Form No: HCJD/C

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

Sales Tax Reference No. 07 of 2017

Islamabad Club, Islamabad through its Secretary

Versus

Appellate Tribunal Inland Revenue, Islamabad Branch, Islamabad and 2 others

Applicant 's by : **Mr. Wasim Abid, Advocate.**

Respondent's by : **Mr. Adnan Haider Randhawa Advocate.**

Date of Hearing : **30.01.2019.**

AAMER FAROOQ, J. -The facts, in brief, are that through Finance Act, 2007, Section (3) (A) was inserted in the Federal Excise Act, 2005. Under the referred Section a Special Excise Duty was to be imposed at the rate of 1 percent on the following:

- All goods produced or manufactured in Pakistan;
- All goods imported into Pakistan.

Vide notification dated 29.6.2007 an SRO was issued by the Government under Section 3 A read with Section 16 of the Federal Excise Act, 2005, by virtue of which it was specified that Special Excise Duty (SED) shall be levied on all goods mentioned in the first schedule of Customs Act except those which are exempt under the notification. On 27.5.2011 a show cause

notice was issued to the applicant namely M/s Islamabad Club Murree Road, Islamabad wherein it was alleged that since the Club is supplying food and beverages hence the supply of the same is liable to Special Excise Duty which the Club has failed to collect. The matter was contested, but the same culminated in order-in-original dated 13.6.2011, whereby demand was created in the sum of Rs.2,358,305/-. The applicant filed an appeal which was disposed off on 05.01.2012. The matter was further agitated by Commissioner Inland Revenue before the Appellate Tribunal Inland Revenue which accepted the same vide order dated 11.11.2016. This Court after hearing the learned counsels for the parties on 28.2.2017 framed the following questions:

"1. Whether Special Excise Duty levied by SRO No.655 (1)/2007 dated 29th June 2007, is applicable to "services" provided by the petitioner or apply only to "goods"?

2. Whether the FBR's clarification dated 22.4.2009 clarifying that the SED is not applicable to services such as those provided by the petitioner was rightly reviewed by FBR vide C. No.1 (3)FED/07/98623-R dated 20th June 2009 of Government of Pakistan, Revenue Division, Federal Board of Revenue? And whether FBR at all has powers of Review?

3. Whether the matter having been referred to Law ministry under the Rules of Business, the clarification/decision of Law Ministry No.530/2009-Law-I, Government of Pakistan, Law and Justice Division declaring inapplicability of SED on services, not binding on FBR?"

4. **Whether vide SRO 655 (1)/2007 dated 29th June 2007 levying 1 % SED has any statutory sanction and what is the effect of repeal of section 3A of Federal Excise Act, 2005 and of inapplicability of section 16(2) being an exemption and not charging provision?**

2. Learned counsel for the applicant, *inter-alia,* contended that the show cause notice was issued in the name of Islamabad Club and that continued throughout and on the basis thereof the instant reference was filed. It was contended that during the course of pendency of the instant reference the Division Bench of this Court handed down judgment in the case Titled as *"Administrator Islamabad Club, through Secretary Islamabad Club, Islamabad Versus Mrs. B. Ayisha Mustafa and another"* ***(Intra Court Appeal No.49 of 2017),*** wherein it was held that the entire functioning of Islamabad Club vested in Administrator Islamabad Club and all actions are to be initiated in his name or defended by him and in this context an application was filed for doing the needful. It was further submitted that up until the judgment of I.C.A No.49 of 2017 law was represented in the case titled *"Ishaq Khakwani Vs. Islamabad Club"* ***(2016 CLC 504)*** in which it was held that Islamabad Club is a person and is amenable to constitutional jurisdiction. It was further contended that an office memorandum was issued by Federal Board of Revenue on 20.6.2009 which stated that cooked food supplied by the hotel and restaurant falls within the ambit of goods produced or manufactured, hence Special Excise Duty shall be levied on

supply of cooked food, however an opinion from the Ministry of Law may be obtained; Ministry of law vide its opinion dated 26.6.2009 clarified that Special Excise Duty (SED) is not applicable on hotels and restaurants and as a result whereof Federal Board of Revenue vide its circular dated 25.7.2009 directed all concerned to proceed in accordance with the opinion. It was contended that under Section 42 of Federal Excise Act, 2005, all officers and persons employed in the execution of the FED Act and Rules made thereunder shall observe and follow the orders, directions and instructions of the Board. Under Section 29 ibid Assistant Commissioner is one such officer. Reliance was placed on *"Pakistan Services Private Limited Vs. Pakistan"* ***(1985 CLC 1757 Karachi)***.

3. Muhammad Wasim Abid, Advocate on behalf of the applicant, further submitted that the services provided by Islamabad Club do not fall under the ambit of goods produced or manufactured. In this behalf it was submitted that the goods which are cooked are not manufactured or produced, hence are not amenable to Federal Excise Duty. Reliance was placed on *"Chairman Federal Board of Revenue Vs. M/s Al-Technique Corporation of Pakistan Ltd"* **(PLD 2017 SC 99)**, *Defence Authority Club Vs. Federation of Pakistan* **(2007 PTD 398)**, *The Indian Hotels Company Ltd. Vs. The Income Tax Officer, Mumbai* ***(2000 7 SCC 39)***, *Union of India Vs. Delhi Cloth & General Mills* ***(AIR 1963 SC 791)***, *State of India Himachal Pradesh Vs. Associated Hotels of India Ltd.* ***(AIR 1972 SC 1131)*** *and Joint*

Commercial Tax Officer Vs. Young Men's Indian Association ***(AIR 1970 SC 1212)***. It was further contended that fiscal statutes are to be interpreted strictly. For the purposes of a good to be produced or manufactured and be liable to Excise Duty the same has to be ordinarily produced or manufactured for the purposes of buying and selling in open market; that to become supply of cooked food by a hotel, restaurant, club and other similarly placed entities does not constitute production or manufacturing.

4. Learned counsel for the respondent department, *inter-alia,* contended that instant Tax Reference is not maintainable inasmuch as it has not been competently filed. In this behalf reliance was placed the decision of this Court in ICA No.49 of 2017. It was further contended that reference application if is incompetently filed then the defect cannot be cured subsequently. Reliance was placed on cases reported as *"Great Bear International Services (Pvt.) Ltd. vs. Pakistan Telecommunication Authority"* **(2015 CLD 1721)**, *"Director, Directorate-General of Intelligence and Investigation and others vs. Messrs Al-Faiz Industries (Pvt.) Limited and others"* **(2006 SCMR 129)** and *"Director General, Intelligence and Investigation FBR, through Director Vs. Sher Andaz and 20 others"* **(2010 SCMR 1746)**.

5. Learned counsels for the parties have been heard and the documents placed on record examined with their able assistance.

6. Since the objection taken by the learned counsel for the appellant goes to the root of maintainability of the instant application, hence the same shall be decided first. The bare perusal of the show cause notice issued by the Assistant Commissioner Inland Revenue shows that the same was issued to the Islamabad Club. As observed by this Court in its judgment titled "*Administrator Islamabad Club, through Secretary Islamabad Club, Islamabad Versus Mrs. B. Ayisha Mustafa and another*" **(Intra Court Appeal No.49 of 2017),** under Section 6(4) of Islamabad Club Administrator Ordinance, 1978, Islamabad Club has no juristic entity and Administrator of the Club is the sole person in which are vested all rights, assets, privileges and liabilities of the club. Under Section 4(g) ibid all proceedings are to be initiated or defended in the name of the Administrator. It was further observed that the legal person in which the entire setup vests is the Administrator of the Club. In such view of the matter the show cause notice was issued against the mandate of 1978, Ordinance and the interpretation rendered to it by this Court. However, since it is trite law that the judgment of the Court operate prospectively and the judgment was delivered on 17.12.2018, whereas the instant proceedings were initiated much earlier and the question regarding the entity and maintainability of the reference was not raised till afore-noted judgment of this Court, hence we shall not dilate upon it inasmuch as steps taken by issuance of show

cause notice was *per se* against the provisions of Islamabad Club (Administration Ordinance, 1978).

7. As noted, in the facts above that vide SRO655 (I) 2007 dated 29.6.2007, it was provided that Special Excise Duty at the rate of 1% of the value shall be levied to all goods specified in the first schedule to the Customs Act, 1969. On the basis of referred notification show cause notice was issued that since the applicant manufactures and produces goods by way of cooking of the food and serving to its members hence it falls within the purview of Section 3 (a) of Finance, Act, 2007. The primary question which is to be settled by this Court is whether cooking of food and beverages and serving to its member falls within the concept of production and manufacturing of the items. In "*Defence Authority Club Vs. Federation of Pakistan*" **(2007 PTD 398),** it was held that the services provided used in schedule cannot not in any manner include membership fee or monthly subscription as the same had no nexus with services which a Club provided to its members like boarding, lodging, arranging parties, supply of foods and other stuffs. It is fundamental principle of construction of fiscal statutes that where there is any ambiguity or doubt the same has to be resolved in favour of taxpayer/citizen. Reliance is placed on cases reported as "*Chairman Federal Board of Revenue Vs. M/s Al-Technique Corporation of Pakistan Ltd*" ***(PLD 2017 SC 99).*** In "*M/s Sarwar & Co. (Pvt.) Ltd Vs Customs, Central Excise and Sales Tax, Appellate Tribunal Lahore*" **(2006 PTD Lahore),** it

was observed that in order to become a good there must be something which could ordinarily come to the market, to be bought and sold and is known to the market.

8. In the *Indian "Hotels Company Ltd. vs. The Income Tax Officer, Mumbai"* ***(2000 7 SCC 39).*** Supreme Court of India observed that in case of hotel business there is no question of manufacturing or proceeding pulses like wheat, rice, meat or such other items but what is done is from such raw materials eatable food stuff is prepared. It was further observed that with regard to the food stuff served or sold the hotels. Prepared the food stuff by cooking or by any other process from raw materials such as cereals, pulses, vegetables meat or the like cannot be regarded as commercially distinct commodity and it cannot be held that such foodstuff is manufactured or produced. In *"Union of India Vs. Delhi Cloth & General Mills"* ***(AIR 1963 SC 791),*** the Supreme Court of India held that the word "manufacture" used as a verb is generally understood to mean as brining into existence a new substance and does not mean merely to produce some change in a substance, however minor in consequence the change may be. It was also observed that 'Manufacture' implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation, but something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use and an article must be something which can ordinarily come to the market to be bought and sold. In *"State of Himachal Pradesh Vs. Associated Hotels of India Ltd"* **(AIR 1972 SC 1131)** the Supreme Court of India adopted the

concept of the English Law that there is no sale when food and beverages are supplied to guests residing in hotels. It was pointed out that supply of meals was essentially in the nature of service provided to them and could not be identified as a transaction of sale; the contention of the Revenue Department that such transaction can be split into two parts one of the service and other of sale on food stuffs was rejected. It was also observed that the transaction essentially is one of service by the hotelier in the performance of which meals are served as part of and incidental to that service, such amenities being regarded as essential in all well conducted modern hotels; the transaction between a hotelier and a visitor to his hotel is thus one essentially of service in the performance of which and as part of the amenities incidental to that service, the hotelier serves meals at stated hours. *In "Joint Commercial Tax Officer V. Young Men's Indian Association"* ***(AIR 1970 SC 1212)***, the Supreme Court of India observed that the clubs or the associations were merely acting as agents for and on behalf of the members. They were not selling goods but were rendering a service to their members.

9. In view of referred position of law and facts it cannot be said that the applicant is manufacturing or producing goods but rather is offering services to its members, hence is not liable to pay Special Excise Duty (SED). Federal Board of Revenue while relying upon by the opinion of Ministry of law issued a circular that hotels and restaurants are not amenable to Special Excise Duty under Section 42 of the Federal Excise Act, 2005. All officers and persons employed in execution of the Act are bound to follow the orders, directions and

instructions of the Board, hence the circular dated 25.7.2009 was binding on the Assistant Commissioner.

10. In view of above discussion, the answers to the questions framed above are in negative. Since the questions framed by this Court have been answered; hence the instant reference is accordingly disposed off. A copy of this decision shall be sent to the Appellate Tribunal Inland Revenue under the seal of the Court as prescribed under the law.

(AAMER FAROOQ)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in Open Court on 25.04.2019.

JUDGE

JUDGE

Niqab M

Approved for Reporting.