2012 THLN 145

(2012 PTD 1638 | 2012 PTCL 475)

Appellate Tribunal Inland Revenue

S.T.As. Nos.2124/LB, 2127/LB and 2125/LB of 2009, decided on 8th December, 2011

PRESENT:
Before Syed Nddeem Saqlain, Chairman and Sohail Afzal, Accountant Member

COCA COLA BEVERAGES PAKISTAN LTD., GUJRANWALA
VS
COLLECTOR OF SALES TAX, GUJRANWALA

Petitioner(s) by: Asim Zulfiqar Ali,. FCA, Shabbar Zaidi FCA and Munawar-us-Islam .

Respondent(s) by: M. Tahir, D.R..

Law: Sales Tax Act (VII of 1990)
Sections: 4, 7, 8(1)(a), 3, 2(33)

ORDER

SYED NADEEM SAQLAIN, CHAIRMAN.---(1).

The appellant, in these three appeals filed under the provisions of the Sales Tax Act, 1990 (hereinaFter `Act'), is a manufacturer of aerated beverages which are marketed under the brand names `Coca-Cola', Tanta' and `Sprite'. The appellant operates through six different bottling plants located in Lahore, Gujranwala, Faislabad, Multan, Rahim Yar Khan and Karachi and for the purposes of levy of sales tax all these plants have been registered under separate sales tax registration numbers. In view of the fact that some of the issues in these appeals are common these are disposed of through this consolidated appellate order.

Exports to Afghanistan

2. In S.T.A. No. 2124/LB of 2009 the appellant feels aggrieved by the decision of the first appellate authority dated 18-8-2009 whereby the order-in-original dated 19-5-2008 disallowing the benefit of zero-rating to the appellant in connection with certain exports to Afghanistan was upheld. The primary reason on account of which the adverse inference was drawn against the appellant was that the appellant could not made available before the adjudicating officer the documents which could enable the revenue to determine that goods were exported to Afghanistan and as such these were entitled to the benefit of zero-rating.

3. In the course of arguments, the learned AR for the appellant submitted that the entitlement to zero-rating regarding exports to Afghanistan, during the period involved in the appeal, was governed by Export Policy Order, 2005 whereby it was provided that for availing the , benefit

of zero-rating the exporter holds copy of import clearance documents by Afghan Customs Authorities and as such these prescribed documents are available with the appellant company. The relevant copies were also placed before us during the course of hearing. On the basis of these documents, it was submitted that non-allowance of benefit to the appellant was illegal and unjustified.

4. We have examined the available record and have given due consideration to submissions of the appellant. In the facts and circumstances of the present appeal, we deem it proper to remand the matter to the adjudicating officer with the directions, that he should verify the aforesaid documents and allow the benefit of zero-rating to the] appellant in case the documents are available. The learned DR did not oppose this. We would, however, add that in this process reason-able opportunity of being heard shall be allowed to the appellant. The appeal on this matter is allowed in terms of aforesaid observations and findings.

Input tax claim of chilling equipment

5. This issue is common in both S.T.A. No. 2125/LB of 2009 and S.T.A. No. 2127/LB of 2009. The relevant facts are that the appellant) purchased chilling equipment constituting deep freezers, refrigerators, visi-coolers etc. and the sales tax paid on the acquisition thereof was claimed as input tax deduction in the relevant sales tax return by reference to provisions of section 7 of the Act. The amount of claim on this account aggregated to Rs.48,223,050 for the year 2006-2007 [S.T.A. No. 2125/LB of 2009] and Rs.4,518,759 [S.T.A. No. 2127/LB t of 2009]. There is no dispute between the rival parties that the equipment, after procurement, was placed at various retail outlets, who were the appellant's customers, in which the goods manufactured by the appellant were placed and offered for sale to consumers. There is also no controversy that the title in these goods remained throughout with the appellant and as such the equipment appeared in appellant's financial statements as 'owned' assets.

6. Through respective show-cause notices, the appellant, on account of claiming the input tax deduction in respect of aforesaid chilling equipment, was alleged to have contravened the provisions of section 8(1)(a) of the Act. Although the appellant attempted to defend the' claim through furnishing of written responses but the matter was decided 1 against the appellant and the claim was principally held to beinadmissible. In the order-in-original pertaining to S.T.A. No. 2125/LB of 2009 the learned adjudicating officer observed that the placement of chilling equipment constituted 'supply', being a 'disposition of goods', a term referred to in the then applicable section 2(33) and thus it attracted levy of sales tax under section 3 of the Act. With these observations it was held by adjudicating officer that since the appellant did not pay sales tax on alleged 'supply', therefore, it was not entitled to claim the deduction of input tax under the law. Likewise, in the order-in-original relevant to S.T.A. No. 2127/LB of 2009, the adjudicating officer principally enforced the allegations contained in the show-cause notice by observing that this was a 'supply' attracting charge under section 3 of the Act and hence the underlying input sales tax was inadmissible.

7. Upon decision in adjudication as aforesaid, the appellant sought remedy through filing of separate appeals before the first appellate authority, however, the respective appeals were dismissed. In the order of the first appellate authority relevant to S.T.A. No. 2125/LB of 2009 it was observed that the claim of input tax adjustment was rightly disallowed by reference to section 8(1)(a) of the Act. No observation was though recorded with regard to conclusion of the adjudicating officer on alleged 'supply' of chilling equipment. In the order pertaining to S.T.A. No. 2127/LB of 2009 the first appellate authority again confirmed the findings of the adjudicating officer, however, while doing so he inter-alia derived strength from the

submissions of the Collectorate/observations of the adjudicating officer that the transaction constituted 'supply' for furtherance of taxable activity which remained chargeable to sales tax under section 3(1)(a) of the Act and since the related output tax liability remained undischarged, the appellant's claim of input sales tax could not be entertained.

8. In the context of the aforesaid findings and observations in the orders impugned before us, the learned A.Rs. submitted that since the orders of the authorities in these two appeals have been passed on somewhat distinguishable basis, therefore, for the purposes of disposal thereof, following specific issues require consideration:

(i) whether the activity involving placement of chilling equipment at retail outlets for undertaking sale of goods manufactured by the appellant constitute 'supply' in terms of provisions of section 2(33) of the Act; and

(ii) whether, in terms of scheme contained in the statute, the input sales tax in relation to 'chilling equipment' acquired by the appellant, is hit by the mischief of provisions of section 8(1)(a) of the Act.

9. The learned AR made detailed submissions in respect of the each of the issues framed above that require our deliberations. The gist of arguments put forth by A.Rs. can be summarized as under:

(i) The placement of chilling equipment by appellant at retail outlets did not constitute a 'supply' as movement of goods to another's premises without any element of 'disposal' or parting with ownership and associated risks and rewards cannot be dragged into the scope of the term 'disposition' used in section 2(33) of the Act. In this respect, reliance was placed on a recent decision of this Tribunal reported as 2010 PTD 2210 in which similar issue was dilated upon in an exhaustive manner. Further reliance was placed on another decision of this Tribunal in S.T.A. No.340/KB of 2009 dated 23-5-2011;

(ii) The basis adopted by the authorities below that since no output tax was paid on alleged 'supply', therefore, the appellant lost the right to claim the input tax adjustment is contrary to the scheme embodied in the provisions of law. It was argued that the basis provided for in the Act for availing the benefit of input tax adjustment is that the input must relate to goods that are used or to be used for the 'purposes' of taxable supplies made or to be made and as such for the allowability of input tax adjustment what needs to be determined is whether or not this criterion is met. According to learned A.Rs. the authorities below erred in connecting the adjustment of input tax with subsequent supply of those very goods in respect of which input tax was paid/claimed. It was further submitted that both 'input tax' and 'output tax' operate in their own respective realms and thus payment of output tax on a particular item is not a condition precedent for claim of input tax thereon;

(iii) The provisions of section 8(1)(a) of the Act needs to be read and applied in conjunction with provisions of section 7 of the Act. Under provisions of section 8(1)(a) only such input tax is inadmissible as relates to goods used or to be used for a purpose other than those of making taxable supplies. In this respect, A.Rs. submitted that the expression purpose has a very wide connotation and cannot be restricted to the extent of goods directly used for taxable supplies. Under these provisions, input tax adjustment on goods which relate directly or indirectly or even remotely to the taxable supplies could not be disallowed. The presumption of the authorities below that chilling equipment, having been placed at retail outlets, in fact contributed towards the taxable supplies of the retail outlets not only contradicts the scheme

of law but is also contrary to the facts of the case. According' to A.Rs. this equipment actually contributed towards the enhancement of supplies made by the appellant as only its products were allowed to be chilled in such equipment and every sale at the retail outlet in fact supplemented the appellant's sale directly and in absolute terms. In this connection, A.Rs. placed reliance on the landmark,judgment of honourable Lahore High Court reported as PTCL 2002 CL 115, 2007 PTD 2391, 2010 PTD 2210 and few others. The gist of these decisions remained that input tax adjustment is a statutory right of a registered person in a manner that all such input tax that relates to goods, used or to be used, for the purposes of taxable supplies remains adjustable;

(iv) In the context of provisions of section 8(1)(a) of the Act, learned A.Rs. argued that the observation of the authorities below that chilling equipment contributed towards taxable activity of retailers, and not the appellant, defeats the entire scheme of law. If, for arguments sake, this is accepted this would mean that all such taxable supplies which are undertaken through a network of wholesalers and retailers would never qualify for adjustment of input tax incurred on sale promotion, advertisement and marketing activities as in these cases, all such activities would be held to be contributing towards the sales/supplies of wholesalers and retailers. This surely, A.Rs. argued, is neither the scheme of law nor the underlying intention. The provisions of law are fully cognizant of such business processes and cater for allowability of input tax the same being for the purpose of taxable supplies;

(v) The A.Rs. rebutted the interpretation of section 8(1)(a) of the Act advanced by authorities below by submitting that these provisions actually provide for restriction of input tax to the extent same is relatable to 'exempt' or 'non-taxable supplies' and hence the mischief of these provisions cannot be extended to cases where a taxpayer is engaged only in making taxable supplies which is admittedly the appellant's case. It was the contention of A.Rs. that specific items in respect whereof input tax has been declared to be inadmissible is the subject of provisions of section 8(1)(b) of the Act and authorities below have grossly erred in invoking the provisions of section 8(1)(a) to deny the input tax adjustment to the appellant. It was added that since appellant's business activities comprised of making taxable supplies only, obviously all the activities undertaken by it remained for the purposes of such taxable supplies and hence provisions of section 8(1)(a) of the Act did not apply. To supplement this line of argument, it was reiterated that since chilling equipment was essential to the business activities of the appellant, related input tax could not be couched in these provisions of law. In this connection, the learned A.Rs. also made a reference to the observations recorded in the order-inÂoriginal where this fact has been admitted but input tax was still disallowed inter-alia on the plea that no output tax was paid on alleged supply; and

(vi) The learned ARs also placed before us the decisions recorded by defunct Customs, Sales Tax and Excise Appellate Tribunal in GST 2003 CL 512 and S.T.A. No. 154/LB of 2007 on the matter and argued that these are per incuriam and also distinguishable. It was submitted that not only these were issued without taking into account the ratio laid down in the order of the Lahore High Court which was operative in the field at the time these decisions were issued but also recent decisions of the Tribunal (2010 PTD 2210 and S.T.A. No. 340/KB of 2009), being later in time and correctly appreciating the law constitute valid precedents on the matter now under consideration. These recent decisions, the A.Rs. submitted, reaffirm the interpretation advanced by the honourable High Court which unfortunately escaped the attention of the honourable members who previously decided the matter.

10. The learned DR supported the orders of authorities below and reiterated the contentions embodied in the impugned orders. The primary line of argument remained that the appellant

could not claim input tax adjustment as chilling equipment did not contribute anything towards the purpose of appellant's taxable supplies. It was submitted that section 8(1)(a) has been rightly invoked in the case of the appellant and if the contention of the appellant is accepted this would mean that input tax adjustment would remain allowable without any restriction. Regarding the decisions relied upon by A.Rs. in support of their contentions, learned DR submitted that department has already assailed these before the High Court and thus these do not constitute a final verdict on the provisions of law applicable in the case on hand.

11. We have heard the arguments, perused the available record and have also given earnest consideration to the decisions relied upon by both the parties. In our view the learned A.Rs. have properly framed the issues requiring our deliberation. In the facts available before us there is no dispute that in this case the title of chilling equipment remained with the appellant and as such it was only a placement of goods at retail outlets without transferring any risks or rewards in the property. In these circumstance, the decision of this Tribunal in 2010 PTD 2210 becomes very relevant and to the point. The facts in this decision were that an automobile manufacturer placed certain vehicles at dealers' premises against security deposits to make the sale thereof to end-customers ready and convenient. The manufacturer retained the title in vehicles with itself. In that case the revenue treated the movement of goods as 'supply' being 'disposition of goods' and security deposit as 'consideration' thereof thus charging it to output - tax :ender section 3 of the Act. This Tribunal held in categorical terms that this was not a 'supply' of goods there being no 'disposition of goods' as for 'disposition of goods' to take place, mere transfer of custody is not enough and the same takes place only when.. the acquirer holds some sort of right to further dispose of the goods at his will/discretion. Clearly, in this case the retailers did not possess any right to further dispose the chilling equipment. and it remained the property of the appellant and hence, it was incorrectly treated to be a 'supply' by the authorities below. The reliance on decision in S,T.A. No. 340/KB of 2009 by the A.Rs, is also on all fours to the present case as facts therein bear even closer resemblance to that on hand. In this case, the equipment installed by pharmaceutical company was used by the medical laboratories/ hospitals to undertake the medical tests by making use of the related kits supplied by the pharmaceutical company and it was held by this Tribunal that not only this was not a case of 'supply of equipment' as the right of ownership remained with the pharmaceutical company but also the use thereof was for the purposes of 'supplies' (test kits) made by the pharmaceutical company. This, it requires no emphasis, is exactly similar to the facts of the appeals under consideration. In this case since the title in chilling equipment was retained by the appellant in absolute terms and since the equipment was not allowed to be used for any other objective, we consider that there arises no question of 'supply' thereof attracting the t levy of output tax under section 3 of the Act. Consequently, we observe that authorities below have clearly erred in concluding that there occurred some 'supply' in the arrangement.

12. We also feel persuaded by the arguments of the A.Rs. on the scope and extent of the provisions of section 8(1)(a) of the Act and its applicability in the present case. In this case we have no hesitation in our minds that chilling equipment was not used for any purpose other than for taxable supplies made or to be made by the appellant. The decisions in PTCL 2002 CL 115, 2007 PTD 2391 and 2010 PTD 2210 are authoritative pronouncements in the context. The learned A.Rs. contention that interpretation advanced by authorities below that chilling equipment contributed towards the taxable supplies of retailers is not only against the spirit of law it also contrary to provisions of law. That is so, because if this is accepted, clearly it would imply that no input tax adjustment on std. promotion activities, aimed at attracting eventual consumers, would be available to manufacturers who supply their Products through a network of wholesales/retailers and the obvious result would be that the entire superstructure

of VAT mode of taxation would crumble down. We note that the grounds on which decisions were previously issued were based on the aspect of alleged supply and utilization of, chilling equipment for the purpose of taxable supplies of the retailers. The ratio of decision of Lahore High Court and those recently issued by this Tribunal, as discussed above, negate these in unambiguous and unequivocal manner. With all the due respect, we are unable to agree with the previous decisions on the matter for more than one reason. Learned A.Rs. have rightly pointed out that in case, the honourable members had been properly assisted and the ratio in PTCL 2002 CL 115 by honourable Lahore High Court was brought in their knowledge, the conclusion arrived at would have been definitely different. We therefore, hold these decisions to be per incuriam and hence, refrain from following these. These are not valid precedents vis-a-vis the case on hand.

13. It has all along been view of courts and also in citations referred supra, that "the provisions of law authorize deduction for all such input tax that relate to goods that contribute directly or indirectly and even remotely towards furtherance of taxable activity". In this case, we observe that it is not at all disputed that subject chilling equipment is being used to chill the beverage products supplied by the appellant and hence, any denial of input tax adjustment is not understandable. Clearly the connection/nexus of chilling equipment with appellant's business is established which is also admitted by the adjudicating officer in one of order-in-originals assailed in these appeals wherein he observed that "...The respondent supplied these equipments to their dealers for facilitating the sales and for publicity of their product". In the presence of such clear observation, we are at loss to understand as to how department is contending for disallowance of related adjustment of input tax. For all intent and purposes the subject goods were for the purposes of taxable supplies of the appellant and hence, were not hit by the mischief of provisions of section 8(1)(a) of the Act. The expression 'purpose' has a very wide application and according to dictionary meaning the same refers to what something is supposed to be achieved. In this case, there is no doubt that chilling equipment was placed to achieve growth in business and that fulfils the requirement of 'purpose' as used in the relevant provisions of law.

14. Notwithstanding our view that there occurred no event of `supply' attracting the incidence of output tax under section 3 of the Act, we would also like to add here that the link made by the revenue that J where no output tax was 'paid, underlying input tax is not allowable is also grossly misconceived. The learned A.Rs. have correctly pointed out that no provision of law authorizes disallowance of input tax on such basis. In this connection the ratio decided on the basis of facts involvedin PTCL 2002 CL 115 is very pertinent. In that case, the taxpayer claimed the input tax on goods that were lost in fire. The revenue denied the input tax adjustment on the grounds that these were not eventually consumed in/formed part of taxable supplies. The honourable High Court rejected the contention of the revenue and observed that since the goods were acquired for the purposes of taxable supplies, therefore, these fully qualified for input tax adjustment. The conclusion . drawn by the revenue is contrary to the scheme of law and implies that input tax adjustment is permissible only where the acquired goods have been further supplied. This, if accepted would mean that no input tax adjustment is allowable to manufacturers even for goods like machinery that is installed for manufacture of goods and not itself supplied. Clearly, such interpretation would entail farcical consequences and we cannot subscribe to it.

15. It would not be out of place to record here that revenue in fact is blowing hot and. cold in the same breath by resting its case simultaneously on the provisions of sections 2(33) and 8(1)(a) of the Act. On one hand, on the, basis provisions of section 2(33) of the Act, it is arguing that a 'taxable supply' took place attracting the charge of tax under section 3 of the Act and on the

other hand it is disallowing the input tax on the premise that placement of chilling equipment was not for the purposes of appellant's taxable activity. As a result of above discussion, we conclude that the appellant's claim of input tax adjustment on chilling equipment was fully in accordance with law. The orders of the authorities below are vacated on this point and it is held that adjustment should be allowed as per the claim of the appellant.

Input tax on vehicles' batteries

16. In S.T.A. No. 2125/LB of 2009, the appellant's claim of input tax adjustment regarding batteries purchased admittedly for use in vehicles engaged in distribution of taxable goods has been disallowed by reference to section 8(1)(a) of the Act. No detailed reasoning, in this respect, has been given by either of the authorities below. The learned A.Rs. argued and we readily agree that in this case, vehicles were used 1 for transportation of goods from manufacturing premises to retail outlets and as such by no stretch of imagination the aspect of 'for the purpose of taxable supplies made or to be made' could be doubted. Resultantly, we accept the appeal on this point and hold the claim to be legitimate and valid under the law.

Input tax on furniture/office equipment/miscellaneous items

17. In S.T.A. No. 2125/LB of 2009, appellant's claim for input tax adjustment on items constituting furniture, office equipment and miscellaneous goods was disallowed again by reference to provisions of section 8(1)(a) of the Act. Again no specific basis for such disallowance has been given in the orders of the authorities below.

18. In this respect, the learned A.Rs. argued that in the year 1998, the Federal Government issued Notification S.R.O. 578(I)/1998 under section 8(1)(b) of the Act through which input tax related to items of furniture, fixture, fittings and office equipment was disallowed specifically. It was the contention of the learned A.Rs. that the very reason that input tax on these items was disallowed through S.R.O. 578(I)/1998 issued under section 8(1)(b) of the Act was that it was otherwise not disallowed or restricted under section 8(1)(a) of the Act. With effect from 1-7-2004, the learned A.Rs. added, such notification was substituted by S.R.O. 490(I)/2004 in which the negative list did not include presently disputed items. After explaining this background, it was emphasized that since, the period in appeal is 2006-2007, there-fore, the input tax on subject items has been wrongly disallowed under section 8(1)(a) of the Act.

19. We find considerable force in the argument of the learned A.Rs. The obvious and inescapable conclusion drawn from the set of facts described above is that departmental action is against the relevant provisions of law and hence, input tax on these items is held to be allowable to the appellant. There exists no valid or justifiable basis to deny adjustment on these items with effect from 1-7-2004. The same is directed to be allowed.

All the three appeals stand disposed in the manner stated above.