JUDGMENT SHEET

ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

Sales Tax Reference No.04/2017
Ghazi Barotha Contractors v. ATIR, Islamabad & another

Applicant by:	Mr. Nauman Rafique, Advocate.
Respondents by:	Syed Ishfaq Hussain Naqvi, Advocate for FBR.

and

Writ Petition No.3253/2017
WAPDA v. ATIR & 04 others

Petitioner by:	Nemo.
Respondents by:	Syed Ishfaq Hussain Naqvi, Advocate for Respondent No.3 (FBR) Mr. Nauman Rafique, Advocate for Respondent No.4
Date of Hearing:	10.03.2021

MOHSIN AKHTAR KAYANI, J: Through this single judgment, we intend to decide the captioned sales tax reference and writ petition having similar questions of law and facts.

2. Succinctly, Ghazi Barotha Contractors (***applicant***) had been awarded a contract on 19.12.1995 by the Water and Power Development Authority (***WAPDA***) for construction of barrage, ancillary works and power channel of Ghazi Barotha Hydro Power Project (***project***). In the meanwhile, a show cause notice was issued to applicant on 17.09.2003 alleging that applicant was not engaged in making taxable supplies. The applicant replied the show cause notice, whereafter the case was adjudicated upon by the Collector (Adjudication), Collectorate of Customs, Rawalpindi through Order-in-Original, dated 26.10.2004, whereby the show cause notice was

upheld in favour of revenue authorities. Appeal filed thereto by the applicant was partially allowed by the Appellate Tribunal vide judgment dated 17.05.2006 but, the demand of sales tax on use of manufactured goods / products has been upheld. Both the parties feeling aggrieved thereof had approached the Hon'ble Lahore High Court, Rawalpindi Bench by filing respective tax references. During pendency of said references, WAPDA had filed W.P. No.2825/2006 before the said Hon'ble High Court, which was allowed and judgment of the Appellate Tribunal, dated 17.05.2006, was set-aside and the matter was remanded for fresh decision. Subsequently, on transfer of jurisdiction of Sales Tax & Excise to the Appellate Tribunal Inland Revenue, the WAPDA filed an appeal before the ATIR assailing the Order-in-Original, dated 26.10.2014, but, the Order-in-Original has been maintained vide impugned order dated 15.06.2016. Hence, the captioned sales tax reference and writ petition.

3. Learned counsel for Ghazi Barotha Contractors (applicant) contended that the show cause notice issued to applicant did not disclose any violation of Section 3 of the Sales Tax Act, 1990, on the basis of which Order-in-Original has been passed in a slipshod manner, per se, the case would be covered under Section 4 read with 5th Schedule of the Act entailing no short payment and attracting no provision of Section 36 of the Act; that despite the Order-in-Original being violative of settled principles and precedents, the learned ATIR has failed to apply its judicial mind, rather upheld the Order-in-Original in a mechanical fashion.

4. Conversely, learned counsel for FBR contended that WAPDA cannot become a party to a dispute cropped up between the applicant and revenue authorities as the WAPDA was not a party in earlier round of appeal; that applicant was supplier or service provider, as such, WAPDA cannot come in aid of supplier or service provider, therefore, WAPDA has no locus standi in this matter; that applicant has failed to rebut the assertion of the revenue authorities wherein the working in the audit report was challenged or figures were confronted so long as the liability with reference to self manufacturing / excavation / consumption of construction materials is concerned, as such, excavation or allied activity was undertaken before it becomes part of immovable property, therefore, sales tax is leviable on such taxable activity, per se, the ATIR has rightly appreciated the facts and circumstances of the case and upheld the Order-in-Original.

5. Arguments heard, record perused.

6. Perusal of record reveals that the instant reference revolves around question raised in show cause notice, dated 17.09.2003, issued by Collector Adjudication on the basis of special audit of the applicant. The precise issue referred in the show cause notice is as under:

> *iv) M/S Ghazi Barotha Contractors is not engaged in making taxable supplies in respect of which sales tax is leviable on their supplies. M/S Ghazi Barotha Contractors is producing taxable goods/products such as RCC Pipes, Crush Sand and Riprap. No Sales tax has been paid on the production and in house self-supply/consumption of such goods/products. The issue of taxability has finally been decided by the Supreme Court of Pakistan in the case of Messers Sheikhoo Sugar Mills vide judgment reported as 2001 PTD 2097. So far as the supply of above goods/products for the manufacturing of taxable goods is concerned, there is no chargeability of sales tax in terms of*

> *Serial No. 43 of the 6th Schedule of the Act, which lays down the partially manufactured goods are exempt if used within the same factory to manufacture goods on which sales tax is leviable on the supply. However, exemption is not available to goods/products used in manufacturing process of exempt goods. As M/S Ghazi Barotha Contractors is not engaged in taxable activity, therefore, whole production and in-house self-supply/consumption of RCC pipes, crush Sand and Riprap are taxable. Thus, they have been contravened section 3, 6 & 26 of the Act. Value of goods /products produced and in-house self-consumed amounts to Rs. 1,750,314,023 on which sales tax of Rs. 262,547,103/- is recoverable along with additional tax and penalty.*

7. The said issue has been maintained against the applicant by all forums primarily on the ground that the applicant is, though in contract, providing an immovable property at the end, which is not taxable but, the consumption of goods / products used in the completion of process or manufacturing of the taxable goods is subject to sales tax.

8. While going through the order of the Appellate Tribunal Inland Revenue, Islamabad, the following questions have been framed vide order dated 30.01.2020:-

i. *Whether having admitted that the applicant was not engaged in taxable activity, the adjudication authority lacked jurisdiction to pass the impugned order in Original?*
ii. *Whether mere manufacture of taxable goods for in-house consumption by a civil works contractor, not liable under law to be registered as a manufacturer thereof, is alone sufficient for charging Sales Tax under the provisions of section 3 of the Sales Tax Act, 1990?*
iii. *Whether on the facts and in the circumstances of the case, the learned Tribunal was justified at law to hold that in-house consumption of goods in question amounted to taxable activity despite the admission of Sales Tax Department that the Appellate was not engaged in making a taxable supply in furtherance of a taxable activity?*

9. In order to resolve the issues, it has been observed from the record as well as from the arguments advanced by both the sides that the applicant is a joint venture of four companies created through joint

venture agreement, dated 25.04.1995, set up with exclusive objective of execution of construction contract awarded to applicant / contractors by WAPDA relating to construction of Ghazi Barotha Canal of 52 Kilometers. On 19.12.1996, two contracts relating to barrage, ancillary work and power channel of the project were awarded by the WAPDA to the applicant, who completed their work. There is no denial to proposition that final project in shape of immovable property has been concluded by the applicant, which does not fall within the ambit of goods for the purpose of sales tax but, the respondent department has objected that for all the self consumed / excavated goods in the construction of 52 km canal for the project comprising of RRC Pipes, crush, sand and rip rap, no sales tax has been paid by the applicant.

10. While going through the question raised, it is important to produce the definition of taxable activity defined in Section 2(35) of the Sales Tax Act, 1990 before amendment through the Finance Act, 2003, which is as under:-

> *"Taxable activity" means any activity which is carried on by any person whether or not for a pecuniary profit, and involves in whole or in part, the supply of goods to any other person, whether for any consideration or otherwise, and includes any activity carried on in the form of a business, trade or manufacture."*

11. The above referred definition clearly spells out that no sales tax is chargeable on the construction of immovable property in shape of 52 km Canal, hence the only issue left for our determination is regarding non payment of sales tax on the in-house supply/consumption of partially manufactured goods, per se, the applicant has taken the stance that it has

supplied the immovable property to the WAPDA, which is not taxable or outside the scope of the Sales Tax Act, 1990, especially when the manufactured/produced/self-consumed/excavated goods become part of the canal, which is permanently fastened with earth, constitute an immovable property, hence no sales tax could be levied.

12. We have gone through the arguments advanced by both the parties, however while dealing with the primary issue as to whether sales tax is to be charged on the intermediary taxes and supplies qua the manufacturing or preparation of a final product being an immovable property is the key question before this Court. Admittedly, immovable property is not subject to sales tax under the Sales Tax Act, 1990 as it does not fall within the definition of good, per se, the goods includes all kinds of movable property, which has to be considered in the light of definition referred in the General Clauses Act, 1897, which means the property of every description, except immovable property, whereas immovable property includes lands, benefit arising out of land and things attached to earth and permanently fastened anything to earth. In this case, the final product is the constructed 52 km long water canal for water channeling, therefore, it is beyond the scope of Sales Tax Act, 1990. However, certain goods used in the construction of said 52 km canal are considered to be goods for taxable supply as such goods were used in the manufacturing or production of the final product. In this regard, we are guided by Section 2(35) of the Sales Tax Act, 1990, which deals with taxable activity, in which *supply of goods to any other person is a key consideration* and same has been carried out in form of business, trade or manufacture, therefore, while going through the

definition of terms "manufacture" or "produce" in terms of Section 2(16) of the Sales Tax Act, 1990, which reads that *any process in which an article singly or in combination with other articles, materials, components, is either converted into another distinct article or product or is so changed, transformed or reshaped that it becomes capable of being put to use differently or distinctly and includes any process incidental or ancillary to the completion of a manufactured product*. Such definition left nothing in favour of the applicant as the applicant had used crush, sand and rip rap in the manufacturing of immovable property, which fall within the definition of taxable supplies referred in Section 2(41) of the Sales Tax Act, 1990 and taxable activity at the same time in terms of Section 2(35) of the Sales Tax Act, 1990, hence, the raw material produced is liable to sales tax, even if used for in-house consumption and similarly, intermediary activity is also subjected to tax, therefore, the arguments advanced by the applicant that final activity, if is exempted, the interim activity is not taxable, is not legally justiciable. In this regard, this Court is guided by the principle settled in case reported as ***2001 PTD 2097 SC (Sheikhoo Sugar Mills Ltd. vs. Government of Pakistan, etc.)***,

> *"25. We have examined section 7 of the Act carefully which appears to be beneficial provision of law in nature providing a facility to a registered person to adjust input tax at the time of making payment of output sales tax. But if no input tax is paid on intermediary produce without any adjustment the tax will be paid in terms of section 3 of the Act on its value which will be, calculated as per the provisions of section 2(46)(a)(i) or section 2(46)(c) of the Act. As such the registered person will not be burdened with the liability of double taxation."*

13. This Court has also considered the concept of intermediary products used in the manufacturing of finished goods, despite the fact that the final product is exempted from the Sales Tax Act, 1990, even then the intermediary products are taxable. This aspect has also been settled by the apex Court in case reported as ***2007 PTD 2410 SC (Collector of Sales and Central Excise Lahore vs. WAPDA, etc.)***, whereby it was held that the use and consumption of intermediary goods could be treated as sales by legal fiction so as to bring such goods under the levy of sales tax where the final product was not subject to sales tax when sold and that the use or consumption of intermediary goods in such circumstances have a rational nexus with sale. This principle has been drawn on the baseline settled in the case of *Sheikhoo Sugar Mills Ltd. supra*, whereby the intermediary product (bagasse) produced during the preparation of sugar by the sugar mills, when it was used as a fuel in the process of manufacturing sugar, the same would be declared liable to sales tax when it is not sold to any other person. Hence, this Court considering all these aspects feel no hesitation to declare that once taxable goods have been supplied by a person to itself would fall within the definition of taxable supply. The argument advanced by the applicant is also not tenable in the light of Section 2(35) of the Sales Tax Act, 1990, which shows that taxable supplies not include sale by one person to another but also sales, manufacture and production of any good, hence by relying upon all these provisions of Sales Tax Act, 1990, it appears that tax on the sales of goods does not exclude the same on self consumption of such goods used in the manufacturing process. Reliance is placed upon ***1998 PTD 3856 Lahore (M/s Ashraf Sugar Mills vs. Central Board of Revenue, etc.)***.

14. It is consistent view of the superior Courts that the use and consumption of intermediary goods could be treated as sales by legal fiction so as to bring such goods under the levy of sales tax where the final product was not subject to sales tax. Reliance is placed upon ***1999 SCMR 526 (Commissioner of Sales Tax vs. Hunza Central Asian Textile and Woolen Mills, etc.)***. The said view has also been rendered by Hon'ble Lahore High Court in case reported as ***2009 PTD 316 (Fouji Kabirwala Power Company v. Collector of Customs and Sales Tax)***.

15. In view of the above detailed discussion, the question formulated and suggested by the applicant from the order of the ITAT has been considered at length and this Court is of the view that the findings given by the Appellate Tribunal are in accordance with law and even based on factual controversy qua the products used in the self consumption, per se, in such scenario no question of law is made out, which requires any answer. Reliance is placed upon ***2006 PTD 2669 Lahore (Commissioner of Income Tax Companies Zone-I Lahore vs. Khalifa Syed Saifullah)***.

16. Taking into account the connected W.P. No.3253/2017, this Court has observed that the WAPDA has challenged all the actions and proceedings by the sales tax department, including the order-in-original and appellate order, primarily on the ground that construction of barrage and power channel, immovable property, is not subject to tax under the Sales Tax Act, 1990, as such, all the same supplies of goods were directed for construction of immovable property, which is not taxable activity in terms of the Sales Tax Act, 1990, whereby it has been suggested that Item No.49 of the Federal Legislative List, 4th Schedule of the Constitution of the Islamic Republic of Pakistan, 1973 restricts the taxing powers of the

federation to the sales and purchase of goods only, per se, the supply of services were expressly excluded from the purview of taxation by the federation. This aspect has been considered by this Court while relying upon ***1998 PTD 3856 Lahore (M/s Ashraf Sugar Mills vs. Central Board of Revenue)***, whereby it was held that definition of word "***supply***" is given in the Sales Tax Act, 1990, the fact remains that under Section 3 of the Act, it is the taxable supply, which is being taxed and same has separately been defined in Section 2(41) of the Sales Tax Act, 1990. The tax on sales of goods is clearly covered by Item No.49 of the Federal Legislative List and when read with Item No.51, it cannot be contended that by levying tax on manufacturing of goods, whether for self consumption or not, the legislature has out stepped its limit.

17. Though the above legal position has clearly been settled but, the respondent has raised question of maintainability of instant writ petition mainly on the ground that WAPDA has no locus standi to invoke constitutional jurisdiction being not an aggrieved person as no right was denied to it. It is admitted position that neither any right of WAPDA has been infringed nor the WAPDA can be called an aggrieved person, especially when the applicant has already raised similar question in the tax regime by invoking the remedies provided under the Sales Tax Act, 1990, as such, in this regard, this Court has been guided by the principles referred in ***2016 PLC (CS) 676 Lahore (Pakistan Medical Association v. Pakistan through Secretary, Ministry of National Health Services, Regulations and Coordination)***. Even otherwise, it is settled proposition of law that what cannot be done directly, the same cannot be permitted to be done indirectly. Reliance is placed upon ***2004 CLD 373 Lahore (Lt. Gen. (R)***

Shah Rafi Alam v. Lahore Race Club) and ***2016 PTD 1750 Sindh (Laguardia Logistics (Pvt.) Ltd. v. Federation of Pakistan through Customs Collectorate Preventive)***.

18. From the above referred legal precedents, we are of the view that the term aggrieved person means a person who has been deprived of his benefit, which he might receive and some other decision has been made or is a person who has suffered a legal grievance against a decision qua his right, which is not the case in hand to the extent of WAPDA. Hence, the writ petition filed by the WAPDA is not maintainable.

19. In view of above detailed reasons, the question raised in the instant reference is hereby answered in ***NEGATIVE*** as the intermediary products used in manufacturing and self consumption by the applicant has rightly been considered as taxable supply. Accordingly, the captioned writ petition is hereby ***DISMISSED*** being not maintainable.

(FIAZ AHMAD ANJUM JANDRAN)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 31.03.2021.

JUDGE

JUDGE

Khalid Z.