

**JUDGMENT SHEET**

**IN THE ISLAMABAD HIGH COURT,**  
**ISLAMABAD**

**Writ Petition No. 3537 of 2013**

**M/s Oil and Gas Development Company Ltd.**

**Vs.**

**Commissioner Inland Revenue, etc**

**Petitioner by : Mr. Hussain Abuzar Pirzada,**  
**Advocate.**

**Respondents by : Sheikh Anwar ul Haq, Advocate.**

**Date of hearing : 01.06.2020.**

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**LUBNA SALEEM PERVEZ, J.**

Present writ petition has been filed by the petitioner under Article 199 of the Constitution of Islamic Republic of Pakistan seeking following direction from this Court:-

*“It is, therefore, respectfully prayed that this Honorable Court may kindly direct Respondent No. 1 to allow the benefit of S.R.O. No. 494 (I)/2013 dated June 10, 2013, to the Petitioner and to withdraw the recovery notices with the order to refund to the petitioner the amount of Rs. 74,190,040 being 50% of the default surcharge and penalty, already paid under duress by the Petitioner and without prejudice to the outcome of the proceeding before the Honorable Islamabad High Court.”.*

2. Facts of the case are that the petitioner is a public limited company engaged in the business of Exploration and Production of Oil and Gas. Proceedings were initiated against the petitioner company for recovery of short payment of sales tax along with default surcharge u/s 34 and penalty u/s 33 of the Sales Tax Act, 1990, and Order-in-Original No. 17/105, dated 04.02.2011, was passed whereby Rs. 1,631,469,011/- was determined as recoverable on account of sales tax for the period from July, 2008 to December, 2010. Thereafter, Sales Tax Order-in-Original No. 04/110, dated 12.09.2011, issued on 12.09.2011, was passed and sales tax demand of Rs. 161,807,109/- was determined for the period from January, 2011 to March, 2011. The Order-in-Original No. 17/105, dated 04.02.2011, was finally upheld by the Hon'ble Supreme Court and the amount adjudged vide Order-in-Original was also paid

by the petitioner. It has been contended by the petitioner that the appeal against the Order-in-Original No. 04/2011 dated 12.09.2011, was also turned down by the Appellate Tribunal against which sales tax reference u/s 47 of Sales Tax Act 1990, was filed before the Hon'ble High Court. Meanwhile, notice u/s 48 (1)(b) read with Rule 71 (2)(b) of the Sales Tax Rules, 2006, dated 25.02.2013 was issued to the Petitioner for recovery of default surcharge and penalty amounting to Rs. 148,380,080/- imposed while passing the above cited Order-in-Originals on the short payment of sales tax . It has been contended by the petitioner that Rs. 74,190,040 being 50% of the total default surcharge and penalty was paid, vide pay order No. 8102184 dated 18.03.2013. In the meantime the Government of Pakistan issued notification bearing SRO No. 494(I)/2013, dated 10.06.2013 (hereinafter referred to as SRO 494), to grant exemption from payment of default surcharge and penalty, subject to the condition of payment of principal amount of sales tax paid on or before 30<sup>th</sup> June, 2013. The petitioner, therefore, vide letter dated 27.06.2013, requested the respondent to extend the benefit of amnesty scheme announced vide above said S.R.O and waive the default surcharge and penalty imposed vide above cited two Order-in-Originals and also refund the amount of Rs. 74,190,040/- paid under duress by the petitioner company on account of default surcharge and penalty. However, Respondent No. 1, vide letter dated 10.06.2013, rejected the petitioner's request for the reason that effect of the amnesty allowed vide S.R.O. dated 10.06.2013, is prospective and not retrospective in nature; hence present petition.

3. Learned counsel for the petitioner submitted that the Petitioner is entitled to the benefits of SRO 494 as it had paid the entire principal amount determined vide Order-in-Originals Nos.17/105 and 04/110, dated 04.02.2011 & 13.08.2011, respectively, well before 30.06.2013, which fact has not been denied by the respondent; that the SRO 494, is beneficial notification issued with the intention to end the litigation pending before

various courts; that contention of the respondent that the effect of the SRO 494, is prospective and not retrospective in nature is contrary to the concept of interpretation of statutes as it is well established that beneficial legislation is always applied retrospectively. Learned counsel in support of his contentions placed reliance on the judgment of Hon'ble Lahore High Court *Shiekh Wahid ud Din Industries Vs. ACST (2006 PTD 336)*.

4. Learned counsel for Respondent No. 1 has objected to the maintainability of the present petition as not being competently filed and submitted that no document to prove the *locus standi* of the signatory has been appended with the petition and placed reliance on the judgments reported as PLD 1979 SC 550 and PLD 1997 Karachi 62. Learned counsel submitted that the issue of short payment of sales tax determined against the petitioner vide Order-in-Original No. 17/105, dated 04.02.2011, was upheld up to the apex court and in respect of Order-in-Original No. 14/110 dated 13.08.2011, he contended that the petitioner has not assailed the judgment of Hon'ble High Court before the Hon'ble Supreme Court of Pakistan thus the charge of short payment of sales tax has been confirmed and, therefore, the benefit of SRO 494 is not extendable to the petitioner. Learned counsel submitted that the judgment of Hon'ble Lahore High Court relied upon by the petitioner is distinguishable as it relates to a different notification bearing S.R.O. No. 575(I)/1998, dated 12.06.1998. Learned counsel contended that SRO 494 is a conditional notification whereby vide para 2 of the said S.R.O. it has been clearly mentioned that *benefits of S.R.O. shall not be available to cases of fraudulent refunds, drawback or any case involving tax or duty fraud or where prosecution proceedings have been initiated*, and submitted that since the petitioner has been prosecuted for recovery of short payment of sales tax, vide Order-in-Originals thus petitioner's case is outside the scope of SRO 494.

5. Arguments of the learned counsel for the parties have been heard and the record appended with the petition has been examined.

6. Regarding preliminary objection, it has been observed that the petitioner is a statutory organization established vide Oil & Gas Development Ordinance, 1961 which provides for the Board of Directors under Section 5 and Chairman under Section 6. Further section 26 of the Ordinance 1961 provides for general or special order in writing for delegation of administrative and financial powers. Learned counsel for the petitioner furnished the copy of letter/resolution delegating the powers of instituting legal proceedings before the Court. The preliminary objection is, therefore, rejected.

7. Present petition involves a short controversy that whether the benefits of amnesty issued for allowing exemption from payment of default surcharge and penalty under the Sales Tax Act, 1990, introduced vide SRO 494 is extendable to the petitioner when admittedly the principal amount of sales tax has already been paid before 30.06.2013. It would be advantageous to reproduce the contents of the said S.R.O which are as under:-

“GOVERNMENT OF PAKISTAN  
MINISTRY OF FINANCE, ECONOMIC AFFAIRS,  
STATISTICS AND REVENUE  
(REVENUE DIVISION)

Islamabad, The 10<sup>th</sup> June, 2013.

NOTIFICATION.  
(CUSTOMS, SALES TAX, FEDERAL EXCISE AND INCOME TAX)

**S.R.O.494(I)/2013.**-In exercise of the powers conferred by section 34A of the Sales Tax Act, 1990, sub-section (4) of section 16 of the Federal Excise Act, 2005, section 202A of the Customs Act, 1969 (IV of 1969) and section 183 of the Income Tax Ordinance, 2001 (XLIX of 2001), the Federal Government is pleased to exempt the whole amount of default surcharge, penalty and other surcharge payable by a person against whom an amount of sales tax, federal excise duty, customs duty or income tax (including withholding tax) is outstanding on account of any audit observation, audit report, show cause notice, adjudication or assessment order, or who has failed to pay any amount of sales tax, federal excise duty, customs duty and income tax (including withholding tax) or claimed inadmissible input tax credit, adjustment, refund, drawback or rebate due to any reason, subject to the condition that the whole outstanding principal amount of sales tax, federal excise duty, customs duty or income tax (including withholding tax), as the case may be, is paid by the 30<sup>th</sup> June, 2013.

2. The benefit of this Notification shall not be available to cases of fraudulent refunds, drawback or any case involving tax or duty fraud or where prosecution proceedings have been initiated.

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**[C.NO. 1/ 47-STB/201 3]**

**(Mohammad Raza Baqir)**  
Additional Secretary”.

Perusal of the S.R.O. reveals that it has been issued in exercise of powers conferred under relevant sections of Sales Tax Act, 1990, Income Tax Ordinance, 2001, Custom Tax Act, 1969, and Federal Excise Act, 2005, whereby, the Federal Government waived the whole amount of default surcharge and penalty and other surcharge payable by a person on the condition of payment of outstanding principal amount due as Sales Tax, Federal Excise Duty, Custom Duty or Income Tax by 30<sup>th</sup> June, 2013. Para No. 2, of the notification provides exclusion of the cases of fraudulent refund, drawback or any case involving tax or duty fraud or where prosecution proceedings have been initiated. The notification has been issued under the delegated legislation *prima facie* with the purpose to allow amnesty from charge of default surcharge and penalty if the principle amount determined under any federal revenue law is paid before 30.06.2013. The contention of the Respondent that SRO 494 has no retrospective application in view of the fact that the payment of principle amount has been paid by the Petitioner before the issuance of SRO, has no force, as the SRO do not provide any such condition of limiting the dates of payment of tax between issuance of SRO and 30.06.2013 for availing amnesty. Admittedly the due amount of sales tax determined through Order-in-Originals has been paid before the cutoff date announced in the notification, therefore, the petitioner cannot be deprived from availing the benefit of amnesty on the pretext of payment of principle amount of sales tax by the Petitioner before issuance of SRO 494. I am in agreement with the argument of the Learned Counsel for the Petitioner that it is beneficial notification issued to provide benefits of waiver of default surcharge and penalty on the solitary condition of payment of principle amount of tax/duty on or before 30.06.2013 and under settled principles of interpretation, the beneficial notification has always a retrospective application.

7. Learned Counsel for the Respondent has also contended that the case of the petitioner falls under the exclusion provided under para 2 of the SRO 494 as the short payment of sales tax demand has been determined through Order-in-Originals which are prosecution proceedings in nature, therefore the case of the petitioner is out of the ambit of SRO 494. This contention of the Learned Counsel for Respondent has also no force as the Order-in-Original is a result of adjudication proceedings for assessment and determination of tax, whereas, prosecution is a criminal proceeding in nature which is separate and independent judicial proceeding for determination and conviction of offences for violation of laws and such proceeding in tax laws is initiated after adjudication and determination of tax. Hon'ble Lahore High Court has explained the word "**adjudicate**" and "**adjudication**" in the following cases as under:-

➤ **M/s Prime Chemicals V/s Government Of Pakistan (2004 P T D 1388)**

*To **adjudicate**, necessarily implies settling, a matter. This is synonymous with the word 'adjudge'. The adjudicatory process may be before an administrative authority or before a Court of law. Even if it is before an administrative agency, the rights are to be adjudged after notice to parties affording opportunity of hearing and appraisal of record. The factual position and the finding are to be recorded specifically.*

➤ **Shahzad Hussain v/s Judge Family Court, Lahore (2011 C L C 820)**

*The concept of **adjudication** has also been elaborated by the superior Courts by holding that it refers to judicial determination of a matter in controversy as distinguished from determination by a Court on the administrative side.*

The term "**prosecution**" has been defined by the Hon'ble Sindh High Court as under:-

➤ **Ismail Abdul Rahman v. Mohammad Sadiq and 3 others, (PLD 1990 Karachi 286)**

*'**Prosecution** or '**prosecute**' in the special sense of law means, according to Webster 's Dictionary: "(a) to follow, pursue, to follow to the end, to seek to obtain; to enforce, or the like, by legal process, to prosecute a right or a claim in a Court of law; (b): to pursue to institute legal proceedings for redress or punishment; to proceed against judicially; esp., to accuse of some crime or breach of law, or to pursue for redress or punishment of a crime or violation of law, in due legal form - before a legal tribunal; the carrying on of a judicial proceeding on behalf of a complaining party, the institution and continuance of a criminal suit involving the process of exhibiting formal charges against an offender before a legal tribunal and pursuing them to find judgment on behalf of the State or Government'.*

*According to Wharton's Law Lexicon by A.S. Oppe, 14th edition (1976 Reprint) page 810, 'prosecution' means "a proceeding either by way of indictment or information, in the Criminal Courts, in order to put an*

offender upon his trial".

*The word 'prosecution' occurring in Article 13 would mean an initiation or starting of proceedings of criminal nature before a Court of Law or a Judicial Tribunal in accordance with the procedure prescribed in the Statute which creates the offences and regulates the procedure.*

8. Thus the “adjudication” and “prosecution” are two separate, distinct and independent proceedings and the term prosecution used in SRO 494 cannot be equated with adjudication/determination of shortfall or sales tax recoverable from petitioner to exclude its case from the scope of the SRO 494.

9. Learned Counsel for the Petitioner, has relied on the judgment of Hon’ble Lahore High Court passed in the case titled **Shiekh Wahid ud Din Industries Vs. ACST (2006 PTD 336)**, wherein, the SRO No. 575 (I)/98 dated 12.06.1998 was issued to grant exemption from additional tax under section 34 and penalties under section 33 of the Sales Tax Act, 1990, on the condition of payment of the principal amount of tax due by the date mentioned therein. The controversy was resolved in favour of the taxpayer and the relevant findings are also reproduced as under:-

*“5. After hearing the learned counsel for the parties we are not persuaded to agree that the amnesty S.R.O. No. 575(I)/98; dated 12-6-1998 is not applicable to the case of the present appellant. It needs to be noted that the amnesty contemplated in that S.R.O. as per paras. 2 and 3 thereof was also available to cases of taxpayers pending in appeals. If the interpretation of that S.R.O. as made by the Revenue authorities as well as the Tribunal is accepted then it is likely to create an anomalous situation. It is that whereas the persons who had already paid the amount due will be deprived of the amnesty while those who will pay that amount after the issuance of S.R.O. 575(I)/98 on 12-6-1998 will be spared of the additional tax and penalty. In other words a person who had already paid the due tax to the public exchequer will be burdened with additional tax and penalty while the one who does so after issuance of that notification and having withheld the amount of the tax due from him in the meanwhile will be rewarded by allowing exemption from A penalty and levy of additional tax. This could never be the intention of any superior or subordinate legislation. A person placed in similar factual situation cannot be discriminated against merely for the reason that he has first to be a continuous defaulter on a particular date of grant of amnesty in order to avail the same. The appellant having paid the fixed tax before the issuance of the said S.R.O. but before the issuance of show-cause notice was clearly entitled to the benefit of the amnesty contemplated in the S.R.O. To hold otherwise would be negation of justice fair equal protection of law.*

*6. It needs to be brought home that the amnesty granting legislation both superior as well as subordinate needs to be construed liberally so that it does not either trap an unwary taxpayer or else otherwise succeeds in taking away with the other hand while giving it by the one. The petitioner having paid the fixed tax due from him is as much entitled to the amnesty contemplated in the said S.R.O. as any other registered person/manufacture who pays the fixed tax amount after issuance of the S.R.O. To hold otherwise would result in the situation as noted above. ”.*

10. The above said judgment [***Shiekh Wahid ud Din Industries Vs. ACST (2006 PTD 336)***] relied upon by the learned counsel for the Petitioner squarely applies to the issue agitated through present petition. In view of the foregoing discussion and the judgment passed in Sheikh Wahid ud Din Industries' case cited supra, impugned letter dated 10.07.2013 is set aside. It is held that the petitioner is entitled to the benefits of amnesty announced vide S.R.O. 494(I)/2013, dated 10.06.2013. So far as the refund of Rs. 74,190,040/- paid by the petitioner on account default surcharge and penalty is concerned, I am of the view that the Sales Tax Act 1990 and the Rules made thereunder provide separate proceedings for such refund. The petitioner is at liberty to apply for refund of the amount in accordance with the prescribed procedure under the Sales Tax Act, 1990 read with Sales Tax Rules 2006.

Instant petition is **allowed** in the above terms.

**(LUBNA SALEEM PERVEZ)**  
**JUDGE**

***Announced in the Open Court on \_\_\_\_\_.***

**JUDGE**

**APPROVED FOR REPORTING.**  
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***Uploaded By: Engr. Umer Rasheed Dar***