JUDGMENT

Messrs SAADULLAH KHAN AND BROTHERS (SKB)

Versus

APPELLATE TRIBUNAL OF INLAND REVENUE and others

S.T.R. No.14 of 2012

ATHAR MINALLAH. J.---The instant reference relates to questions of law arising out of order dated 15-12-2011, passed by the learned Appellate Tribunal Inland Revenue, Islamabad Bench, Islamabad (hereinafter referred to as the "Tribunal").

2. Briefly stated, the facts of the case are that the applicant is, inter alia engaged in the business of construction of roads. A Show-Cause Notice, dated 28.10.1998, was served on the applicant. It was alleged that the applicant had evaded sales tax amounting to Rs.3.079 million for the period dated 01-7-1996 to 28-9-1998. It was further alleged that the applicant had not obtained the registration under the Sales Tax Act, 1990 (hereinafter referred to as the "Act"). The activity for which the recovery was demanded was in respect of the alleged supply of crushed stones from the Plant of the applicant situated at Taxila. The Show-Cause Notice was adjudicated vide Order-in-Original No. 73 of 1998, dated 22.12.1998 (hereinafter referred to as the "Order-in-Original No. 73/ 1998"). The applicant assailed Order-in-Original No. 73/1998 before the Tribunal. The Tribunal, vide its order dated 20-6-2002, remanded the case to the Adjudicating Authority for de novo proceedings. The Adjudicating Authority, vide Order-in-Original No. 03/2004, dated 03.3.2004, (hereinafter referred to as "Order-in-Original No. 03/2004") vacated the Show-Cause Notice, after giving the parties an opportunity of hearing. The Department assailed the Order-in-Original No. 03/2004 before the Tribunal, mainly on the ground that it had been condemned unheard. The Tribunal, vide its order dated 29-1-2008, accepting the appeal, remanded the case to the Adjudicating Authority. The Adjudicating Authority passed Order-in-Original No. 10/2008, dated 25.6.2008 (hereinafter referred to as "Order-in-Original No. 10/2008") confirming the amount of sales tax demanded in the Show-Cause Notice. The applicant preferred an appeal before the respondent No. 4, who upheld the order of the Adjudicating Authority. The applicant, thereafter, assailed the order of the respondent No. 4 before the learned Tribunal. The learned Tribunal through order dated 15-12-2011 dismissed the appeal of the applicant. The questions formulated in the instant reference under Section 47 of the Act are as follows:

a) Whether or not the respondents are justified in law in passing impugned order ignoring documentary evidences of Lease Agreement dated 19-3-1999 showing installation of crushing plant subsequent in time and Contract with CDA
dated 26.9.1997 and construction of road during Oct, 97 to Jan, 98 that too is later in time of alleged time of supply?

b) Whether or not the learned respondents are justified in passing the impugned order mere

on presumption of supply when the prosecution brought no evidence of supply on record but just relied mere on hypothetical figures of presumed supply?

c) Whether or not the respondents are justified in law embodied in section 3 and subsection (3) of section 3 of the Sales Tax Act, 1990 in placing burden of proof of purchases upon the applicant who is the purchaser of crushed stone but not the supplier?

3. In other words, the questions for our consideration and opinion are whether in the case of proceedings under the Sales Tax Ordinance, 1990 (hereinafter referred to as the "Act of 1990") the Department is burdened with the onus to prove the allegations, or whether the statute envisages the concept of 'Reverse Onus'; whether the learned Tribunal failed to advert to the question as to who has to discharge the burden of proof and to what extent; and whether the learned Tribunal failed to advert as to whether a levy, charge and payment of Sales Tax would be attracted in the case of a person who is admittedly not registered, nor has been compulsorily registered by the Department; and lastly, whether the findings of fact are perverse and the material record was not taken into consideration.

4. Before giving our opinion, it would be pertinent to examine the provisions of the Act of 1990. Section 3 of the Act of 1990 is the charging section and specifies the scope of the tax known as the Sales Tax. The charge, levy and payment is on "taxable supplies" made by a "registered person" in the course or furtherance of any "taxable activity" carried on by such a registered person. It is also important for the purposes of the said charging section to ascertain the value of taxable supply, as it forms the basis for the calculation of the tax. In the context of the provisions of Section 3, there are, inter alia, three fundamental factors, which would attract the levy, charge or payment of the Sales Tax; firstly, there must be a "taxable supply"; secondly, the 'value of taxable supply' must be determined, and thirdly that the taxable supply must have been made in the course or furtherance of any taxable activity carried out by a registered person. Taxable Supply, Value, and Taxable Activity have been defined in Sections 2(41), (46) and (35) respectively. Taxable supply means 'a supply of taxable goods ---other than the goods exempt under section 13---". Section 2(39) defines 'taxable goods' as meaning all goods other than those which have been exempt under section 13. Section 2(12) defines 'goods' as including every kind of movable property other than actionable claims, money, stocks, shares and securities. Manufacturer or producer as defined in section 2(17) is confined to a person who engages exclusively or not, in the production and manufacture of goods. Supply, taxable supply or time of supply are also confined to 'goods' as defined in section 2(12). The object and purpose of the enactment of the Act of 1990 is declared in the preamble as consolidation and amendment of the law relating to the levy of tax on the sale, importation, exportation, production, manufacture and consumption of 'goods'.

5. It is obvious from the combined reading of the above provisions that the most crucial

expression is 'goods'. The charging section 3 may, therefore, be explained as, the sales tax is charged, levied and paid by a person i.e. who is an importer, manufacturer, wholesaler, dealer, distributer or retailer, registered or liable to be registered [Section 2(25)] under the Act of 1990, and makes a supply i.e. a sale or other transfer of the right to dispose of the movable goods other than those exempt under section 13, as an owner or transacting or dealing with such goods in the manner as provided under section 2(33), in the course or furtherance of any taxable activity [Section 2(35)]. As a corollary, a person engaged in the construction of a building, tower, a highway or a road, will remain outside the scope of section 3 of the Act of 1990. In other words, being engaged in the business of immovable property or project will not attract the chargeability or levy of sales tax, since such a person will neither be a manufacturer nor producer in the context of the Act of 1990, nor could be construed as making a taxable supply of movable goods. However, if such a person simultaneously is independently making a taxable supply of movable goods in furtherance or in the course of a taxable activity, for example manufacturing or producing cement and supplying the same by putting it to private or business use in the construction of buildings or roads, then, to the extent of the supply of cement, the chargeability under section 3 will be attracted, provided it is not exempted under section 13. Moreover, if a person engaged in the construction of roads or an immovable tower receives a supply of movable goods, not exempt under section 13, from another person, then the ingredients of the charging section will not be satisfied. In a nutshell, the business or activity of erecting a tower, or the construction of an immovable building per se will not fall within the ambit of section 3 of the Act of 1990.

6. Registration under the Act of 1990 is another critical pre requisite for the purposes of section 3. The charge, levy and payment of sales tax is on a person making the taxable supply who ought to be a 'registered person'. Registered person is defined under section 2(25) as a person 'who is registered or liable to be registered' under the Act of 1990. The proviso disentitles a person from the 'benefits' under the Act, if liable to be registered but is not registered. However, an unregistered person is not exempt or in any manner absolved from the charge, levy and payment of the tax. An unregistered person, therefore, will not be entitled to the benefit of claiming input or deducting input tax under section 7, but is nevertheless liable to the charge, levy and payment of the tax if otherwise the ingredients of section 3 are fulfilled. Chapter III of the Act of 1990 deals with registration. At the time of the enactment, there were eight sections. However, pursuant to amendments made from time to time, at present there are two sections i.e. 14 and 21 which are enforced while others have been omitted. The requirements which makes a person liable to registration are provided under section 14. The provisions, as they stand today, were inserted vide Finance Act, 2004. Pursuant to powers vested under the relevant statutes, inter alia, under section 50 of the Act of 1990, the Federal Board of Revenue has made the Sales Tax Rules, 2006 (hereinafter referred to as the "Rules") Chapter 1 of the Rules relates to registration, compulsory registration and de-registration. Rule 6 empowers the authorised officer to compulsorily register a person if satisfied that the latter is liable for the same. This power of compulsory registration was

hitherto provided under section 19 of the Act of 1990, which was omitted vide the Finance Act, 2004. Thus the statutory provision makes it a mandatory obligation for an authorized officer to register a person liable for registration but who has not sought the same voluntarily. A heavy burden lies on the department to show why a person was not registered compulsorily if found liable to be registered.

7. Before examining the question of burden of proof, it would be beneficial to discuss the rules of interpretation applied in the case of fiscal statutes. It is settled law that while interpreting fiscal statutes the Court looks at what is clearly said; there is no room for any intendment; nor is there any equity about a tax; there is no presumption as to tax; nothing was to be read in or implied and one could only look fairly at the language used. These principles were stated by Rowlett J, regarding interpretation of fiscal statues in the case of Cape Brandy Syndicate v. Inland Revenue Commissioner, (1921)1 KB 64. In the words of Lord Cairns in Charles James Partington v. Attorney General (1869) LR 4 HL 100 '--if the court seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be'. The taxing statute has to be interpreted strictly and as a corollary any defect or omission cannot be inferred. The powers vesting in taxation officers to impose penalties and initiate criminal proceedings under the Act of 1990, e.g. section 33, default surcharge under section 34 or arrest and power under section 37-A, are akin to penal provisions and thus to be strictly construed. As a settled law the parameters provided in the taxing statutes determines the chargeability and levy of a tax.

8. The aforementioned principles have been affirmed, enunciated and followed by the Supreme Court of Pakistan in cases of Messrs Mirpurkhas Sugar Mills Limited v. Government of Sindh through Chief Secretary, Sindh and 2 others [1993 SCMR 920], Muhammad Younas v. Central Board of Revenue, Government of Pakistan and others [PLD 1964 SC 113], The Commissioner of Income Tax, Karachi v. Mst. Khatija Begum, Partner, Shakil Impex, Karachi [PLD 1965 SC 472], Messrs Hirjina and Co. (Pakistan) Ltd. v. Commissioner of Sales Tax Central, Karachi [1971 SCMR 128], Aslam Industries Ltd. Khanpur v. Pakistan Edible Corporation of Pakistan and others [1993 SCMR 683], Collector of Customs (preventive) and 2 others v. Muhammad Mehfooz [PLD 1991 SC 630], Commissioner of Income Tax (Central) Karachi v. Messrs Fakir Cotton Ginning and Pressing Industries Ltd., Gambat and another [PLD 1991 SC 280], Government of West Pakistan and others v. Messrs Jabees Ltd. [PLD 1991 SC 870], The Commissioner of Agricultural Income Tax East Bangal v. B.W.M. Abdur Rehman, Manager, Taki Bara Taraf Wards Estate [1973 SCMR 445], Messrs Mehran Associates Limited v. The Commissioner of Income-Tax, Karachi [1993 SCMR 274], Collector of Customs (Appraisement) Karachi and others v. Messrs Abdul Majeed Khan and others [1977 SCMR 371], Messrs Star Textile Ltd. and 5 others v. Government of Sindh and 3 others [2002 SCMR 356], Government of Pakistan and others v. Messrs Hashwani Hotel Ltd. [PLD 1990 SC 68], Federation of Pakistan and

others v. Haji Muhammad Sadiq and others along with seven other civil appeals [PLD 2007 SC 133], X.E.N. Shahpur Division v. Collector Sales Tax (Appeals) Collectorate of Customs Federal Excise and Sales Tax, Faisalabad and 2 others [2008 PTD SC 1973], Government of Pakistan and others v. Messrs Hashwani Hotel Ltd. [PLD 1990 SC 68] and A & B Food Industries Limited v. Commissioner of Income-Tax/Sales, Karachi [1992 SCMR 663]. These principles for interpretation of fiscal statutes are also a guide to the degree of burden of proof expected to be discharged by the department or the tax payer if the latter is alleged to have failed to make payment of the tax on the taxable supply of goods.

9. The next question which needs our consideration is, who is to discharge the burden of establishing whether a person is liable to pay any tax or charge and the same has not been levied or made or has been short levied; or in other words, who is to discharge the burden of proof for sales tax not charged, levied or paid? In simple words, burden of proof refers to proving disputed facts or whoever asserts a fact has a duty to establish that it is 'highly probable to be true'. A distinction is drawn in civil and criminal cases. In the case of the former the existence of facts asserted have to be established through convincing evidence by 'preponderance of evidence' while in the case of the latter it is the duty of the prosecution to prove beyond reasonable doubt the alleged crime and its elements. It is pertinent to mention that in some exceptional cases the legislature, in its wisdom, has provided for what is known as 'reverse onus' by placing the burden on the person against whom a fact has been asserted. Illustration of such statutory provisions are section 187 of the Customs Act, 1969 or Section 14 of the National Accountability Bureau Ordinance, 1999. The concept of reverse onus i.e. placing the burden on the accused runs contrary to the established principle of presumption of innocence. It is for this reason that courts lean in favour of interpreting or reading down such provisions in an effort to guard the fundamental principle of presumption of innocence. In the Act of 1990 there is no provision in para materia with section 187 of the Customs Act, 1969 nor did the legislature intend to reverse the onus of proof. The proceedings before the adjudicating authorities or the statutory appellate forums are quasi judicial in nature, akin to a civil action or proceedings in contradistinction to criminal proceedings. When the department asserts a fact e.g. alleges that a person is liable to make the payment of tax and the same has not been levied or charged, the former is burdened with a statutory duty to persuade the adjudicating forum by persuasion through 'preponderance of the evidence' that the facts asserted are highly probable to be true, rather than being unreliable, false or doubtful. The degree and quality of evidence required for such persuasion renders presumptions or conjectures as alien. Preponderance of the evidence inevitably has to be based on clear and convincing evidence. Lord Denning in Miller v. Minister Pension (1947) 2 All ER 372 has described the standard as 'more probable than not'. It is, therefore, also known as establishing facts on the standards of 'balance of probabilities'. There is, therefore, a heavy duty on the department to persuade the adjudicating forums that the facts asserted against a tax payer are highly probable to be true rather than being doubtful, as the benefit of such doubt will lean in favour of the taxpayer.

In the context of the Act of 1990, the burden is on the department to establish the allegations against a tax payer by 'preponderance of the evidence' or also known as 'balance of probabilities'. The adjudicating forum must be persuaded on the basis of the evidence produced by the person making the assertion that the existence of the asserted facts are highly probable to a prudent mind.

10. We will now examine the facts and circumstances of the present case in the light of the above principles and law. In the instant case the contravention report by the department was prepared on 28-9-1998. The said contravention report claims to be based on a visit of the concerned officials to the alleged plant of the applicant in 1996. Various statements have been made by the department before the respective forums and duly recorded in the respective orders. It is pertinent to refer to the position taken by and on behalf of the department before the Adjudicating Officer, as recorded in Order-in-Original No. 03/2004, and the same is reproduced as follows:

"The original written statement of M/S. SKB recorded on the spot at the time of visit by the undersigned along with statements of some other units and copies of correspondence made with association of stone crusher were sent to the higher authorities as documentary evidence at the time of hindrance made by the unit owners in the year 1996. Lateron after the completion of registration of un-registered units, the local sales tax offices at Islamabad, Rawalpindi, Hassan Abdal, Chakwal and Jehlum were ordered to be windup as per boards verbal instructions. The record of all these offices along with furniture and vehicles were deposited in the Sales Tax House, Islamabad in October, 1998. However, comments in this case have been made on 21.01.2003. Now after passing more then 5 years, the copy of requisite statement of manager of the plant of Messrs SKB is impossible to be traced from such old record. It is also added that sale tax house of Rawalpindi/ Islamabad zone has been shifted twice i.e. from 1-8/4, Islamabad to F-8 Markaz, Islamabad and there from to Liaqat Bagh Rawalpindi. So production of such statement with the comments to prove the truthfulness is beyond the control."

11. The various orders passed after the Order-in-Original No. 03/ 2004 fails to disclose or refer to any evidence, documentary or otherwise, which may have been produced by the department to at least make out a prima facie case against the applicant. Except for Order-in-Original 03/2004, all subsequent orders take the promise that it was for the applicant to have established the allegations as untrue by producing evidence or documents. This is also reflected in the short operative paragraph of the impugned order. It also appears to be odd that the concerned official, who claims to have visited the plant of the applicant in 1996, prepared the contravention report on 28-9-1998 i.e. after a lapse of two years. On the other hand, it has remained a consistent stance of the applicant that it had commenced supply from its plant after it was awarded the contract by the Capital Development Authority (hereinafter referred to as the "CDA"). The applicant has placed documents on record to suggest that it was not carrying out any activity prior to 03.9.1998, and the forums below brushed them aside. The orders passed by various forums following the Order-in-

Original No. 03/2004, dated 30-3-2004 appear to have placed the entire onus on the applicant, while accepting the version of the concerned official as gospel truth, despite the fact that, admittedly, he could not produce the documents claimed to have been prepared at the time of the first visit in 1996. There is no explanation for the inordinate delay of two years in making the contravention report. The statement of the official of the department recorded by the adjudicating officer in Order-in-Original 03/2004 is, prima facie, based on presumptions and conjectures. The perusal of the impugned order reflects that the learned Tribunal, without considering the record or discussing the reasons for its satisfaction with the findings of the forums below, firstly placed the onus on the applicant to establish the allegations in the negative, inter alia, to establish having not been engaged in supply since 1996 and, secondly, observed that the orders passed by the respective authorities below had been passed on sound footings, and were justified and well reasoned. There is also no explanation as to why the officer who visited the alleged site in 1996 did not register the applicant if he was of the opinion that the former was liable to registration. Moreover, the alleged liability appears to have been calculated on a hypothetical basis without being supported by any convincing evidence. None of these factors, as reflected in the impugned order, seem to have been considered by the learned Tribunal. We are afraid that this tantamounts to refusal to exercise jurisdiction vested in the Tribunal under section 46 of the Act of 1990 read with sections 131 and 132 of the Income Tax Ordinance, 2001 (hereinafter referred to as the "Ordinance").

12. It is noted that under subsection (2) of section 46 of the Act of 1990, the Tribunal has to decide the appeals as per procedure laid down under sections 131 and 132 of the 'Ordinance'. The decision or determination of the Tribunal on the questions of fact attains finality, as it is the last forum in this regard. It is settled law that failure on part of the Tribunal to advert to questions raised before it, or to take the relevant matters into consideration which renders the findings of fact as perverse, or non reading or misreading of evidence or material record raise questions of law in the context of section 47 of the Act of 1990. It is the statutory duty of the Tribunal to decide the appeals after taking into consideration the relevant facts, to weigh the reasons for and against and thereafter pass a speaking order/judgment. The Tribunal, therefore, carries a heavy burden of discharging its functions in a fair, just and transparent manner. The levy, charge or payment of a tax or duty imposes a financial burden and, therefore, the role of the Tribunal as the last statutory forum assumes greater importance. The Tribunal in the instant case failed in giving any findings of facts nor has it adverted to the relevant considerations.

13. In the light of the above, we answer the three questions of law formulated by the applicant in the negative. It is not for this Court to give findings on questions of fact, as the provisions of section 46 of the Act of 1990 does not vest this power or jurisdiction in
the Court. It would, therefore, be appropriate to remand the case to the Tribunal for deciding the appeal afresh which shall be deemed to be pending. This Court expects that the learned Tribunal, after giving an opportunity of hearing to the parties, shall pass an order keeping in view the

principles and law as discussed herein above. It is further expected that the appeal shall be decided expeditiously, preferably within sixty days.

14. The office is directed to send a copy of this judgment under the seal of this Court to the learned Tribunal as required under section 47(5) of the Sales Tax Act, 1990.