached to an incorrect conclusion by reading only portion of the definition that suits the respondents' viewpoint, while deliberately ignoring the earlier part of the same definition; that the recipients to whom the applicant sold sugar squarely fall within the definition of "*wholesaler*". It is further submitted that the definition of "*wholesaler*" is intended to be a non-exhaustive and inclusive definition, with each portion of the said definition being separate, distinct and disjunctive. He has added that it has been ignored that at the relevant time i.e. fiscal year 2014-2015 Rule 4 of Chapter I of the Sales Tax Rules 2006 (the '**Rules**') provided a separate definition of "*retailer*" for the purposes of registration and de-registration, therefore, non-registration could not

automatically convert a person, involved in bulk sale and purchase, within the definition of “*retailer*”.

3. Barrister Muhammad Saram Israr, learned advocate for respondents No. 2 to 4 controverted the stance of the applicant and the interpretation of above provisions made by the learned counsel of the applicant.

4. Heard.

5. The applicant, was served with show-cause-notice dated 01.12.2015 (the ‘*notice*’) on the basis of the then newly inserted sections i.e. 236G and 236H of the *Ordinance* through Finance Act 2013 being a manufacturer of sugar on account of failure to collect tax on sales made to wholesalers / retailers at the rate specified therein. The *notice* culminated into order dated 28.12.2015 (the ‘*order-in-original*’) passed by respondent No. 3, whereby, while relying upon section 2(47) of the *Act* and rule 4 of the *Rules*, the said respondent has reached to the conclusion that sales made to unregistered persons are to be treated as supply to retailer and this required collection of tax under section 236H of the *Ordinance* @ 0.5% of the gross amount of sales. The

appeal to the learned *Tribunal* was filed, which was decided on 09.11.2017 almost with the same conclusion.

6. Both sides, in course of arguments, focused on the definition clauses of the *Act* in the relevant fiscal year that reads as under:-

*2(47) "wholesaler" includes a dealer and means **any person who carries on, whether regularly or otherwise, the business of buying and selling goods by wholesale or of supplying or distributing goods, directly or indirectly, by wholesale for cash or deferred payment or for commission or other valuable consideration or stores such goods belonging to others as an agent for the purpose of sale; and includes a person supplying taxable goods to a person who deducts income tax at source under the Income Tax Ordinance, 2001 (XLIX of 2001); and***

*2(28) "retailer" means **a person supplying goods to general public for the purpose of consumption.***

Provided that any person, who combines the business of import and retail or manufacture or production with retail, shall notify and advertise wholesale prices and retail prices separately, and declare the address of retail outlets.

(Emphasis Supplied)

7. Various recipients (the '**recipients**') of supplies of the applicant, are treated as "**retailer**" on account of failure to register as "**wholesaler**". The

requirement to register as “*wholesaler*” or “*retailer*” depending upon their particular activity was separately given in Chapter I of the *Rules*. We would like to reproduce the relevant rule applicable during the material time period:-

"4. Requirement of registration. *The following persons engaged in making of taxable supplies in Pakistan including zero-rated supplies in the course or furtherance of any table activity carried on by them, if not already registered, are required to be registered in the manner specified in this chapter, namely:-*

(a) xxx

(b) *a retailer whose value of supplies, in any period during the last twelve months exceeds five million rupees:*

(c) xxx

(d) *a wholesaler (including dealer) and distributor*

(e) xxx

(f) xxx

8. The learned two forums below relied on the above provisions while reaching to the conclusion that the *recipients* are to be considered as “*retailers*” and applicant was required to collect 0.5% tax under section 236H of the *Ordinance*. This Court in case titled “*Olympia Industries (Pvt.) Ltd., Lahore versus Assistant Collector, Central Excise & Sales Tax, Sheikhpura Division, Lahore and 2 others*” (2002 PTD 776) while interpreting word

“*wholesale*” reached to the conclusion that the same has specific commercial meaning of buying goods and selling them in large quantities to traders who then sell the goods in smaller quantities. Even otherwise, a plain reading of above reproduced provisions of law reflects that legislature envisaged “*wholesalers*” and “*retailers*” as two distinct persons depending on their characteristics of business and quantity of the commodities they deal with as well as the category of the recipients of such supplies. “*Retailer*” as per the then section 2(28) of the *Act* was a person supplying goods to general public for consumption purposes or end-consumers. The proviso to the same further clarified the position even if someone combines the business of retail with some other nature of business.

9. The consequences, if any person fails to register himself as “*wholesaler*” or “*retailer*”, as the case may be, were given in the *Ordinance* at the relevant time, which are also ignored by the assessing officer. Supplies to a person having “*wholesaler*” status when failed to register had result of collection at higher rate of 0.2% as provided in Division XIV, Pt. IV of Schedule I of the *Ordinance*.

Treating a person as “*retailer*” merely on account of non-registration as “*wholesaler*”, without first assuming an exercise of ascertaining his actual status is unsafe. The questions reproduced above are, therefore, answered in **affirmative** and in favour of the applicant.

10. At this juncture, learned counsel for revenue has stated that the case may be remanded to assessing officer to ascertain the actual position or status of the *recipients*. This is not objected by learned counsel for the applicant. The orders assailed before us are, therefore, *set-aside* and the case is remanded to the assessing officer in terms of the above developed consensus. A copy of this order be sent to the learned *Tribunal* as required under section 133(8) of the *Ordinance*.

(**ABID AZIZ SHEIKH**)
JUDGE

(**SULTAN TANVIR AHMAD**)
JUDGE

Approved for reporting

JUDGE

JUDGE