IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Mr. Justice Qazi Faez Isa
Mr. Justice Yahya Afridi
Mr. Justice Jamal Khan Mandokhail

Civil Appeal No. 458 of 2017
(Against the judgment dated 04.10.2016 passed by the Lahore High Court, Lahore in Excise Tax Reference No. 02 of 2009).

M/s Pakistan WAPDA Foundation
... Appellant

Versus

The Collector of Customs, Sales Tax, Lahore, etc.
... Respondents

For the Appellant:	Mian Ashiq Hussain, ASC *(through video-link, Lahore)*
For the Respondents:	Mrs. Kausar Parveen, ASC Mr. Naeem Hassan, Secy. Litigation, FBR
Date of Hearing:	19.10.2022

JUDGMENT

Yahya Afridi, J.- M/s Pakistan WAPDA Foundation **('appellant')** challenged the judgment of the Lahore High Court, dated 04.10.2016, rendered in Excise Tax Reference No. 02 of 2009, whereby three concurrent orders passed by the adjudicatory forums provided under the Central Excises Act, 1944 **('Central Excises Act')** and the Sales Tax Act, 1990 **('Sales Tax Act')** had been maintained, and this Court *vide* its order dated 24.03.2017 granted the leave to appeal in the following terms:

> Leave is granted to consider whether reclamation of transformer oil by the petitioner is tantamount to manufacturing within the purview of the Central Excise Act, 1994; and whether the said process is a taxable supply chargeable to sales tax under the provisions of Section 3 of the Sales Tax Act, 1990.

Show Cause Notice

2. Briefly, the facts of the case are that the appellant was served with a show cause notice dated 18.06.2003 **('Show Cause Notice')** by the Deputy Director Sales Tax, asserting that the appellant was reprocessing waste transformer oil into useable transformer oil in the Transformer Oil Reclamation Plant **('Plant')** installed at its premises at Shalimar Town, Lahore, and that too, without obtaining a central excise license and sales tax registration and without paying the central excise duty and the sales tax leviable thereon, and thereby violated the provisions of rules 7, 9, 52, 174, 176, 226, 236 and 238 of the Central Excise Rules, 1944 read with sections 2(25) and 3 of the Central Excises Act. Further, the appellant was stated to have also violated the provisions of SRO 456(I)/96 dated 13.06.1996 superseded by SRO 333(I)2002 dated 15.06.2002, applicable under sections 2(16) and (33), 3, 6, 14, 15, 22, 23 and 26 of the Sales Tax Act.

Written Response of the Appellant

3. In its written response to the Show Cause Notice, the appellant responded, *inter alia*, that it was a society registered under the Societies Registration Act, 1860, established only for charitable purposes, and carried out no commercial activity; that the activity of reclamation of transformer oil by the appellant was exempt from the levy of central excise duty; that the appellant only provided service of repairing the transformers to WAPDA, which did not constitute *'supply'* of any taxable goods or *'manufacture'* of any new marketable items, and hence was not liable to levy of excise duty and sales tax.

Decisions of Adjudicatory Forums

4. All three adjudicatory forums *vide* the Order-in-Original dated 27.04.2005, the Order-in-Appeal dated 29.03.2006, and the Order of the

Appellate Tribunal dated 21.10.2008, concurrently rejected the stance taken by the appellant, and held the appellant liable to payment of excise duty and sales tax for reclamation of transformer oil. These findings were maintained by the High Court in its impugned judgment.

Submissions of the Parties

5. The learned counsel for the appellant in his oral submissions, as well as in the concise statement, reiterated the stance the appellant had taken in its written response to the Show Cause Notice. In addition, he submitted that the Central Excises Act and the Sales Tax Act were the creation of the Parliament, and the Parliament lacked the authority to legislate on the subject of 'services', that being the constitutional domain of the Provinces, and not of the Federation, within the contemplation of Article 142 of the Constitution. The learned counsel further contended that during the entire process of reclamation, transformer oil remained the property of WAPDA, and therefore, no sale of transformer oil took place, which was *sine qua non* in Entry No. 49 of the Federal Legislative List, hence the levy of sales tax could not be imposed on the activity of reclamation of transformer oil carried out by the appellant. To support his stance, he placed reliance on the cases of **Chairman FBR v. Hazrat Hussain[1], Province of Madras v. M/s Boddu Paidanna[2], State of Madras v. Gannon Dunkerley[3]** and **Haider Zaidi v. Abdul Hafeez[4].**

6. In rebuttal, the learned counsel representing the Revenue vehemently opposed the contentions of the learned counsel for the appellant and maintained that the activity of the appellant of reclaiming transformer oil came within the charging provisions of the Central

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[1] 2018 SCMR 939.
[2] AIR 1942 FC 33.
[3] AIR 1958 SC 560.
[4] 1991 SCMR 1699.

Excises Act and the Sales Tax Act. He submitted that the appellant-Foundation was an 'Associated Undertaking' of WAPDA, therefore, the activity of reclaiming transformer oil by the appellant for WAPDA fell within the purview of sub-clause (ii) of clause (a) of sub-section (2) of section 46 of the Sales Tax Act. He explained that in case the supplier and the recipient are 'associated persons' and the supply is made for no consideration or for a consideration which is lower than the open market price, the value of supply shall mean the open market price of the supply excluding the amount of tax. Therefore, he submitted, the applicable rate of refined transformer oil in the open market was taken for the calculation of the sales tax in the present case. With regard to the levy of the excise duty, he contended that the activity of reclaiming transformer oil came within the purview of *'manufacture'* and *'production'* in terms of sections 2(25) and 3 of the Central Excises Act read with SRO No. 456(I)(96) dated 13.06.1996.

Admitted Factual Position

7. Before we proceed onto considering the contentions of the learned counsel for the parties, it would be important to first lay out the essential admitted facts. First, the period of the alleged non-payment of the excise duty and sales tax is 07.05.2002 to 18.06.2003 **('relevant period');** second, the appellant is a separate legal juristic entity, and legally distinct from WAPDA; third, these two separate legal persons entered into an arrangement, wherein the appellant was to reclaim transformer oil of WAPDA at its Plant and receive consideration for the said activity; and finally, the title of transformer oil during the entire process of reclamation remained with WAPDA, while the possession (and not ownership) of the transformer oil was delivered by WAPDA to the

appellant to clear it of impurities and make it useable again, after which the same was returned to WAPDA.

8. Insofar as the contention of Revenue that the appellant is an associated person is concerned, we note that the same was not asserted in the Show Cause Notice. Therefore, it would not be appropriate to entertain this argument at this stage.

Constitutional Challenge

9. Given the above admitted facts, we first address the constitutional challenge made by the appellant to the very *vires* of any duties or taxes on *'services'* under the Central Excises Act and the Sales Tax Act. We find this challenge to be both misplaced and misdirected. The legislative authority of the Parliament has been clearly laid down in the 4th Schedule to the Constitution, and where the Parliament transgresses the said authority and enacts a law encroaching upon a legislative field not provided for in the Federal List, or the erstwhile Concurrent List,[5] the law so enacted would be without lawful authority in view of the clear mandate of Article 142 of the Constitution. However, the facts of the present case are otherwise. Throughout the relevant period, the Parliament had the authority to legislate, as provided in Entry No. 44 and Entry No. 49 of the Federal Legislative List in the 4th Schedule to the Constitution, on the subjects of excise duty and sales tax. The said Entries, as they then stood, read as under:

> **Entry No. 44**: Duties of excise, including duties on salt, but not including duties on alcoholic liquors, opium and other narcotics.
>
> **Entry No. 49:** Taxes on the sales and purchases of goods imported, exported, produced, manufactured or consumed.

The Parliament in order to bolster provincial autonomy introduced amendments in the Constitution through the 18th Amendment in 2010,

[5] 18th Constitutional Amendment in 2010.

which included an amendment in Item No. 49 of the Federal Legislative List and the amendment item read as under:

> **Entry No. 49:** Taxes on the sales and purchases of goods imported, exported, produced, manufactured or consumed ***except sales tax on services***.
>
> (Emphasis provided)

Thus, as there was no bar on the constitutional mandate of the Parliament to legislate on the subjects of excise duty and sales tax during the relevant period, there was no restriction on the legislative authority of the Parliament to legislate on 'services', which was introduced in Entry No. 49 through the 18th Constitutional Amendment in the year 2010. Surely, the contention of the learned counsel for the appellant would have substance, had the relevant period been after the introduction of the 18th Amendment, which is not the case in hand. Accordingly, the constitutional challenge made by the learned counsel for the appellant is dispelled.

Essential Question of Law

10. On merits, the main thrust of the learned counsel for the appellant was that the appellant was providing a service to WAPDA under an agreement, and not carrying out any manufacturing activity, so as to come within the purview of the charging sections of the Central Excises Act and the Sales Tax Act. Thus, the essential question that requires determination can be stated as under:

> Whether in the facts and circumstances of the present case, reclamation of used transformer oil carried out by the appellant for WAPDA amounted to 'manufacture' within the contemplation of the Central Excises Act and the Sales Tax Act?

In this regard, we have noticed that all three statutory adjudicatory forums failed to appreciate the distinct exposure of the appellant under the two statutes - the Central Excises Act and the Sales Tax Act. They also failed to grasp the scheme expounded by each of the statutes, and appreciate that these statutes related to different taxing events, and thus

exposed persons to liability in distinct scenarios. In order to ensure that no such overlapping occurs, we shall consider and address the contested claims of the parties relating to each statute, separately.

Central Excise Duty

11. Central excise duty is an in-direct tax, the incidence whereof is to be passed on to the consumer. During the relevant period, the governing law was the Central Excises Act, which had four essential facets: first, the subject matter; second, the taxing event; third, the person who would be liable to pay the tax; and fourth, the rate of the tax. The subject matter is the specified *'excisable goods'* and *'excisable services'*, as provided in the First Schedule thereto; the *'taxing event'* is when the *'excisable goods'* are produced or manufactured, or when the *'excisable services'* are provided or rendered; the person liable to pay the tax is who produces or manufactures the *'excisable goods'*, or the one who provides or renders the *'excisable services'*; and the extent of liability, that is the rate of excise duty, is specified in the First Schedule to the Central Excises Act. It is only when the first two essential conditions are fulfilled that the excise duty at the rate specified under the Central Excises Act would be chargeable to the person who manufactured the *'excisable goods'*, or the person who provided the '*excisable services'*.

12. In the present case, during the relevant period, the Central Excises Act read with the Central Excise Rules, 1944 was the applicable law. The charging-section was section 3 of the Central Excises Act, and the relevant portion thereof during the relevant period read as under:

> **3. Duties specified in the First Schedule to be levied**
> (1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods, produced or manufactured in Pakistan or imported into Pakistan and on such goods, as the Federal Government may, by notification in the official Gazette, specify, as are produced or manufactured in the non-tariff areas and are brought to the tariff areas, and on all excisable

> services, provided or rendered, in Pakistan, as, and at the rates, set forth in the First Schedule
> ....
> Provided further that notwithstanding anything contained in this Act, in respect of excisable goods and services which the Federal Government may, by notification in the official Gazette, specify, the duty shall be levied and collected as if it were a tax payable under section 3 of the Sales Tax Act, 1990, and all the provisions of that Act and the rules, notifications, orders and instructions made or issued thereunder shall, as far as may be and with necessary modifications, apply.
>
> (Emphasis provided)

While the relevant provision relating to the mode, manner and payer of the excise duty was prescribed under rule 7 of the Central Excise Rules, 1944. The said rule then read as under:

> **7. Recovery of Duty.**--Every person who produces, cures, purchases or otherwise acquires without payment of duty, or manufactures any excisable goods, or who stores such goods in a warehouse, shall pay the duty or duties due on such goods, at such time and place and to such persons as may be designated in or under the authority of these Rules, whether the payment of such duties is secured by bond or otherwise; provided that, in the case of unmanufactured products, the person purchasing or acquiring them from a curer shall assume the liability for the payment of duty; and if any such person does not pay such duty or duties at such time and place and to such person as aforesaid, or upon written demand made by the proper officer, whether such demand is delivered personally or is left at his dwelling house, or at the premises where such duty or duties have been charged, every such person shall be liable to a penalty under these Rules:
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> Provided that, in the case of natural gas, the liability for payment of duty shall, if the Central Board of Revenue by order in writing so directs, be of the distributors or the consumers.
>
> (Emphasis provided)

Excisable Goods

13. As for the first element, we note that 'transformer oil' was at the relevant period an *'excisable good'* within the purview of the Central Excises Act, as it was enumerated as PCT heading 2710.1997 which in view of Article 1(i) of the First Schedule to the Central Excises Act formed part of that Schedule.

Manufacture of Excisable Goods

14. Moving on to the next crucial determining element, the taxing event - whether reclamation of the said *'excisable good'* amounted to manufacture. This would require a recourse to the definition of the term

'manufacture', as provided under the Central Excises Act, the relevant portion therein then read as under:

> **Section 2 (25)**
> **'manufacture'** includes any process incidental or ancillary to the completion of a manufactured product and any process of re-manufacture, remaking, reconditioning or repair and the process of packing or repacking such product; and, in relation to tobacco, includes the preparation of cigarettes, cigars, cheroots, biris, cigarette and pipe or hookah tobacco, chewing tobacco or snuff, and the word '**manufacturer'** shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account if those goods are intended for sale and, in respect of gold and silver and products thereof, also any person dealing in gold and silver and products thereof who, whether or not he carries out any process of manufacture himself or through his employees or relatives, gets any process of manufacture carried out on his behalf by any person who is not in his employ, and any person so dealing in gold and silver and products thereof shall be deemed to have manufactured for all purposes of this Act, all products of gold or silver in which he deals in any capacity whatever.
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> (Emphasis provided)

This court has, in several judgments, enunciated certain principles for adjudging what constitutes 'manufacture' within the purview of the scheme envisaged in the Central Excises Act. Some of the leading principles in this regard are cited here for ready reference:

i. The Central Excises Act enlarges the scope of the word 'manufacture' to such acts, processes, works, and repair which may not generally be covered by the word literally.[6]

ii. The word 'manufacture' includes any process incidental or ancillary to the completion of a manufactured product and any process of re-manufacture, remaking, reconditioning or repair and the process of packing or repacking such product.[7]

iii. It is not necessary that any new article may be produced in this process. The article may even remain the same but the processing may make it a finished good different in quality or utility from the original one.[8]

iv. A process in which goods, though remain same, are made marketable and are, therefore, regarded by the purchasing public as different articles having a positive and specific use in their new state.[9]

v. The definition of the word 'manufacture' contained in the Central Excises Act is not an absolute one but a qualified

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[6] Assistant Collector of Central Excise v. Orient Straw Board (PTCL 1992 CL. 38).
[7] ibid.
[8] ibid.
[9] Superintendent of Central Excise v. Faqir Muhammad (PLD 1959 W.P. (Rev.) 103), Collector of Customs v. Mahboob Industries (2006 PTD 730).

> one, and thus leaves ample scope for enlarging the scope of the definition.[10]

In the neighbouring jurisdiction, the Supreme Court of India has also rendered various judgments explaining the scope and extent of the term *'manufacture'* as provided under the Indian Central Excise Act, 1944, and one of the leading judgments in this regard is **Servo-Med Industries v. Commissioner of Central Excise**[11], wherein the Court after making an exhaustive survey of the caselaw on the subject laid down the general principles relating to what constitutes *'manufacture'* in terms of the Indian Central Excise Act, 1944, thus:

> (1) Where the goods remain exactly the same even after a particular process, there is obviously no manufacture involved. Processes which remove foreign matter from goods complete in themselves and/or processes which clean goods that are complete in themselves fall within this category.
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> (2) Where the goods remain essentially the same after the particular process, again there can be no manufacture. This is for the reason that the original article continues as such despite the said process and the changes brought about by the said process.
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> (3) Where the goods are transformed into something different and/or new after a particular process, but the said goods are not marketable. Examples within this group are the Brakes India case and cases where the transformation of goods having a shelf life which is of extremely small duration. In these cases also no manufacture of goods takes place.
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> (4) Where the goods are transformed into goods which are different and/or new after a particular process, such goods being marketable as such. It is in this category that manufacture of goods can be said to take place.

In the above case, the matter related to syringes and needles purchased in bulk from the open market. The syringes and needles would then be sterilized. One syringe and one needle in an unassembled form would be put in a printed plastic pouch and the plastic pouches so packed were sold to an industrial customer. The Indian Supreme Court concluded that the process of sterilization did not produce a transformation in the original articles leading to new articles known to the market as such and,

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[10] Federation of Pakistan v. M/s Noori Trading Corporation (PTCL 1992 CL. 363).
[11] (2015) 14 SCC 47.

therefore, the sterilization of syringes and needles for medical use would not amount to the process of *'manufacture'*, as syringes and needles would remain syringes and needles even after sterilization.

15. Relevant to the case in hand are the cases falling under the first category. The Indian Supreme Court was of the view that to remove foreign matters from the goods or to cleanse the same would not fall within the purview of the term 'manufacture'. The said finding of the Court was based on the judgment of **Mineral Oil Corporation v. CCE, Kanpur Manu**.[12] The essential facts of that case were that the used transformer oil was processed for removal of impurities to reclaim it as transformer oil, as in the present case. The Court on finding that no new and distinct commodity came into existence, as a result of the process undertaken *"[b]oth before and after the said processes"* came to the conclusion, *"transformer oil remained as transformer oil*." We are afraid this judgment of the Supreme Court of India would not come to the rescue of the present appellant, as the very definition of the term *'manufacture'* in the Central Excise Act, 1944 of India and that of Pakistan are distinct. In this regard, a comparison of the two illustrates their stark distinguishing features.

'Manufacture' as defined in Central Excise Act of India	**'Manufacture' as defined in Central Excises Act of Pakistan**
"manufacture" includes any process- (i) incidental or ancillary to the completion of a manufactured product; and (ii) which is specified in relation to any goods in the Section or Chapter notes of [the Fourth Schedule] as amounting to manufacture; or; (iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or	'manufacture' includes any process incidental or ancillary to the completion of a manufactured product and **any process of re-manufacture, remaking, reconditioning or repair** and the process of packing or repacking such product; and, in relation to tobacco, includes the preparation of cigarettes, cigars, cheroots, biris, cigarette and pipe or hookah tobacco, chewing tobacco or snuff, and the word 'manufacturer' shall be construed accordingly and shall

[12] 1999 (114) E.L.T. 166. (Civil appeal from this judgment was dismissed by the Indian Supreme Court)

labeling or relabelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer. (iv) which is specified in relation to any goods by the Central Government, by notification in the Official Gazette, as amounting to manufacture, and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account	include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account if those goods are intended for sale and, in respect of gold and silver and products thereof, also any person dealing in gold and silver and products thereof who, whether or not he carries out any process of manufacture himself or through his employees or relatives, gets any process of manufacture carried out on his behalf by any person who is not in his employ, and any person so dealing in gold and silver and products thereof shall be deemed to have manufactured for all purposes of this Act, all products of gold or silver in which he deals in any capacity whatever.

Keeping in view the above definitions of the term *'manufacture'* under the two legal regimes, we note that the definition of the term provided under the Central Excises Act of Pakistan is more expansive and exhaustive in scope, as it includes '*any process of re-manufacture, remaking, reconditioning or repair'*. These words expanding the term 'manufacture' are visibly absent in the definition of the said term provided in the Central Excise Act, 1944 of India. It is this very reason that the Indian Supreme Court in the cases of **Servo-Med Industries** and **Mineral Oil Corporation *(supra)*** deemed it necessary to hold that goods which undergo a process to remove foreign matter or to cleanse the same, would not come within the purview of *'manufacture'*. However, under the excise law of Pakistan, we note that the situation would be otherwise. Transformer oil was being reclaimed in the case before us. Reclamation of transformer oil is a process in which impurities are removed from the used transformer oil so that it becomes usable as transformer oil again. It is akin to 'repair' which means renewal or restoration by renewal.[13] So, when transformer oil, which in its waste form could not be used owing to

[13] LexisNexis Tax Law Dictionary, 2016, LexisNexis.

the impurities developed therein, is put back to a usable condition, an activity of *'reconditioning'* or *'repair'* takes place. We have seen that the Central Excises Act has enlarged the scope of the word manufacture to among other things *'recondition'* or *'repair'* which may otherwise not be covered by the word 'manufacture' in its ordinary dictionary meaning. Thus, it is but apparent that indeed the appellant's activity of carrying out the process of reclamation of transformer oil would constitute *'manufacture'* within the contemplation of section 2(25) of the Central Excises Act.

Manufacturer

16. Next, we come to the third important component of excise duty – who is liable to pay. The charging-section 3 of the Central Excises Act and rule 7 of the Central Excise Rules mandate that the person, who produces or manufactures *'excisable goods'*, or renders or provides *'excisable services'*, enumerated in First Schedule of the Central Excises Act, is liable to make the payment of excise duty. The appellant's stance is that it was acting under an agreement to provide *'services'* of reclaiming transformer oil for WAPDA, and hence not liable to pay excise duty; while the Revenue insists that the appellant was the *'manufacturer'* of reclaimed transformer oil, hence, liable to pay the excise duty.

17. Admittedly, the appellant and WAPDA are two distinct and separate legal persons, who had entered into an agreement, whereby waste transformer oil, the so-called raw material, was provided free of cost by WAPDA to the appellant for reclamation of transformer oil. The title of waste transformer oil during the entire process of reclamation remained with WAPDA. Therefore, the transfer of possession of waste transformer oil by WAPDA to the appellant under a contract, so that the same is reclaimed and made useable, and thereafter, is returned to

WAPDA, would constitute *'bailment'* within the contemplation of section 148 of the Contract Act, 1872.

18. In such circumstances, when the appellant did not have title over waste transformer oil and was reclaiming the same for WAPDA under a contract, it cannot be described as the real *'manufacturer'*, while the capacity of WAPDA, the real owner of the waste as well as of reclaimed transformer oil, can hardly be described otherwise.

19. Viewed from another perspective, we note that, unlike the Sales Tax Act, the Central Excises Act does not define the term 'manufacturer' separately, and there is only a pointer indicating the meaning of the said term in the definition of the term *'manufacture'*. Let us revisit the definition of *'manufacture'* provided in the Central Excises Act at relevant time, which read as follows:

> 2(25) 'manufacture' includes any process incidental or ancillary to the completion of a manufactured product and any process of re-manufacture, remaking, reconditioning or repair and the process of packing or repacking such product; and, in relation to tobacco, includes the preparation of cigarettes, cigars, cheroots, biris, cigarette and pipe or hookah tobacco, chewing tobacco or snuff, and **the word 'manufacturer' shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account if those goods are intended for sale** and, in respect of gold and silver and products thereof, also any person dealing in gold and silver and products thereof who, whether or not he carries out any process of manufacture himself or through his employees or relatives, gets any process of manufacture carried out on his behalf by any person who is not in his employ, and any person so dealing in gold and silver and products thereof shall be deemed to have manufactured for all purposes of this Act, all products of gold or silver in which he deals in any capacity whatever.
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> (Emphasis provided)

The meaning of the word *'manufacturer'* as provided in the highlighted part of the above stated definition of *'manufacture'* appears to be inclusive, with the potential of enlarging the scope thereof. We also note that the provision itself adds two explanatory instances of persons, who would also be included in the meaning of the word 'manufacturer'. Referral to these instances starts with the words *'not only'* followed by a

description of the first of the instances. Then, there are the words *'but also'* followed by the description of the other instance. The construction *'not only....but also'* is called a correlative conjunction and is used to present two related pieces of information, with the second one being more surprising or, we may say, different than or independent of the first.[14] Use of a comma before *'but also'* suggests that a new or different category starts after the comma, and the words *'if those goods are intended for sale'* found at the end of the description of two instances relate to the latter category only. It may, thus, be said that the explanatory instances of the word *'manufacturer'* leave us with the following two categories:

i. a person who employs hired labour in the production or manufacture of excisable goods; and

ii. a person who engages in the production or manufacture of excisable goods on his own account if those goods are intended for sale.

It is not disputed that both the appellant and WAPDA were not engaged in reclamation of transformer oil for sale, so as to fall in category (ii) of manufacturer. This would leave us to consider, whether the appellant or WAPDA would fall within the other stated category (i) of manufacturers. As noted above, the waste transformer oil was provided by WAPDA to the appellant, and the same remained the property of WAPDA during the entire reclamation process. In such a scenario, the role of the appellant in the entire reclamation process could at most be described as rendering services for the reclamation of transformer oil by providing 'labour' for 'hire' to WAPDA under a contractual arrangement.

20. Conventionally, the word 'hire' is associated with the act of employment, rather than being a reward for services, however, with time,

[14] The Britannica Dictionary.
<https://www.britannica.com/dictionary/eb/qa/not-only-but-also>

and that too when referred to in the commercial use, it is now even applied to services.[15] Similarly, the term 'labour' ordinarily includes every possible human exertion, mental and physical. However, over time, the term 'labour' has been adjudged to include services performed for a corporation engaged in the manufacturing process.[16] Thus, where one furnishes materials to be manufactured by the other, according to specifications defined by him, the contract is one for 'labour'.[17] A person who himself does not engage in the production or manufacture of excisable goods, but hires the labour of another person, whether natural or juristic, on contract for this purpose, therefore falls within the scope of the first category of manufacturers mentioned above.

21. Viewed in such perspective, the role and capacity of WAPDA engaging the services of the appellant for reclaiming transformer oil on an agreed consideration (charges) would fall within the purview of *'manufacturer'* described in category (i) above, described in the definition of *'manufacture'* provided in section 2(25) of the Central Excises Act. The appellant only provided the services to WAPDA for reclamation of transformer oil. No doubt, reclamation of transformer oil is a manufacturing process within the meaning of the term *'manufacture',* as provided in section 2(25) of the Central Excises Act and the manufacturing of transformer oil is also an '*excisable good'* under the Central Excises Act.[18] However, excise duty on this *'excisable good'* is to be paid by the manufacturer,[19] not by the service provider. As the appellant is not a *'manufacturer'*, it is not liable to pay the excise duty on reclaimed transformer oil, an *'excisable good'*.

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[15] Baughman v. Sterrett Operating Service (173 A. 38, 39, 167 Md. 50).
[16] Appeal of Black (47 N.W. 342, 343, 83 Mich. 513).
[17] United Iron Works v. Standard Brass Casting Co. (231 P. 567, 569, 69 Cal.App. 384).
[18] First Schedule.
[19] Central Excise Rules 1944, r 7.

22. The appellant provided *'services'* for reclaiming transformer oil to the *'manufacturer'* - WAPDA. We need to see whether such *'service'* is an *'excisable service'* under the Central Excises Act specified in the First Schedule to the Central Excises Act. Perusal of the First Schedule to the Central Excises Act shows that the services provided while carrying out reclamation of waste transformer oil or, for that matter, any waste oil are not specifically mentioned in the table of *'excisable services'* provided in the Schedule. However, there is an omnibus heading; 9809.0000 titled *"Services provided or rendered by persons engaged in contractual execution of work or furnishing supplies".* An argument could be advanced that the activity of reclamation of transformer oil performed by the appellant could be considered as *'work'* so as to fall within the meaning of *'contractual execution of work'*. However, no definite finding can be rendered by this Court on this point, and that too at this stage, when the same was not put to the appellant in the Show Cause Notice.

23. Thus, we conclude with regard to the stance of the Revenue in the Show Cause Notice, which asserted that the appellant was liable to pay excise duty for the reclamation of transformer oil for WAPDA, that the same is not legally sustainable.

Sales Tax

24. Moving on to sales tax, we note that like any other indirect taxes, the incidence of this tax is also passed on to the consumer. But unlike the Central Excises Act, the Sales Tax Act is not restricted to specified goods and specified services provided in its schedule, rather it encompasses in its purview *'supply'* of all goods other than exempted goods. The definition of '*taxable goods'* as provided in section 2(39) and

the relevant portion of the charging section, that is section 3 of the Sales Tax Act, read as under:

> **2(39) "taxable goods"** means all goods other than those which have been exempted under section 13.
>
> **3. Scope of tax**
> (1) Subject to the provisions of this Act, there shall be charged, levied and paid a tax known as sales tax at the rate of fifteen per cent of the value of –
> (a) taxable supplies made in Pakistan by a registered person in the course or furtherance of any taxable activity carried on by him; and
> (b) goods imported into Pakistan

What we gather from the above provision is that the intent of the legislature is to encompass two events to charge the tax: first, when *taxable supplies* are made in the course of furtherance of a *taxable activity* carried out by a registered person in Pakistan; second, when the goods are imported into Pakistan. The amount of sales tax is *ad valorem*, based on the value of the taxable supplies made in Pakistan or the goods imported into Pakistan. Regarding the responsibility of paying the sales tax, section 3(3) clearly identifies that this would be the person making the *supply* or importing the goods into Pakistan. The said provision is cited here for ease of reference:

> **Section 3(3)**
> The liability to pay the tax shall be,
>
> (a) in the case of supply of goods in Pakistan, of the person making the supply, and
> (b) in the case of goods imported into Pakistan, of the person importing the goods.

In the present case, the issue for determination does not concern the goods imported into Pakistan, but relates to a *taxable supply*, which the Revenue asserts the appellant made.

25. In order to charge sales tax, the taxing event under the charging-section is when a registered person makes a *taxable supply* in the course or furtherance of any *taxable activity* carried on by him. The matter would best be understood when we consider the import of the four terms,

supply, *taxable goods, taxable supply* and *taxable activity,* as defined in the Sales Tax Act, which are reproduced here for ready reference:

> **2(33)** "**supply**" includes sale, lease (excluding financial or operating lease) or other disposition of goods in furtherance of business carried out for consideration and also includes –
>
> (a) putting to private, business or non-business use of goods acquired, produced or manufactured in the course of business;
> (b) auction or disposal of goods to satisfy a debt owed by a person;
> (c) possession of taxable goods held immediately before a person ceases to be a registered person; and
> (d) such other transaction as the Federal government may, by notification in the official Gazette, specify.
>
> **2(39) "taxable goods"** means all goods other than those which have been exempted under section 13.
>
> **2(41) "taxable supply"** means a supply of taxable goods made in Pakistan by an importer, manufacturer, wholesaler (including dealer), distributor or retailer other than a supply of goods which is exempt under section 13 and includes a supply of goods chargeable to tax at the rate of zero per cent under section 4.
>
> **2(35) "taxable activity"** means any activity which is carried on by any person, whether or not for a pecuniary profit, and involves in whole or in part, the supply of goods to any other person, whether for any consideration or otherwise, and includes any activity carried on in the form of a business, trade or manufacture.

On a careful reading of the above definitions, we note that the tread of the taxing event starts when a person makes a *supply* of *taxable goods*, the definition whereof has been expansively provided with various activities beyond the sales of goods, and further, by inserting the words "*other disposition of goods"* in the definition of the term. In such circumstances, a case may be set up against the appellant, of making a *supply* of transformer oil to WAPDA. What is crucial is whether the *supply* of transformer oil made by the appellant met the test of being a *taxable supply* made in the course or furtherance of any *taxable activity* carried on by the appellant.

26. The stance of the Revenue in the Show Cause Notice is that the appellant was manufacturing transformer oil at its reclamation plant, and thereby carrying out a *taxable supply*. To bring a supply within the scope of *taxable supply*, it is essential that the same is made by *'an*

importer, manufacturer, wholesaler (including dealer), distributor or retailer'. Admittedly, the process of reclamation of transformer oil was '*manufacture'* within the purview of said term provided in section 2(25) of the Central Excises Act. However, the term *'manufacture'* as defined in section 2(16) of the Sales Tax Act, has a marked difference from the definition of the same term provided in the Central Excises Act. To appreciate the distinction, let us review the definitions provided under the two enactments:

Sales Tax Act	Central Excises Act
2(16) "manufacture" or "produce" includes – (a) any process in which an article singly or in combination with other articles, materials, components, is either converted into another distinct article or product or is so changed, transformed or reshaped that it becomes capable of being put to use differently or distinctly and includes any process incidental or ancillary to the completion of a manufactured product; (b) process of printing, publishing, lithography and engraving; and (c) process and operations of assembling, mixing, cutting, diluting, botling, packaging, repacking or preparation of goods in any other manner;	**2(25) 'manufacture'** includes any process incidental or ancillary to the completion of a manufactured product and **any process of** re-manufacture, remaking, **reconditioning or repair** and the process of packing or repacking such product; and, in relation to tobacco, includes the preparation of cigarettes, cigars, cheroots, biris, cigarette and pipe or hookah tobacco, chewing tobacco or snuff, ... (Emphasis provided)

A watchful reading of the above definitions under the two enactments reveals that the one provided under the Central Excises Act has a more extensive scope, as it includes '*any process of re-manufacture, remaking, reconditioning or repair'*, which are not provided in the definition of the said term provided under the Sales Tax Act. This distinctive feature has already been dilated upon in the precedents of this Court, two of the leading judgments in this regard are as under:

Chairman FBR v. Al-Technique Corporation[20]

In this case, the respondent used to sterilise syringes and other medical equipment which were provided to it by other entities. The appellant argued that the respondent was liable to pay sales tax on the sterilisation process and that the same amounted to manufacturing. The Court held:

> The syringes remain syringes after sterilisation. Therefore, a bare reading of all the aforementioned definitions taxable in their legal and usual context makes it manifest that the process of sterilisation of medical/surgical products does not fall within the meaning of 'manufacture' as provided in Section 2(16) thus the respondent is not a 'manufacturer' under section 2(17) and is not making a 'taxable supply' as per section 2(41) and therefore cannot be charged to sales tax under Section 3 of the Act.

Deputy Collector, Central Excise v. Tyrex Pakistan Ltd.[21]

In this case, the respondents were engaged in the business of retreading tyres and received only the repair charges. The appellants argued that this process amounted to manufacturing. The Court held:

> [T]he combined effect of Section 2(11) and Section 3 of the Act is that the sale tax can be collected from the production of those goods which are produced or manufactured. The extended definition in the Excises and Salt Act does not apply to the present case... Even according to the dictionary meaning [of the word 'retread' in Websters Dictionary] "anything used again after repairs does not mean that the goods have been shaped into a new product.

27. In the present case, the appellant only reclaimed or repaired transformer oil. During the process of reclamation, impurities are removed from used transformer oil. This activity does not involve conversion of any article singly or in combination with other articles into another distinct article or product. Nor does the process change or transform transformer oil in a way rendering it capable of being put to use differently or distinctly.[22] The appellant returned the same good, that is transformer oil, to the owner of that good, WAPDA, after charging the latter for the repair work done by it. The process of reclamation of transformer oil by the appellant, thus, does not fall within the meaning of *'manufacture'* as provided in section 2(16) of the Sales Tax Act and, in

[20] PLD 2017 SC 99.
[21] PTCL 1996 CL. 358.
[22] Chairman FBR v. Al-Technique Corporation (PLD 2017 SC 99).

sequel, the appellant is not a *'manufacturer'* as defined in section 2(17). As the appellant is not a manufacturer, it does not get caught up in the activity of making a '*taxable supply'* as per section 2(41) for only a supply of taxable goods by an importer, manufacturer, wholesaler (including dealer), distributor or retailer falls within '*taxable supply'* under that section. The appellant, not belonging to any of the said capacities, therefore, cannot be charged to sales tax under section 3 of the Sales Tax Act.

Conclusion

28. To summarise the foregoing discussion, the conclusion follows:

Excise Duty

(i) The appellant is not a *manufacturer* of transformer oil within the contemplation of section 2(25) of the Central Excises Act, 1944 read with rule 7 of the Central Excise Rules, 1944.

(ii) The appellant is, therefore, not liable to pay the *excise duty* for reclaiming (manufacturing) transformer oil, as claimed by the Revenue in the Show Cause Notice.

(ii) The *services* provided by the appellant for reclaiming transformer oil may have come within the purview of *excisable services* provided under heading 9809.0000 in the table of *services* provided in the First Schedule of the Central Excises Act. However, no definite finding can be rendered on this issue by this Court, and that too at this stage, when the same was not put to the appellant to respond to in the Show Cause Notice.

Sales Tax

(i) The appellant is not a *manufacturer* within the purview of section 2(17) of the Sales Tax Act, 1990. The *supply* of reclaimed transformer oil by the appellant to WAPDA, thus, does not come within the scope of *taxable supplies* under the Sale Tax Act.

(ii) The appellant is, therefore, not liable to pay the sales tax as claimed by the Revenue in the Show Cause Notice.

29. Given the above, we find that the true purpose, as well as the distinctive attributes of the terms 'manufacture' and 'manufacturer' envisaged in the two taxing statutes — the Central Excises Act and the

Sales Tax Act — were not correctly appreciated by the forums below leading to flawed conclusions regarding the very chargeability of central excise duty and sales tax on the appellant for reclaiming the transformer oil for WAPDA.

30. In the circumstances, we find the impugned judgment of the High Court, the orders of the Tax Authorities, as well as the ruling of the Tribunal, are not in accordance with the law. This warrants the positive interference of this Court. Accordingly, the present appeal is allowed, and consequently the impugned orders of the High Court and all three adjudicatory forums are set aside.

Judge

Judge

Judge

Announced in Open Court on 8th December, 2022

Judge

Islamabad
Approved for reporting
Arif