

## JUDGMENT

**MOHSIN AKHTAR KAYANI, J---**Through this Intra Court Appeal the appellant has assailed the judgment dated 27.12.2013 passed by the learned Single Bench of this Court in W.P. No.247/13 whereby the learned Single Judge in chambers has dismissed the writ petition of the appellant.

2. Brief facts of the instant case are that the appellant filed a Writ Petition No.247/13 against Government of Pakistan, Chief Commissioner Inland Revenue, Islamabad and OGDCL on the grounds that the appellant is a Company incorporated under the Companies Ordinance, 1984 which is an Independent Power Producer in Pakistan and the appellant while dealing with the power generation entered into an agreement with Government of Pakistan and its Corporations and Companies including respondent No.3. The appellant purchases low BTU gas from respondent No.3, generates electricity and sales electricity to WAPDA for onward transmission and sale to the consumers. The agreement between appellant and respondent No.3 was executed on 02.11.1995. At the same time the appellant had also entered into a power purchase agreement dated 03.11.1995 with the WAPDA. Appellant is mainly aggrieved by the order passed on 30th June 2012 by the FBR, as respondent No.3/OGDCL had applied to respondent No.2/Chief Commissioner Inland Revenue, LTU, Islamabad to condone the delay in exercise of his powers under section 74 of the Act to issue debit notes to the appellant under section 9 of the Act read with Rule 22 (4) of the Sales Tax Rules, 2006 for the period April 2011 to December 2011.

3. The letter dated 29th June, 2012 issued by respondent No.3 for condonation of delay is mainly on the ground that Supreme Court of Pakistan had decided C.P.L.A. No.993 of 2011, dated 21st July, 2011, whereupon, the respondent No.3 had filed a review petition against the said order before the Apex Court but in order to seek some time applied to the Commissioner Inland Revenue to safeguard the OGDCL's interest in passing on the incidence of sales tax to final consumer on the plea that OGDCL wants to charge and deposit Rs.477,709,87/- sales tax on two specific heads for the said period and seeks time for condonation without prejudice to the fate of review petition. In the said letter respondent No.3 also stated that the period covered by the subject debit/credit note exceeds the time limits provided for issuance of debit/credit note to Uch Power (Pvt.) Limited/the appellant, therefore, OGDCL requested for grant of time for condonation under section 74 of Sales Tax Act, 1990. In response to letter dated 29th June 2012, the Chief Commissioner Inland Revenue passed the order dated 30th June 2012 whereby 30 days time was given from the date of the order in favour of OGDCL Islamabad. After the issuance of condonation order dated 30th June 2012 by respondent No.2 in favour of respondent No.3 the present appellant filed a representation dated 04th September 2012 to the Chairman FBR for the withdrawal of condonation letter dated 30th June 2012 however, FBR vide letter dated 10.12.2012 turned down the representation of the appellant while observing that the Board has considered the entire matter and it has been concluded that the condonation order issued by the Board is in order. Appellant feeling aggrieved by the said order assailed the orders dated 30th June 2012 and 16.12.2012 issued by the FBR, in the writ petition before the learned single Judge in Chamber. The said writ petition was dismissed through the impugned order dated 27.12.2013.

4. Learned counsel for the appellant has argued that the Commissioner Inland Revenue/FBR has no authority to condone the time limit in the debit/credit note as it directly affects the appellant. The learned counsel for appellant further contended that no opportunity has been granted to them before issuance of the impugned order as the said sales tax relates to the appellant in which there is no fault of the appellant. The appellant further argued that OGDCL has assailed the initial proceedings before the Tax Authorities and finally in the Supreme Court of Pakistan, the Hon'ble Apex Court has decided against the OGDCL, therefore, OGDCL applied before the Tax Authorities seeking condonation which was granted to them only for 30 days but in this regard respondent No.3/OGDCL is again charging the tax which has already been paid and in other case the said tax has not been claimed by the OGDCL from the appellant.

5. Conversely, learned counsel for respondent No.2 argued the Supreme Court of Pakistan through its order dated 21st July, 2011 passed in C. P. No.993/2011 "Messrs OGDCL v.

Commissioner Inland Revenue, Islamabad, etc.", has decided that the OGDCL company has been receiving money from Messrs UCH (Pvt.) Limited for supply of gas, the charges for the supply of gas were divided into various components heads i.e., monthly demand charges, monthly commodities charges, monthly transportation demand charges and monthly transportation commodities charges, but all these heads actually form part of sale consideration. The division of sale consideration into various parts by giving each part a different name would not make any difference and same was subject to payment of sale tax. While hearing the said case the Apex Court has dismissed the plea of respondent No.3 and thereafter respondent No.3 has applied for condonation in terms of section 74 of the Sales Tax Act, 1990 for condonation of delay which has been granted for 30 days time by the Competent Authority, therefore, the appellant is not aggrieved by the orders in question rather they are pre-empting future actions under garb of instant writ petition which has rightly been dismissed by learned Judge in Chamber through the impugned order.

6. Arguments heard, record perused.

7. From the perusal of record it has been observed that the appellant Company is a power generation company which entered into agreement with respondent No.3 for gas supply under agreement dated 2.11.1995 and at the same time the appellant has also entered into a power purchase agreement dated 23.11.1995 with the WAPDA as the appellant purchases low BTU gas from respondent No.3, generates electricity and sales electricity to WAPDA for onward transmission and sale to the consumers. The dispute raised by the appellant started with the request by the OGDCL to the Commissioner Inland Revenue under section 74 for condonation of time limit. Respondent No.3 filed a C.P. No.993/2011 before Hon'ble Supreme Court of Pakistan which was decided on 21.07.2011 by the Hon'ble Supreme Court of Pakistan wherein, the precise case of the OGDCL is that Messrs Uch Power (Pvt.) Limited made the payment to the OGDCL for the supply of gas under four heads namely monthly demand charges, monthly commodities charges, monthly transportation demand charges and monthly transportation commodities charges in lieu of supplying the gas whereby OGDCL was served with show cause notice dated 29th June, 2009 by Addl. Collector Sales Tax alleging that during the course of audit company it has transpired that instead of paying royalty to the Government on heads named above, the OGDCL company continued to pay sales tax only on commodities charges, therefore, a show cause notice has been issued which was replied by the company and finally penalty and default charges have been imposed upon the company by tax authorities. The said order was challenged in appeal before the Commissioner Inland Revenue (appeals), the same was dismissed. The company preferred the appeal against the said order before the Inland Revenue Appellate Tribunal which met the same fate and finally a reference under section 47 of Sales Tax Act, 1990 was filed before the Islamabad High Court which was also dismissed by the Hon'ble Division Bench of Islamabad High Court, therefore, the respondent No.3 has filed a civil petition before the Hon'ble Supreme Court of Pakistan which was dismissed with the following observations:--

"6. It is to be noted that the petitioner company had been receiving money from Messrs Uch Power Limited for the supply of gas. The charges for the supply of gas were divided into various component/heads i.e. Monthly Demand Charges, Monthly Commodity Charges, Monthly Transportation Demand Charges and Monthly Transportation Commodity Charges, but all these heads actually form part of the sale consideration. The division of sale consideration into various parts by giving each part a different name would not make any difference and the same was subject to the payment of sales tax.

7. With regard to the submission made by the learned counsel for the petitioner that DGRRA was not authorized to conduct the audit of the petitioner company and the demand of sales tax on the basis of audit conducted by DGRRA was illegal; it is to be noted that although the audit was conducted by DGRRA but it was conducted under the instructions of Ministry of Petroleum and Natural Resources, therefore, objection so raised has no force.

8. In view of the facts and circumstances of the case we are of the view that the learned counsel for the petitioner has failed to make out any case for making interference in the

impugned judgment of the High Court. Thus the petition is dismissed and leave declined. There is no order as to costs."

Through the above mentioned order of Apex Court it has been held that the OGDCL is responsible to pay the Tax on all the heads and all four heads are taxable under the law as held by the Apex Court. Respondent No.3 in compliance of said order of the Apex Court has submitted a request for condonation of time limit under section 74 for issuance of debt/credit notes under section 9 of the Sales Tax Act, 1990 vide application dated 29.06.2012 with the following request:--

2. Although OGDCL has filed a Review Petition before the Supreme Court of Pakistan however in view of the earlier decision of Supreme Court of Pakistan in Sales Tax C.P.L.A No.993/2011 dated July 21, 2011, and also to safeguard OGDCL's interest in passing on the incidence of sales tax onto the "final consumer, OGDCL wants to charge and deposit Rs.477,709,87 sales tax on above-mention last two fixed charges for the period April 2011 to December 2011, without prejudice to our review petition at honourable Supreme Court of Pakistan.

3. Since the period covered by the subject Debit/Credit Note exceeds the time limit provided for issuance of Debit/Credit Note to Uch Power (Private) Limited NTN 0657166-2 under rule 22(4) of the Sales Tax Rules, 2006, therefore, we request your good self to kindly grant us time condonation under section 74 of the Sales Tax Act, 1990 for issuance of Debit/Credit Note under section 9 Sales Tax Act, 1996."

The representation was entertained by Federal Board of Revenue (FBR) and same was allowed with the following order:

**"GOVERNMENT OF PAKISTAN**

**(REVENUE DIVISION)**

**FEDERAL BOARD OF REVENUE**

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C.No.2(123)Ex/2012-93047-R

Islamabad, the 30th June, 2012

To: The Chief Commissioner Inland Revenue,  
Large Taxpayer Unit,  
Islamabad

**Subject: REQUEST FOR CONDONATION OF TIME LIMIT UNDER SECTION 74 FOR ISSUANCE OF CREDIT/DEBIT NOTES UNDER SECTION 9 OF THE SALES TAX ACT, 1990.**

I am directed to refer to the above subject and to say that in exercise of the powers conferred under section 74 of the Sales Tax Act, 1990, the competent authority is pleased to condone the time limit for issuance of debit/credit notes in respect of supply of natural gas by Messrs Oil and Gas Development Company Limited to Messrs Uch Power ("Private) Limited, for 30 days from the date of this order in favour of Messrs OGDCL Islamabad, if otherwise in order.

2. Permission in the light of aforesaid Condonation shall not be treated as a right to any input adjustment/refund which has to be determined by the field formations after pre-refund audit/scrutiny of the return/claim in accordance with the relevant provisions of the Sales Tax Act, 1990 and rules made thereunder and instructions of the Board issued from time to time.

Sd-

(Dr. Muhammad Sarmad Qureshi)

Secretary (IR Exemptions)

Ph: # 051-9203993

Copy to:-

1. Mr. Shaukat Ali, Chief Accountant (Sales), Finance and Accounts Department, OGDCL, Islamabad.
2. Messrs Uch Power (Private) Limited."

After issuance of letter dated 30.06.2012 only 30 days time was granted/condoned to the OGDCL. Appellant filed a representation against the condonation order dated 30.06.2012 before the Chairman FBR vide application dated 04.11.2012 in which they had specifically requested for the withdrawal of the said condonation, said representation was decided by the FBR vide order dated 10.12.2012 whereby the FBR/respondent No.2 held that the Board has considered the requests of the appellant and held that the condonation order issued by the Board is in order. After issuance of the said order the appellant feeling aggrieved filed writ petition on the ground that if the condonation has been granted to respondent No.3 they will issue debit/credit note to the appellant in which they will charge the sale tax whereas it is default of respondent No.3 which has not charged sales tax on two heads initially and finally when the matter has been decided by the Apex Court they are issuing the debit/credit note to the Uch power (Pvt.) Limited/appellant and they themselves have sought the condonation. In this regard the main plea of the appellant is that they have not been given due hearing while granting the condonation of delay by the FBR Government of Pakistan to the OGDCL.

8. From the perusal of agreement between the OGDCL and Uch Power (Private) Limited dated 02.11.1995 it transpires that clause 1.46 relates to observing the Laws of Pakistan including federal, provincial and local laws of the Pakistan as well as all orders, rules, regulations, statutory revisionary orders, executive orders, decrees, policies.

"1.46 "Law of Pakistan" -- The Federal, provincial and local laws of Pakistan, including without limitation, all orders, rules, regulations, statutory revisionary orders, executive orders, decrees, policies, judicial decisions, notifications or other similar directives made pursuant thereto, as such laws, orders, rules, regulations, decrees, Policies, judicial decisions and notifications or other similar directives may be amended from time to time."

Hence, from the above mentioned provisions of the said agreement it is mandatory for the appellant to follow the law in letter and spirit as and when held by the Government or by Superior Courts of Pakistan and finally when the Supreme Court of Pakistan has held that four heads referred in the said heads are taxable and OGDCL has to charge the said tax from Uch Power (Pvt.) Limited, hence it is the responsibility of OGDCL to claim the said taxes from Uch Power (Pvt.) Limited, therefore, the same has rightly been applied, whereas clauses 12.1 and 12.2 read as under:--

**"12.1 Allocation of Responsibility.**

- (a) OGDC shall have the responsibility to pay all royalties and all taxes on its income.
- (b) Subject to Section 12.1(a) above, the Company shall have the responsibility to pay all other lawfully imposed taxes, charges, fees and excise duty levied in respect of the Gas which is purchased by the Company under this Agreement.

**12.2 Withholding Requirements.**

(a) Payments by the Company to OGDC may be subject to such withholding tax as may be applicable under the Income Tax Ordinance of 1979 (XXXI of 1979), as amended from time to time. If the Company is required to make such withholding from an invoice amount which would otherwise be due pursuant to Article 8 and Article 9, the Company shall provide to OGDC a written notification of such withholding by the Due Date for payment of such invoice.

(b) Excise duty and other taxes as specified in section 12.1(b) levied now or in the future on Gas delivered by OGDC under this Agreement may be subject to withholding by OGDC and shall be determined and remitted by OGDC to the concerned government agency in accordance with the prevailing rules OGDC shall recover such excise duty and other taxes in the following manner:

(i) OGDC shall invoice the Company for the amount of excise duty and other taxes in accordance the provisions of section 9.2.

(ii) The Company shall pay such invoiced amounts in accordance with the provisions of Section 9.3."

Whereas clause 9.2 of the agreement deals with the invoice which is reproduced as under:--

"9. 2 Invoices. Based upon the meter readings taken pursuant to Article 6 Gas pricing determined in accordance with Exhibit "B" hereto and the Gas quantities determined in accordance with the provisions of Exhibit "D" hereto, OGDC shall, on or before the twentieth (20th) day of each Month after the first delivery of Gas required hereunder, deliver to the Company an invoice which shall include (a) the actual quantities of Gas delivered during the preceding Month, (b) the amount owed by the Company for service under this Agreement during such preceding Month, (c) any lawfully imposed excise duty or other taxes levied on Gas purchased by the Company which are paid by OGDC and subject to recovery by OGDC from the Company pursuant to section 12.1(b) upon submission of calculations in reasonable detail supporting the quantities of Gas delivered and the amount owed, and (d) certification by an authorized officer of OGDC. OGDC agrees to furnish a copy of such invoice to up to one (1) party designated by the Company concurrently with the furnishing of the invoice to the Company."

From the plain reading of the above mentioned clause it has been settled that OGDC will recover all the amounts of taxes, excise duties from the company, through an invoice under the laws of Pakistan and they are responsible to pay all these amounts, however, if there is any dispute among the parties regarding the invoice of payment or anything under the said agreement they can resolve the matter in terms of Article 18 of Dispute Resolution mechanism in which the parties can initially resolve the matter by their meeting in terms of clause 18.1 and thereafter the matter shall be referred to Mediation by Expert and finally the Arbitration under clause 18.3. The Article 18.1 is reproduced as under:--

"18.1 Resolution by Parties.

(a) In the event that a Dispute arises, the Parties shall attempt in good faith to settle such Dispute by mutual discussions within thirty (30) Days after the date that the disputing Party gives written notice of the Dispute to the non-disputing Party. During such mutual discussions and any resolution procedure prescribed pursuant to this Article 18, the Parties shall faithfully continue to perform their respective obligations under this Agreement.

(b) In the event that a Dispute is not resolved in accordance with Section 18.1(a) within the time period set forth therein, either party may (but shall not be compelled to) refer the Dispute to the chief executive officer or chief operating officer of the Company and OGDC (or another authorized director or officer designated by notice to the Company or OGDC in writing) for further consideration and attempted resolution within fifteen (15) Days after

the Dispute has been referred to such individuals (or such longer period as the Parties may agree)."

From the above mentioned provisions of Article 18 it is clear that all the issues can be resolved through an arbitration mechanism, therefore, any other remedy is not available under the law.

9. In view of above referred discussion we have gone through the order passed by learned single Judge in chamber whereby, learned single Judge in chamber has categorically held that the question as to whether the appellant company is required to pay the sales tax for the defaulted period or not, is already subject matter of the arbitration proceedings, therefore, when the matter is already subject to arbitration proceedings if initiated by the appellant then, the writ is not competent. Even the appellant cannot exercise two remedies at the same time and in last from the perusal of order passed on 30.06.2012 whereby OGDCL has been granted 30 days time for issuance of debit/credit notes in respect of supply of natural gas to Uch Power (Pvt.) Limited, the said 30 days time has already been elapsed and the debt/credit notes have been issued to the appellant and if the appellant is aggrieved by the said debit/credit notes they can avail the remedy provided under clause 18 of the agreement executed between the appellant and respondent No.3, therefore, learned single Judge in chamber has rightly passed the impugned order. The instant appeal is not maintainable and is hereby dismissed.

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