Form No: HCJD/C-121.

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

STR No. 184 of 2011

Mustehkam Cement Limited
Vs
Commissioner Inland Revenue, LTU, Islamabad

DATE OF HEARING : 25-2-2016.

APPLICANT BY : Barrister Farrukh Jawad Panni, Advocate.

RESPONDENT BY : Dr. Farhat Zafar, Advocate.

ATHAR MINALLAH, J.- Through this reference we shall decide the instant Sales Tax Reference, which relates to order dated 23-2-2011, passed by the Appellate Tribunal Inland Revenue, Islamabad Bench, Islamabad (hereinafter referred to as the "Tribunal"). The questions of law proposed in the instant application are stated to have arisen from the said order of the learned Tribunal.

2. The facts, in brief, are that the applicant was issued a show cause notice dated 07.10.2006. It was alleged that the applicant had submitted an adjustment note for the tax period July 2006 seeking adjustment advice for the tax period July 2006. The relevant authority, after scrutinizing the documents, observed that the applicant had made input tax adjustment of an amount of Rs.10476557/- against invoices issued by

another registered person namely M/s Attock Petroleum Limited. It was observed that the said invoices in fact related to the tax periods of December 2005, January 2006 and February 2006. It was further observed that the said invoices had already been used for claiming input tax for the month of March 2006. The input relating to the invoices was, therefore, alleged to have been claimed and adjusted twice, which was in violation of the provisions of the Sales Tax Act 1990 (hereinafter referred to as the **"Act of 1990"**). The applicant was, therefore, called upon to explain as to why the inadmissible tax may not be recovered along with the additional tax, and in addition to impose a penalty under Section 33 (5). It was alleged that SRO No.389 and 391 (1)/2006 dated 27-04-2006 were also violated. The applicant, in its reply dated 18-09-2006, unambiguously admitted that the input tax adjustment had been claimed twice. However, it was asserted that it was an inadvertent bonafide error. The Additional Collector Sales Tax decided the Show Cause Notice vide Order-in-Original No.01 of 2006, dated 14-11-2006 (hereinafter referred to as the **"Order-in-Original"**). The learned Additional Collector held the input tax adjustment as inadmissible and thus ordered the recovery thereof along with the default surcharge under Section 34 of the Act of 1990. The adjudicating officer, in addition, imposed a penalty of five percent of the amount involved as provided under serial no. 11 of sub section (1) of section 33 of the Act of 1990. The applicant preferred an appeal, and the same was dismissed by the learned Collector (Appeals) Rawalpindi vide Order-in-Appeal No. 62/2007 dated 14-3-2007. The Order-in-Original was, therefore, upheld. The applicant filed an appeal before the learned Tribunal and the same was also dismissed with costs, vide order dated 23-2-2011.

3. The learned counsel appearing on behalf of the applicant has contended that; the claim of input tax adjustment relating to the invoices

issued by M/s Attock Petroleum Limited was a bonafide mistake and, therefore, default surcharge or penalty could not have been imposed; claiming the input adjustment inadmisable does not fall within the ambit of section 36 of the Act of 1990 and, therefore, the show cause notice and the subsequent proceedings were without lawful authority and jurisdiction; there was no loss of revenue as the total amount of the output tax was more than the inadmissible claim of input adjustment; the adjudicating officer had erred in law by ignoring the provisions of the Sales Tax (Refund of Excess Input Tax to the Manufacturers) Rules, 2005 (hereinafter referred to as the **"Rules of 2005"**); referring to Rule 8 the learned counsel argued that the officer of sales tax may refuse adjustment of any amount but could not order the recovery thereof under section 36; no computerized adjustment invoice was provided under Rule 6 of the Rules of 2006; no output tax was payable for the tax period of July 2006; even if the inadmissible input tax had been claimed, in the absence of any loss of revenue the imposing of a penalty or default surcharge is harsh, illegal and without lawful authority; the default surcharge and penalty cannot be imposed in a mechanical manner, particularly when there is no allegation of tax fraud.

4. The learned counsel appearing on behalf of the Department, on the other hand, has argued that; the applicant had claimed the input tax relating to the same invoices twice and, therefore, it was a case of submitting false documents and information; in case the inadmissibility of the false claim had not been detected during the scrutiny of the document, revenue would have suffered loss; the applicant is a well established business entity and it cannot claim such a mistake to be bonafide.

5. The learned counsels have been heard and the record perused with their able assistance.

6. The sales tax is levied and charged under the Act of 1990 and is in the nature of an indirect tax. In the case of an indirect tax the intermediary collects the tax from another person while the latter actually bears the burden of the tax. After collecting the tax it is the statutory duty of the intermediary to account for and deposit the same in the exchequer. The scheme of the Act of 1990 is based on self assessment and, therefore, it imposes a statutory obligation on the registered person collecting the tax from the other person to declare and account for the tax in the monthly returns as provided under the provisions of the Act of 1990. In order to answer the questions raised by the applicant in the instant Reference application, it would be beneficial to examine the scheme of the Act of 1990.

7. Section 3 of the Act of 1990 is the charging section. Sub-section (14) of section 2 defines the expression "Input Tax". Section 6 prescribes the time and manner of payment of sales tax. Sub-section (2) of section 6 expressly provides that the tax in respect of taxable supplies made during a tax period shall be paid by the registered person at the time of filing of the return in respect of the corresponding tax period. Section 7 describes the mechanism for determination of tax liability. It, inter-alia, entitles a registered person to deduct input tax paid during the tax period for the purposes of taxable supplies made, or to be made, by him from the output tax. In a nutshell the input tax is claimed and adjusted against the output tax that is due from a registered person during a particular tax period. The other adjustments allowed to be made from the output tax are specified in section

9. The proviso of sub section (1) of section 7 provides that where a registered person has not deducted input tax within the relevant period, the latter may claim such tax in the return for any of the six succeeding tax periods. It is, therefore, obvious that in order to determine the tax liability, the registered person is entitled to claim input tax during the relevant tax period and the same is adjusted against the output tax due to be paid by such registered person. The time for claiming the input tax has also been specified. The input tax, therefore, can be adjusted only once during the relevant period and in the manner prescribed in the Act of 1990. However, input tax relating to invoices which have been claimed and adjusted cannot be used again. Such a claim is, therefore, inadmissible and the amount of tax involved is liable to be recovered. It may also be pointed out that proceedings for recovery of inadmissible input tax has no nexus with the amount of output tax. Inadmissible adjustment of the input tax essentially falls within the ambit of tax not levied or short levied because it correspondingly reduces the output tax due from a registered person. This would be elaborated later in the context of section 36. Moreover, the act of claiming inadmissible input tax attracts the imposition of a surcharge and penalties contemplated under the relevant provisions of the Act of 1990.

8. Furthermore, section 10 of the Act of 1990 prescribes the conditions and the procedure in the eventuality when the input tax exceeds the output tax. It provides that such excess amount may either be refunded or carried forward to the next tax period, as the case may be. A plain reading of sections 3, 6, 7 & 10 conjunctively shows that inadmissible adjustment of input tax amounts to tax not levied or short levied. Moreover, a claim for a refund has to be made in accordance with the prescribed procedure provided under the Act of 1990 and the Rules made there under. The inadmissible

adjustment of input tax in a relevant tax period is liable to be recovered in the manner as provided under the Act of 1990. Likewise, a person claiming a refund of the input tax in excess of the output tax has to follow the prescribed procedure as provided under the Act of 1990 and the Rules made there under. In this regard reference may be made to Chapter-V of the Sales Tax Rules of 2006 (hereinafter referred to as the ***"Rules of 2006"***). It is settled law that where the law requires an act to be done in a particular manner, it ought to be done in that manner alone. Reliance is placed on the case of *"Muhammad Anwar and others versus Mst. Ilyas Begum and others"* [PLD 2013 S.C. 255]. There is no force in the argument of the learned counsel appearing on behalf of the applicant that it was for the Adjudicating Officer to have treated the adjudication proceedings as proceedings for a refund and thus ought to have adjusted the excess amount from the output tax. The inadmissibility of the input tax, for which the show cause notice was issued, is admitted by the applicant. In a self assessment scheme such a lapse on the part of the registered person is neither expected nor can the latter claim immunity from the consequences arising there from e.g. imposition of a penalty under Section 33 or default surcharge under Section 34 of the Act of 1990.

9. Section 33 of the Act of 1990 describes the various offenses/violations in column no. 1 of the Table. The penalty against the corresponding offence is mentioned in column no. 2 thereof. Clause 11 of the Table given in section 33 contemplates the imposition of a penalty in the case of three eventualities; when a false or forged document is submitted to any officer of the Inland Revenue; secondly, when a person destroys, alters, mutilates or falsifies the records, including a sales tax invoice; thirdly, a person knowingly or fraudulently makes a false statement, false declaration,

false representation, false personification, gives any false information or issues or uses a document which is forged or false. The penalty has been prescribed in column no. 2 which envisages that such a person shall be liable to pay a penalty of twenty five thousand rupees or one hundred percent of the amount of tax involved, whichever is higher, or shall further be liable to conviction which may extend to three years or with fine as specified therein. The three categories contemplated in clause 11 are not restricted to persons who may have committed a tax fraud. Submitting a false document to any officer of the Inland Revenue, therefore, attracts the penalty as provided in column no.2. The Black's Law Dictionary [Eighth Edition] defines "false" as follows:

> "False, adj. 1. Untrue <a false statement>.
> 2. Deceitful; lying <a false witness>."

Thus filing of a return and claiming adjustment of inadmissible input tax in respect of invoices already used for the purposes of adjustment during some other tax period would attract category-(a) of clause-11 of section 33 of the Act of 1990. It may also be pointed out that a plain reading of section 33, clause 11 (a) shows that the Adjudication Officer is not vested with any discretion once it has been established that the offence has been committed. For an offence under clause 11 (a) of section 33, the penalty of rupees twenty five thousand or one hundred per cent of the amount of tax involved, whichever is higher will be attracted. Filing of a return and an untrue or false statement made therein e.g. claiming inadmissible adjustment of input tax will attract clause 11 (a) of section 33.

10. Next is the liability for default surcharge under section 34 of the Act of 1990. Section 34 starts with a non-obstante clause in the context of section 11. Section 34 provides that failure on the part of the registered person to pay the tax due or any part thereof, whether willfully or otherwise, in time or in the manner specified under the Act of 1990, Rules or notifications issued there under or a tax credit, or if a refund is claimed or an adjustment is made which is not admissible, or the rate of zero percent of supplies made during the course of taxable activity has been incorrectly applied, then such a registered person shall, in addition to the tax due , pay default surcharge at the rates specified in clause (a) to (c) of sub section (1) ibid.

11. The legislative intent is obvious from a plain reading of section 34. The legislature has described the categories of registered persons and the eventualities which would attract default surcharge under section 34 of the Act of 1990. It, inter alia, includes the making of an inadmissible adjustment of input tax, regardless of whether the act has been done willfully or otherwise. The legislature, in its wisdom, has not left the imposition of the default surcharge to the discretion of the Adjudicating Officer. The non-obstante clause in the context of section 11 of the act of 1990 and the use of the expression "shall" makes the imposition of default surcharge mandatory. The calculation of the default surcharge has also been explicitly mentioned in sub-section (2) of section 34. It is, therefore, obvious that if the tax due is not paid in time or in the manner specified under the Act, Rules or notifications there under, or an adjustment is made which is not admissible, then the default surcharge, as provided under section 34, shall automatically be attracted and the registered person would be required to pay at the same rates and as per the calculations specified therein.

12. The learned counsel has also raised a question of law relating to section 36 of the Act of 1990 i.e. "whether the provisions would be attracted in the case of an inadmissible claim of input tax." Section 36 was omitted vide the Finance Act 2012 and the provisions thereof were inserted in section 11. At the time when the show cause notice was issued i.e. prior to 2012, section 36, as it stood enforced at the relevant time, consisted of four sub-sections. Sub-section (1) related to the issuance of a show cause notice for the payment of any tax or charge not levied or made, or short levied or erroneously refunded by reason of some collusion or deliberate act, while sub-section (2) related to the eventuality of the tax having not been levied or short levied on account of inadvertence, error or misconstruction. The crucial expression in the context of section 36 is, tax levied or short levied. The Black's Law Dictionary 8th Edition defines the expression 'levy' as follows:

> *"**Levy** (**lev**-ee), n. **1.** The imposition of a fine or tax; the fine or tax so imposed. ___ Also termed tax levy. [Cases: Taxation 295. C.J.S. Taxation 423.] **2.** The enlistment of soldiers into the military; the soldiers so enlisted. **3.** The legally sanctioned seizure and sale of property; the money obtained from such a sale. ___ Also termed (in sense 3) levy of execution. [Cases: Execution 122-147. C.J.S. Executions 100, 102-127, 146-147, 149, 151, 203.]*
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> ***Levy,** vb. **1.** To impose or assess (a fine or a tax) by legal authority <levy a tax on gasoline>. **2.** To enlist for service in the military <the troops were quickly levied>. **3.** To declare or wage (a war) <the rival clans levied war against each other>. **4.** To take*

or seize property in execution of a judgment <the judgment creditor may levy on the debtor's assets>. [Cases: Execution – 122-147, C.J.S. Executions 100, 102-127, 146-147, 149, 151, 203.]

13. It is obvious from the above definition that the imposition, assessment as well as collection of a tax falls within the ambit of the expression 'levy'. As already explained above, the sales tax is an indirect tax and the registered person, who is required to file a return, acts as an intermediary. It is, therefore, a statutory duty of an intermediary to correctly assess, collect and account for payment of the tax through filing a tax return, inter alia, making a true and correct declaration relating to admissible adjustments therein. In the event of making a wrong assessment of tax, it would tantamount to non levy or short levy in the context of section 36. One of the important adjustments relates to the claiming of input tax. The adjustment of input tax inevitably affects the output tax. In the case of inadmissible adjustment of the input tax, the output tax is correspondingly reduced. It, therefore, brings the matter within the fold of tax either having not been levied or short levied. It has been pointed out above that claiming inadmissible input tax attracts penal consequences and, therefore, adjudication becomes inevitable. Section 36 of the Act of 1990, as it stood then, enabled the assessing officer to adjudicate the matter. There is, therefore, no doubt that a case of inadmissible adjustment of input tax falls within the scope of section 36 and, therefore, the competent authority in the instant case was empowered to issue a show cause notice as contemplated therein.

14. Lastly, we would advert to the arguments of the learned 13 counsel for the applicant relating to the Rules of 2005. The Rules of 2005 have been enacted in exercise of powers conferred under section 50 of the Act of 1990, read with the proviso to sub-section (1) of section 10 ibid. It explicitly mentions that the rules shall apply to such registered manufacturers who meet the criteria as prescribed therein. "Manufacturer" is defined in clause (e) of Rule-2. Rule-3 describes the scope of the claim. Rule-4 to Rule-7 prescribes the procedure for the processing of the claims. Rule-3 expressly provides that only such input goods shall be taken into account for the purpose of availing a refund under the Rules of 2005, which have been acquired on payment of Sales Tax during the relevant tax period. The Rules of 2005 impose conditions and restrictions besides prescribing a procedure. By no stretch of the imagination are the Rules of 2005 attracted in a case where the department finds or detects inadmissible adjustment of input tax by a registered person. The procedure for claiming the benefit envisaged under the Rules of 2005 is distinct and separate and cannot be confused with the recovery proceedings initiated in the case of alleged non-levy or short levy of tax. Moreover, there is no force in the argument of the learned counsel for the applicant that the Adjudicating Officer could not have ignored the Rules of 2005. This argument is misconceived because firstly the adjudication proceedings have no nexus with the Rules of 2005, nor is the Adjudicating Officer empowered to examine the claims under the said Rules. The proceedings for the recovery of the tax under section 36 are distinct and separate from the proceedings relating to claims made by the registered person for refund under the Rules of 2005. The applicant had admittedly adjusted inadmissible input tax and had used invoices twice. It was, therefore, not a case covered under the Rules of 2005.

15. In the light of the above discussion, the questions proposed in the instant application at Serial No. (i), (iv), (v), (vi) and (vii) are answered in the ***affirmative*** while the questions listed at Serial No. (ii), (iii) and (viii) in the ***negative***.

16. The office is directed to send a copy of this judgment under the seal of the Court to the learned Appellate Tribunal as required under sub-section (5) of section 47 of the act of 1990.

(NOOR UL HAQ N. QURESHI)
JUDGE

(ATHAR MINALLAH)
JUDGE

Announced in the open Court on 29.03.2016.

JUDGE

JUDGE

Approved for reporting.

*Asad K/**