APPELLATE TRIBUNAL INLAND REVENUE, LAHORE BENCH.

STA No.253/LB/2011

1. M/s. Lahore Electric Supply Company Ltd., Lahore. ... Appellant

Versus

The CIR, RTO, Lahore ... Respondent

Appellant by : 1. Mr. Shahbaz Butt, Advocate
2. Mr. Kamran Iqbal Butt, FCA
3. Mr. Abid Latif Lodhi, Finance Manager

Respondent by : 1. Mr. Asif Iqbal Hashmi, Legal Advisor
2. Dr. Ishtiaq Ahmad, DR (LTU)

STA No.284/LB/2011

M/s. Islamabad Electric Supply Company Ltd., Islamabad. ... Appellant

Versus

The CIR, LTU, Islamabad ... Respondent

Appellant by : 1. Mr. Shahbaz Butt, Advocate
2. Mr. Kamran Iqbal Butt, FCA

Respondent by : 1. Syed Tauqeer Bokhari, Legal Advisor
2. Dr. Ishtiaq Ahmad, DR (LTU)

Date of Hearing : 14.06.2011
Date of Order : 14.06.2011

563,432/m

ORDER

This order shall decide subject appeals, having similar facts and a common legal proposition.

2. Appellants are Electric Supply Companies, incorporated with the object of distributing Electric Power, after purchasing the same from electricity generating entities like WAPDA. Being registered under section 14 of the Sales Tax Act 1990, the appellants were paying sale tax (output tax) on distribution/supply of the electricity and were

Rules, 2007. The electric power was also supplied to Steel Melters and Re-rollers, however, special procedure for payment of sales tax by them was provided in Chapter XI of the Rules of 2007. Under Rule 58H, Steel Melters / Re-rollers were obliged to pay sales tax @ Rs.6 per unit. Under sub-rule (2) of Rule 58H, payment of the tax was required to be made through Electricity Bills alongwith electricity charges.

3. The appellants were confronted with respective Show Cause Notices, on common issue that the tax collected from the Steel Melters/Re-rollers, under Rule 58(H) through Electricity Bills, was wrongly adjusted by them against input tax. Departmental view was that this tax was final discharge of tax liability of the Steel-Meltes/Re-rollers, and appellants had just collected the same on behalf of department. The notices were contested on different interpretation of relevant provisions. Reply to show cause Notices could not satisfy the adjudicating officers, who proceeded and passed Orders-in-Original, creating demand of the tax collected but not deposited in National Exchequer along- with penalty and default surcharge to be calculated at the time of payment. First Appeals by both appellants before different Commissioners (Appeal) failed, as interpretation made by adjudicating officers was upheld.

4. These orders are impugned before us i.e., Order-in-Appeal Nos. 1&2/A-11/2011 both dated 09.05.2011 and Order-in-Appeal No.143/2011, dated 03.05.2011. Two appeals are filed by LESCO (Lahore Electric Supply Company Limited), relating to tax periods July 2008 to June 2009 & July 2009 to June 2010. Third appeal is filed by

period July 2008 to December 2010. Appellants were represented by Mr. Shahbaz Butt (Advocate Supreme Court) alongwith Mr. Kamran Iqbal Butt (FCA). Department was represented by Legal Advisor Mr. Asif Hashmi (Advocate) alongwith Dr. Ishtiaq Ahmad (DR, LTU) in appeal filed by LESCO and in appeal filed by IESCO, Legal Advisor Syed Tauqeer Bokhari (Advocate) has represented dpartment.

5. Mr. Shahbaz Butt, arguing for the appellants submitted that appellants were entitled to adjust input tax under section 7 of Sales Tax Act 1990 read with Rule 15 to Chapter III of Special Procedure Rules, 2007. He elaborated that Special Procedure Rules were notified through SRO 480(I)/2007 dated 09 June 2007 effective from 01-07-2007, whereas Special Procedure for Steel Melters/Re-rollers was introduced through SRO 687(I)/2007 dated 06 July, 2007. He argues; as no corresponding amendment was made in Chapter III, dealing with Special Procedure for Electric Power Supplies, therefore, department's interpretation had no force. He further submitted that no restriction on adjustment of tax collected under Rules 58H was available in chapters III or XI. He emphasized that the appellants were never declared as withholding agents under Sales Tax Special Procedure (Withholding Rules 2007), wherein it was specifically provided that tax withheld would be deposited by withholding agent through his monthly return and such collection should not be treated his output tax. He added that department was estopped by its conduct because return filed by appellants, electronically, were based on pre-defined formula available

SEAL OF INCOME TAX APPELLATE TRIBUNAL GOVT. OF PAKISTAN LAHORE

existing law and Rules. He argues that format of the Sales Tax returns for appellant also support the appellants contention, as a payable amount by a registered person, even if there was a brought forward balance, was available for adjustment against such allegedly withheld amount. Learned counsel has also relied on well entrenched principle of interpreting taxing statute that where there are two interpretations possible, one favoring the taxpayer should be adopted. He explains that FBR through order C.No.3(15)SJJ/ 09/33608 dated 20 August 2009, set aside the demand on same issue, however, re-opened the case vide its order dated 10 October, 2009, which showed that FBR was itself doubtful on the interpretation made by department.

Learned legal advisors, arguing for respondent/department submitted that the right of adjustment of input tax was never denied by the department. However, it was explained, that adjustment of input could be allowed against output tax payable by the appellant under section 3 of the Sales Tax Act read with Rule 3(1) of Chapter III of Special Procedure Rules, 2007. It is argued that tax collected through Electricity Bills under Rule 58H of Chapter XI was tax of the Steel Melters/Re-rollers, therefore, same was wrongly adjusted. Mr. Asif Hashmi, representing LTU Lahore, argued that appeals, before Commissioner (Appeals) filed by LESCO were barred by time and Commissioner (Appeals) had not condoned the delay. Mr. Shahbaz Butt, in reply, explained that appeals were decided on merits by Commissioner (Appeals), therefore, his observation on the issue of

6. Heard both the parties, record perused and relevant provisions of law and Rules are examined deeply.

Dealing with the issue of limitation in two appeals filed by LESCO, we agree with the submission of learned counsel for appellant that no express order of dismissing the appeals as time barred was passed, despite disagreeing with the explanation of appellant for late filing of appeals. In our view, merits of case involved in these appeals had wider implications, therefore, learned Commissioner (Appeals) preferred to decided appeals on merits. We too, tend to ignore the objection of limitation and prefer to deal with merits of the case as was done by learned Commissioner.

Before addressing the arguments from both sides, to determine the issue on merits, examination of relevant Rules at the touchstone of relevant provisions from Sales Tax Act 1990 is necessary.

Under section 3 of the Sales Tax Act 1990, sales tax is charged, levied and paid on '*value of supply*' and sub-section 3(a) fix liability, to pay tax, on the person making supply. Section 7 of the Act of 1990 tells about determination of tax liability and entitles the registered person, making taxable supply, to deduct "***input tax***", paid or payable during tax period for the purpose of taxable supply made or to be made, from "***output tax***" that is due from him. Input tax is defined under section 2(14), as a '*tax levied on supply of goods to registered person*' and output tax is defined in section 2(20), as a '*tax levied on supply of goods by registered person*'.

paid on a taxable supply to the person is deductable from the tax payable. In simple words sales tax is paid only on value added part of a taxable supply. Where chain of value addition is broken, it is the stage where burden of the tax, collected at many stages, rests i.e., on the person consuming the goods without further supply.

8. Sales Tax Act 1990, however, has delegated powers to the Federal Government to frame a special procedure for certain supplies. Normal procedure discussed above, to charge, levy and collect the sales tax can be deviated through special procedure. Relevant part from section 71 of the Act of 1990, giving such powers, is reproduced;

> **"71. Special procedure.—**
>
> (1) Notwithstanding anything contained in this Act, the Federal Government may, by notification in the official Gazette, prescribe special procedure for scope and payment of tax, registration, book keeping and invoicing requirements and returns, etc. in respect of such supplies as may be specified therein."

Powers of prescribing the special procedure is not confined to section 71, legislature, in number of other sections of the Act, has bestowed such power on the Federal Government or FBR ("**the Board**") to prescribe a procedure, other than normal procedure, for certain supplies, taxable goods, registered person or a group of registered person. For instance;

i. under section 3(2)(b), Federal Govt. can declare, through notification, that the tax shall be charged, collected and paid in such manner and at a higher or lower rate in respect of any

ii. under subsection (6) to section 3, the Board or Federal Govt. can levy and collect tax, in lieu of tax under sub-section (1), of such amount as it may deem fit, on any supplies or class of supplies or on any goods or class of goods and may also specify the mode, manner or time of payment of such amount of tax.

iii. Section 6(2) ordains that the tax shall be paid at the time of filing returns, however, its proviso confers power on Board to direct that tax shall be charged, collected and paid in any other way, mode, manner or at time as my be specified in a notification. Its sub-section (3)(ii) again empowers the Board to specify mode and manners for payment of tax other than depositing it in a designated bank.

Section 7A(2), a *non obstante* provision, delegate power on the Federal Govt. to specify the minimum value addition required to be declared by certain persons or categories of persons, for supply of goods of such description, or class as may be prescribed, and to waive the requirement of audit or scrutiny of records if such minimum value addition is declared.

The Sales Tax Special Procedure Rules 2007 were notified through S.R.O. 480(I)/2007 date 9th June 2007, under the delegated powers, preamble of the Rules fortify the legal position discussed above;

> **S.R.O. 480(I)/2007.** In exercise of the powers conferred by section 71 of the Sales Tax Act, 1990, read with clauses (9) and (46) of section 2, sections 3 and 4, sub-section (2) of section 6 1[, section 7], section 7A, clause (b) of sub-section (1) of section 8, clause (a) of sub-section (2) of section 13, sub-sections (2A) and (3) of section 22, sections 23 and 60 thereof, the Federal Government is pleased to make the following rules, namely:—

9. In this backdrop of legal position under Sales Tax Act 1990, we now advert to examine the relevant Rules of special procedure, different interpretation of which by both the parties lead to these appeals. Chapter III of the Special Procedure Rules 2007 deals with

Power" and admittedly, appellants are governed by this procedure.

Relevant parts from the Rules are reproduced for ease;

CHAPTER III

SPECIAL PROCEDURE FOR COLLECTION AND PAYMENT OF SALES TAX ON ELECTRIC POWER

13. Levy and collection of sales tax.— (1) Every person, referred to in the preceding rule, who supplies electric power **shall charge and collect sales tax** at the rate specified in sub-section (1) of section 3 of the Act.

(2) Subject to sub-rule (3), sales tax on electric power **shall be levied and collected** at the following stages, namely:

(a) ... ...

(b) in case of generation, transmission, distribution and supply of electric power by a public sector project like WAPDA a private sector project including an IPP, a Captive Power Unit or any other person, the **responsibility to collect sales tax** shall be of the person making the supply, and the **value shall be** the price of electric power including all charges, surcharges excluding the amount of late payment surcharge, rents, commissions and all duties and taxes whether local, Provincial or Federal, but excluding the amount of sales tax, as provided in clause (46) of section 2 of the Act8[: Provided that in case of electric power supplied by WAPDA, the additional charge of Rs. 0.10 per kwh, collected on account of Neelum Jehlum Hydro Power Development Fund shall not be included in value for determination of sales tax payable.]

14. Filing of returns and deposit of sales tax.—

(4) Any person other than an IPP, WAPDA or KESC who supplies electric power **shall file a monthly sales tax** return under section 26 of the Act and Chapter II of the Sales Tax Rules, 2006, and **deposit the amount of sales tax** payable for the tax period by the due date.

15. Determination of sales tax liability in respect of WAPDA

16. Input tax adjustment for registered consumers.— (1) In case of registered consumers, the electric power bill issued by electric power distribution company **shall be treated as a tax invoice** as defined in clause (40) of section 2 of the Act.

(2) The registered consumers **shall be entitled to claim input tax adjustment against such invoice** after the bill has been paid, as per the provisions of section 7, 8 and 8B of the Act provided the bill contains registration number and address of the business premises declared to the Collector by such consumer.

17. Record keeping and invoicing.— (1) Every person who supplies electric power shall maintain records as prescribed under section 22 of the Act or a notification issued thereunder.

(2) Every person who supplies or distributes electric power shall print in his bill or invoice, as the case may be, registration number of the consumer, if applicable, the rate and the amount of sales tax required to be charged by him under sub-section (1) of section 3 of the Act.

(3) Every person who supplies electric power and using computerized accounting system may issue a computer generated sales tax invoice and keep his record on the computer in the prescribed format.

CHAPTER XI

SPECIAL PROCEDURE FOR PAYMENT OF SALES TAX BY STEEL-MELTERS, RE-ROLLERS AND SHIP BREAKERS

58H. Payment of tax.– (1) Every steel-melter, steel re-roller and composite unit of steel melting and re-rolling (having a single electricity meter), **shall pay sales tax** at the rate of **[six rupees] per unit** of electricity consumed for the production of steel billets, ingots and mild steel (MS) products which will be considered as their final discharge of sales tax liability.

(2) **Payment of tax** by steel melters, re-rollers and composite units of melting and re-rolling shall be made **through electricity bills** alongwith electricity charges

Provided that in case the due amount of sales tax mentioned in sub-rule (1) is not mentioned in the electricity bill issued to any steel melter or re-roller or composite unit of melting and re-rolling, the said melter or re-roller or composite unit shall

(3) In case of default in payment of sales tax by the due date mentioned on the electricity bill, besides other legal action by the concerned Sales Tax Collectorate, the concerned electric supply company shall disconnect the electricity connection of the unit.

(6) Steel melters and re-rollers, except Pakistan Steel Mills [, Heavy Mechanical Complex and Peoples Steel Mills, paying sales tax on fixed rates through electricity bills **shall not be entitled to any input tax adjustment.**

[58I. **Invoices and returns.**– (1) Sales tax invoices shall be issued by steel melters to re-rollers showing sales tax amount of five thousand five hundred and twenty-six rupees per metric ton.

(2) For supplies to registered persons, sales tax invoices shall be issued by steel re-rollers using ingots or billets of steel melters showing sales tax amount of five thousand nine hundred and sixty rupees per metric ton.

(3) Re-rollers using billets of Pakistan Steel Mills or Heavy Mechanical Complex or Peoples Steel Mills or imported billets shall issue sales tax invoices to downstream industry showing sales tax of seven thousand three hundred and eight rupees per metric ton.

(4) Re-rollers using ship-plates and re-rollable scrap as raw material shall issue sales tax invoices to registered persons showing sales tax of five thousand six hundred and twenty-eight rupees per metric ton.

(5) For buyers other than registered persons, steel re-rollers shall issue invoices showing sales tax of seven hundred eighty rupees per metric ton.

(6) Persons supplying imported MS products to registered persons shall issue invoices showing sales tax of seven thousand three hundred and eight rupees per metric ton. For supplies of imported MS products made to buyers other than registered persons, sales tax amount of seven hundred and eighty rupees per metric ton shall be shown in the invoices.

(7) Every steel-melter and steel re-roller paying sales tax under these rules shall submit a copy of electricity bill showing payment of tax due duly authenticated by the concerned Association along with

Rule 13(1) of Chapter III prescribes that payment of sales tax shall be the responsibility of person supplying electricity and rate shall be as specified in section 3(1) of Sales Tax Act 1990. Sub-rule 2(b) tells that value of the supply shall be the price of electricity including all charges etc. Rule 14 casts duty on the distributing company (like appellants) to deposit sales tax in the designated bank along with monthly returns. Rule 15 entitles the adjustment of input tax in the manner specified in section 7 of the Act of 1990. So far no notable deviation is found in these rules from the normal procedure, however, Rule 16 treats the electricity bill as 'tax invoice' for registered consumers. Rule 17(2) requires that the distributing company shall print in the electricity bill the rate and amount of sales tax.

Rule 58H of Chapter XI, interpretation of which is in dispute, prescribes a different rate of tax i.e. "***six rupees per unit of the electricity consumed***" payable by Steel Melters/Re-rollers. This tax is lieu of tax under section 3(1) as envisaged in sub-section (6) of section 3 and in essence is output tax. Sub-rule (2) of this rule prescribe that this tax can be paid in two manners; One, through electricity bills alongwith electricity charges and Second, through monthly sales tax return, if same is not found mentioned in the electricity bill issued. We may observe here that prescribing the manner of payment through electricity bill finds support from section 6(3)(ii). Collective reading of sub-rule (1) and (6) of Rule 58H reveals that the tax envisaged under

strengthens the observation made ibid that this tax is output tax of the Steel Melters/Re-rollers, because adjustment of input can only be made against an output tax.

10. Tax under Rule 58 is *'capacity based'* on the presumption that whatever is produced shall be supplied. Formula of prescribing this tax in lieu of normal tax has been discussed by Apex Court in *Chairman CBR Vs Haji Sultan Ahmad Case* (PLD 2008 SC 320). The rules under Chapter XI were challenged before Lahore High Court and were declared *ultra vires* to the Sales Tax Act 1990. On appeal, the operation of the judgment by Lahore High Court was suspended, while granting leave. The excerpt from the judgment, explaining above said formula is reproduced;

"2. Facts of the case lie in a small compass. The respondents who are engaged in the business of **steel Melting and Re-Rolling used to pay sales tax on production i.e. that tax liability was determined on the hypothesis that whatever is produced will be supplied ultimately.** Later on special procedure was introduced in the Federal Budget, 2004-2005 and notified vide S.R.O.484(I)/2004 for the payment of sales tax on ingots/billets and mild steel manufacturer. ***In this way minimum value addition for steel melters and re-rollers was fixed by working out that 800 units of electricity are required to meet and produce one metric ton of steel, and for the purposes of taxable supply it was assumed that whatever is produced will be supplied ultimately and stock variation will not affect the taxable activity.*** The charge of sales tax through self declaration on the basis of electricity consumed was introduced through S.R.O.678(I)/2007, dated 6-7-2007. On the basis of above explained formula sales tax was decided to be collected through electricity providers in the monthly bills. Some of the registered persons challenged the special Procedure for collection and payment of sales tax notified vide S.R.O.678(I)/2007 issued by the Federal Government in exercise of powers under section 71 of the Sales Tax Act, 1990 and filed Constitutional Petitions in the Lahore High Court ..."

800 Units / Metric Ton.

11. After examining the relevant rules and law at length, we have no doubt in holding that the tax envisaged under Rule 58H to Chapter XI of Sales Tax Special Procedure Rules 2007 is in lieu of tax under section 3(1) of Sales Tax Act and is not output tax of the appellants. Appellants are entitled to adjust input tax under Rule 15 to Chapter III i.e., in accordance with section 7, from the tax payable under Rule 13(1) of the same Chapter. We have noticed in a copy of electricity bill issued to Steel Melters/Re-rollers (shown to us during proceeding) that tax under the Rule 58H was printed, separate from the tax paid under Rules 3(1). The tax payable by the appellant was printed @ 17% as required under Rule 17(2) of Chapter III. We may also observe that the Rules discussed above do not stop the appellants from adjusting input from the output tax paid @ 17% and we hold accordingly. The appellants, however, were not justified to adjust tax collected under Rule 58H.

In presence of the conclusion arrived at, on examination of relevant provisions, arguments of learned counsel for the appellant could not impress us. It was not necessary that appellants should have been declared withholding agents under section 3(7) read with Special Procedure (Withholding) Rules, 2007. Preamble of Withholding Rules of 2007 shows that these are made for Govt. Departments, autonomous bodies and Public Sector Organizations (withholding agents) to whom goods and services are supplied. Such withholding agents, while advertising for purchases, are required to notify that sales tax intended by these Rules shall be deducted from the

withholding. No corresponding change, therefore, was required to be made in Chapter III dealing with appellants. We are also not convinced by the arguments that due to pre-defined formula on webpage department was estopped by its conduct. Suffice it to say that there is no estoppel against law, which in this case is very clear. We have also not found two possible interpretations of the law discussed above, particularly of the Rule 58H, therefore, the principle of interpretation relied upon by learned counsel is held not applicable.

We have found that all the objections raised by appellant were very ably addressed by the adjudicating officer having passed Order-in-Original in IESSCO case, the same and Orders-in-Originals passed in LESSCO's case are upheld for the same reasons.

Appeals by appellants, therefore, fail and are dismissed.

SEAL OF INCOME TAX APPELLATE TRIBUNAL GOVT. OF PAKISTAN LAHORE

sd/-

(SHAHID JAMIL KHAN)
Judicial Member

sd/-

(MUHAMMAD ASHRAF)
Accountant Member

Copy of the bench order forwarded to
1. The Appellant
2. THE CIT. L.T.U. Lahore

By order

Assistant Registrar 29/6/11
Income Tax Appellate Tribunal
Lahore.