

Form No: HCJD/C-121.

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

STR No. 265 of 2011

M/S Islamabad Electric Supply Company Limited.
Vs
The Deputy Commissioner Inland Revenue, Audit-II, LTU,
Islamabad, etc.

DATE OF HEARING : 21-03-2016.

APPLICANT BY : Mr Tariq Rasheed, Advocate.

RESPONDENTS BY : Hafiz Munawar Iqbal, Advocate.

ATHAR MINALLAH, J.- Through this consolidated judgment we shall decide the instant Sales Tax Reference along with STR No. 02 of 2012. The instant reference has been filed by the taxpayer while the latter by the Department. Both have proposed questions of law for our consideration, arising out of the judgment of the Appellate Tribunal Inland Revenue, Islamabad Bench, Islamabad, dated 07.09.2011. The questions of law proposed for our consideration essentially relate to the status of the supply of electricity by the Islamabad Electric Supply Company Limited (hereinafter referred to as the

"Company") to the territory of Azad Jammu and Kashmir in the context of levy and payment of sales tax.

2. The facts, in brief, are that the Company is incorporated under the Companies Ordinance, 1984 and, inter alia, engaged in the distribution of electricity. An agreement, dated 27-06-2003, was executed between the Government of Pakistan, through the Ministry of Water and Power, the Government of Azad Jammu and Kashmir and the Water and Power Development Authority (hereinafter referred to as **"WAPDA"**) in respect of raising the Mangla Dam. Clause 5.3 of the agreement dated 27.06.2003 is reproduced as follows;-

"The Ministry shall ensure that the CBR does not levy the GST on electricity generated in and supplied to the AJ&K since the GST is applicable in Pakistan and the AJ&K already charges GST through their tax Department. All rules prescribed by the Government of Pakistan with respect to the GST would be applicable to the Government."

3. A show cause notice, dated 14.12.2010, was issued by the Deputy Commissioner Inland Revenue (Audit-II),

wherein it was alleged that the Company had not paid / deposited sales tax on the taxable supplies i.e. the supply of electricity made to Azad Jammu and Kashmir. The Company filed a written reply dated 28.12.2010. The reply of the Company was based on twofold arguments; firstly, that Azad Jammu & Kashmir was not a part of Pakistan and, therefore, the supply of electricity falls within the expression 'goods exported' for the purposes of section 4 of the Sales Tax Act 1990 (hereinafter referred to as the "Act of 1990") and, secondly, that the agreement dated 27.06.2003 had the effect of exempting the Company from the payment of sales tax on the supply of electricity made to Azad Jammu and Kashmir. The Deputy Commissioner Inland Revenue adjudicated the show cause notice vide Order-in-Original no.11 of 2010, dated 31.12.2010. The demand raised vide the show cause notice was confirmed and the Company was directed to deposit an amount of Rs.1269.950 million along with additional surcharge under section 34 of the Act of 1990. The Company filed an appeal and the same was dismissed by the Commissioner Inland Revenue (Appeals-1) Islamabad vide Sales Tax Order-in-Appeal No. 126 of 2011 dated 29.03.2011. The Company filed an appeal before the learned Tribunal. The learned Tribunal did not accept the contention of the Company that the taxable supply of electricity was exempt under the Act of 1990 or that it was to be treated as 'goods exported'. Placing reliance on clause 5.3 of the agreement, dated 27.06.2003, the learned Tribunal held that since the Government of Pakistan had agreed

and ensured that sales tax shall not be levied and charged by the then Central Board of Revenue (hereinafter referred to as the "Board"), therefore, the tax could not be charged or recovered on the supplies made by the Company to Azad Jammu & Kashmir.

4. The learned counsel appearing on behalf of the Company has contended that; Azad Jammu & Kashmir is a foreign territory, as contemplated under Article 1(2) of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the "**Constitution**"); Azad Jammu & Kashmir is a sovereign state; the supply of electricity was made under a valid legal instrument i.e. agreement dated 27.06.2003, executed between two sovereign states; the supply made to the territory of Azad Jammu & Kashmir falls within the meaning of the expression 'export' and, therefore, is to be treated as zero rated in terms of section 4 of the Act of 1990; reliance has been placed on Item No.2 of the Fifth Schedule of the Act of 1990; the learned Tribunal failed to appreciate the nature of the supply made to the territory known as Azad Jammu & Kashmir; the Act of 1990 does not extend to Azad Jammu & Kashmir and, therefore, the provisions of the said statute are not attracted in the instant case.

5. On the other hand, the learned counsel for the Department has argued that; the learned Tribunal mistakenly

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held that the demand for payment of sales tax was not justified on the basis of the agreement dated 27.06.2003; admittedly, the supply of electricity made by the Company to the territory of Azad Jammu & Kashmir falls within the purview of section 3 of the Act of 1990 and, therefore, is liable for the charge, levy and payment of sales tax; neither have the taxable supplies attracting the charge, levy and payment of sales tax been exempted under section 13 of the Act of 1990 nor can it be treated as 'export' for the purposes of section 4 *ibid*.

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

7. In order to answer the questions proposed by the Company and the Department in the respective references, it would be essential to examine the scheme of the Act of 1990 and the status of Azad Jammu & Kashmir. The questions for our consideration stem from the status of taxable supplies made to the territory of Azad Jammu & Kashmir from Pakistan. It is an admitted position that supply of electricity has not been declared as exempt in the manner prescribed under section 13 of the Act of 1990. It is also apparent from the questions proposed by the Company and the assertions made before us that it does not claim nonpayment of the tax on the basis of the agreement dated 27.06.2003; rather, it asserts that supplies

made from the territories of Pakistan to Azad Jammu and Kashmir fall within the scope of 'export' for the purposes of section 4 and, therefore, are to be charged at the rate of zero percent.

8. It is also an admitted position that the supply of electricity by the Company to the territories of Azad Jammu and Kashmir are taxable supplies, attracting the charge and levy of sales tax under section 3 of the Act of 1990 and that the same has not been exempted in the manner prescribed under section 13 *ibid*. The two fundamental questions which are required to be answered are firstly, whether the supply of electricity to Azad Jammu & Kashmir falls within the scope of 'export' and is thus to be treated as 'goods exported', and secondly, whether the agreement dated 27.06.2003 can be treated as an instrument or made the basis for the purposes of nonpayment of sales tax under the Act of 1990.

9. Section 3 of the Act of 1990 is the charging section and describes the scope of the sales tax and the charge, levy and payment thereof. In case section 3 is attracted to supplies made by a registered person then the payment of sales tax at the specified rates becomes mandatory unless it is either exempt under section 13 or falls within the ambit of section 4 of the Act of 1990, in order to claim the charge at the

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rate of zero percent. Section 13 contemplates three modes whereby a registered person may claim exemption from payment of the charge and levy of the tax. The goods either have to be specified in the sixth schedule of the Act of 1990 or the Federal Government by a notification in the official gazette, or the Board through a special order in each case has exempted payment of the whole or any part of the tax chargeable under the Act of 1990.

10. Sub-section (48) of section 2 defines zero rated supply as meaning a taxable supply which is charged to tax at the rate of zero percent under section 4. Section 4 starts with a non-obstante clause and provides that the goods enumerated in clauses (a) to (d) specified therein shall be charged tax at the rate of zero percent. Such goods, though liable to be charged tax under section 3, but since they fulfill the criteria mentioned in one of the clauses / categories specified in clauses (a) to (d) the charge is at the rate of zero percent i.e. no tax is required to be paid. In the instant case, the Company asserts that it is covered under clause (a) of section 4 i.e. electricity supply to Azad Jammu and Kashmir falls within the expression of goods 'exported' and, therefore, it is to be charged tax at the rate of zero percent. It is not the case of the Company that clauses (b) (c) or (d) are attracted in this case. The main thrust of the arguments of the learned counsel for the Company was on the basis of Azad Jammu & Kashmir

having the status of a foreign territory and, therefore, supply made thereto was to be treated as 'export'. There is no cavil to the proposition that Azad Jammu & Kashmir is not a territory specified under sub-article (2) of Article 1 of the Constitution. The territory of Azad Jammu & Kashmir is governed under the Azad Jammu & Kashmir Interim Constitution Act 1974 (hereinafter referred to as the **"Azad Jammu & Kashmir Constitution"**). Under the Azad Jammu and Kashmir Constitution two legislative forums have been expressly created i.e. the Azad Jammu & Kashmir Council and the Azad Jammu & Kashmir Assembly. The Council, established under section 21 of the Constitution, consists of the Prime Minister of Pakistan as its Chairman, six members elected by the Azad Kashmir Assembly and five members to be nominated by the Prime Minister of Pakistan from amongst Federal Ministers and members of the Parliament. Under sub-section 3 of Section 31 of the Azad Jammu and Kashmir Constitution neither the Council nor the Assembly of Azad Jammu & Kashmir can make laws with respect to the matters enumerated in clauses (a) to (d) *ibid*. Clause (d) expressly bars the Council and the Assembly from making laws in respect of the external affairs of Azad Jammu & Kashmir, including foreign trade and foreign aid. Section 56 of the Azad Jammu & Kashmir Constitution empowers the Government of Pakistan in respect of the matters specified therein. Under the relevant U.N. resolutions and the resolutions of the Commission appointed by the United Nations for India and Pakistan, pending the final solution of the

State of Jammu and Kashmir, Azad Jammu and Kashmir is to be administered under the control of Pakistan. Azad Jammu & Kashmir, therefore, has a special status. Though it may be treated as a foreign territory but by no stretch of the imagination does it fall within the definition of sovereign state or a distinct country, recognized as such by the comity of nations.

11. Next is the question of interpretation of the expression 'goods exported' in the context of section 4 of the Act of 1990. It is settled law and, as observed and held by the august Supreme Court in the case titled "Pakistan Textile Mill-Owners' Association, Karachi and two others versus Administrator of Karachi and two others" [PLD 1963 S.C. 137], that in a taxing statute, as in any other statute, there is no reason to depart from the general rule that words used in a statute must first be given their ordinary and natural meaning. It is only when such an ordinary meaning does not make sense that resort can be made to discovering other appropriate meanings. The august Supreme Court, therefore, in the said judgment saw no difficulty in giving the words 'import' and 'export' their ordinary and natural meaning. The said principles were reiterated by the apex Court while interpreting the word 'import' in the case of "Messrs Master Foam (Pvt) Ltd versus Government of Pakistan through Secretary and others" [PLD 2005 SC 373]. While giving the expressions or words used in a

statute their ordinary and natural meaning guidance is invariably sought from the meanings given in various dictionaries. Since the Act of 1990 has not defined the expression 'export', therefore, it would be beneficial to examine the ordinary and natural meaning thereof. The expression 'export' has been defined in various dictionaries as follows.

The Black's Law Dictionary (Nineth Edition) defines 'export' and 'exportation' as follows:-

"export, n. (17c) 1. *A product or service created in one country and transported to another.*

domestic export. *A product originally grown or manufactured in the United States, as distinguished from a product originally imported into the United States and then exported.*

2. *The process of transporting products or services to another country.*
Cf. IMPORT (1), (2).

Export, vb. (15c) 1. *To send or carry abroad.* 2. *To send, take, or carry (a good or commodity) out of the country; to transport (merchandise) from one country to another in the*

course of trade. 3. To carry out or convey (goods) by sea.

Exportation. (17c) *The act of sending or carrying goods and merchandise from one country to another."*

The Concise Oxford English Dictionary Twelfth Edition defines 'export' as follows;-

"export. *v. 1. Send (goods or services) to another country for sale. Spread or introduce (ideas or customs) to another country. 2. Computing transfer (data) in a format that can be used by other programs. n. 1. An exported product or service. 2. The action of exporting of goods or services. [as modifier] of a high standard suitable for export: export ales.*

12. Before proceeding further it would be relevant to refer to a judgment of the Supreme Court of India titled "Burmah Shell Oil Storage & Distributing Co. of India Ltd. and Standard Vacuum Oil Co. versus The Commercial Tax-Officer

and others" [AIR 1961 Supreme Court 315], wherein the expression 'export' has been discussed as follows:-

"The word 'export' may conceivably be used in more senses than one. In one sense, 'export' may mean sending or taking out of the country, but in another sense, it may mean sending goods from one country to another. Often, the latter involves a commercial transaction but not necessarily. The country to which the goods are thus sent is said to import them and the words 'export' and 'import' in this sense are complementary. An illustration will express this difference vividly. Goods cannot be said to be exported if they are ordered by the health authorities to be destroyed by dumping them in the sea, and for that purpose are taken out of the territories of India and beyond the territorial waters and dumped in the open sea. Conversely, goods put on board a steamer bound for a foreign country but jettisoned can still be said to have been 'exported', even though they do not

reach their destination. In the one case, there is no export and in the other, there is, though in either case the goods go to the bottom of the sea. The first would not be within the exemption even if a sale was involved, while any sale in the course of the second taking out would be. In both, the goods were taken out of the country. The difference lies in the fact that whereas the goods, in the first example, had no foreign destination, the goods, in the second example, had. It means, therefore, that while all exports involve a taking out of the country, all goods taken out of the country cannot be said to be exported. The test is that the goods must have a foreign destination where they can be said to be imported. It matters not that there is no valuable consideration from the receiver at the destination end. If the goods are exported and there is sale or purchase in the course of that export and the sale or purchase occasions the export to a foreign destination, the exemption is earned."

13. It is, therefore, obvious from the above that the expression 'export' and 'import' are complementary to each other. Goods sent out of Pakistan have to be imported in another country. For the purposes of 'export' the conditions and the procedure as prescribed and provided for under section 131 of the Customs Act 1969 are also to be complied with. Likewise, the restrictions and conditions imposed under the Import and Export Control Act 1950 would also apply. The warehouses established, operated and managed in Azad Jammu and Kashmir are licensed under sections 12 and 13 of the Customs Act 1969 by the Collector of Customs, Rawalpindi/Islamabad. The goods entering the territory of Azad Jammu and Kashmir are neither treated as goods imported or exported from Pakistan. It is, therefore, not enough for goods to be merely taken out of the territory of Pakistan in order to be treated as 'export'. Goods taken out of the country and imported into another country after fulfilling the prescribed conditions and procedure are treated as goods having been exported. Azad Jammu & Kashmir is not a country wherein goods are imported from Pakistan. It is for this reason that the procedure prescribed for exporting goods from Pakistan is neither attracted in the case of goods sent to Azad Jammu & Kashmir nor are they dealt with as imports upon entry into the said territory.

14. The upshot of the above discussion is that goods taken out of the territories specified in Article 1(2) of the Constitution and sent to Azad Jammu & Kashmir cannot be treated as 'goods exported' from Pakistan to another country.

15. As already noted above, in the case of goods chargeable to duty under section 3 of the Act of 1990 the payment at the specified rates is mandatory unless such taxable supplies are exempt under section 13, or the tax is charged at the rate of zero percent under section 4. It is settled law that what cannot be done directly cannot be done indirectly, and likewise a thing ought to be done in the manner as prescribed under the statute. The learned Tribunal, therefore, erred by holding that pursuant to the agreement dated 27.06.2003 the Company was not liable to pay sales tax. The learned counsel for the Company has not been able to show any provisions in the Act of 1990 which would empower either the Government of Pakistan or the learned Tribunal to hold that no tax is to be paid on the basis of an agreement unless an exemption is granted in one of the modes provided under section 13 of the Act of 1990. We, therefore, hold that neither the sales tax on supplies of electricity made by the Company to Azad Jammu & Kashmir were exempt nor could have been charged at the rate of zero percent as zero rated supplies. Consequently, the demand raised through the show cause notice dated 14.12.2010 was valid and in accordance

with the provisions of the Act of 1990 and had been rightly upheld vide Order-in-Original no. 11 dated 31-12-2010.

16. The questions formulated and proposed for our consideration in the two references are, therefore, answered in the light of what has been discussed and held above. The judgment dated 07-09-2011 stands modified accordingly.

17. A copy of this order shall be sent under the seal of this Court to the learned Tribunal

(NOOR UL HAQ N. QURESHI)
JUDGE

(ATHAR MINALLAH)
JUDGE

Announced in the open Court on 09-06-2016.

JUDGE

JUDGE

Approved for reporting

Asad K/*