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Judgment Sheet

IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

Case No: S.T.R. No.115/2015

M/s Pak Gen Power Ltd. **Versus** The Commissioner Inland
Revenue, etc.

JUDGMENT

Dates of hearing	31.10.2016
Petitioner by	Mr. Khurram Shahbaz Butt alongwith Asim Zulfiqar, Chartered Accountant, A.F. Ferguson & Co, Lahore.
Respondents by:	Mr. Sarfraz Ahmad Cheema, Advocate alongwith Dr. Ishtiaq Ahmad, Commissioner (Legal), Inland Revenue for the respondents.

Syed Mansoor Ali Shah, C.J.:- This judgment will decide the instant reference, as well as, connected references mentioned in **Schedule-A**, as all these cases raise common questions of law and facts.

2. The following questions of law arise out of the order of the learned Appellate Tribunal Inland Revenue (“ATIR”):

a. Whether the learned ATIR after admitting that the applicant was engaged in only one taxable supply, was justified in holding that Rule 25 (3) of the Sales Tax Rules, 2006 shall apply to the case of the applicant, ignoring Rule 13 (3) of the Sales Tax Special Procedures Rules, 2007 and Rule 25 (1) of the Sales Tax Rules, 2006?

b. Whether the learned ATIR, has miserably failed to consider that the apportionment visualized under sub-section (2) of section 8 of the Sales Tax Act, 1990 read with Rule 24 and 25

of the Sales Tax Rules, 2006 shall come into play when a registered person is engaged in taxable and exempt supplies simultaneously?

Brief facts

3. The petitioner entered into a Power Purchase Agreement (“**Agreement**”) dated 05.09.1995 with WAPDA. The said Agreement has two main components relevant for the purposes of Sales Tax Act, 1990 (“**Act**”); one is Energy Purchase Price (“**EPP**”) and the other is Capacity Purchase Price (“**CPP**”). It is submitted that against the EPP there is actual supply of electricity to WAPDA whereas against CPP there is no separate supply made to WAPDA and the consideration received as CPP is simply to cover the cost of maintaining the power plant engaged in making the supply of electricity to WAPDA. It has been argued that Section 8 (2) of the Act envisages two sets of supplies i.e., taxable supply and a non-taxable supply, hence there must exist two separate sets of supplies to attract section 8 (2) of the Act. It is submitted that respondent-department by relying on Rule 13 (3) of the Sales Tax Special Procedures Rules, 2007 (“**Rules**”) has assumed that as consideration received by the petitioner under CPP has not been included in calculating the value of supply of the electricity supplied to WAPDA and as a result excluded from tax, this exclusion automatically transforms the consideration received against CPP into a non-taxable supply. He contends that Rule 13 (3) of the Rules envisages one supply and simply limits and defines the scope of the value of the said supply. The assumption that such an exclusion produces a non-taxable supply under the Agreement is wholly misconceived and application of section 8 (2) to the consideration received under CPP is unlawful. He contends that the petitioner is entitled to reclaim or deduct input tax as per section 7 read with section 8 (1) of the Act. For the above argument he drew support from an unreported judgment dated 22.11.2012 passed in W.P. No.12851/2012 in the case titled M/s Baba

Farid Sugar Mills Ltd. V. Federation of Pakistan, etc. Additionally a copy of the Power Purchase Agreement dated 05.09.1995 for ready reference has been placed on the record as **Mark-A.**

4. Learned counsel for the respondent department alongwith Dr. Ishtiaq Ahmad, Commissioner (Legal), Inland Revenue submits that exclusion of the consideration received by the petitioner as CPP under Rule 13(3) of the Rules amounts to a non-taxable supply and as a consequence Section 8 (2) of the Act is applicable to the instant case.

5. We have heard the arguments of the parties and gone through the record.

6. The questions of law mentioned above can be reduced to a single question i.e., whether Section 8 (2) of the Act is applicable to the facts of the present case and perhaps more importantly whether consideration received as CPP amounts to a non-taxable supply?

7. The petitioner has entered into a Power Purchase Agreement with WAPDA. The said agreement rests on two major components i.e., EPP and CPP. EPP is against the supply of electricity by the petitioner to the WAPDA, whereas CPP is consideration received by the petitioner for maintaining the power plant, but no separate supply is being made against the said consideration. It is important to first examine the scope and meaning of section 8 (2) of the Act and Rule 13 (3) of the Rules in the light of the other provisions of the Act, all of which are reproduced hereunder:-

Section 8 (2): If a registered person deals in taxable and non-taxable supplies, he can reclaim only such proportion of the input tax as is attributable to taxable supplies in such manner as may be specified by the Board.

Supply, taxable supply, taxable goods, value of supply are defined in section 2 (33), (41) (39) and (46) of the Act in the following manner:

Section 2 (33): “Supply” means a sale or other transfer of the right to dispose of goods as owner, including such sale or transfer under a hire purchase agreement, and also includes:

- (a) putting to private, business or non-business use of goods produced or manufactured in the course of taxable activity for purposes other than those of making a taxable supply;
- (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) In case of manufacture of goods belonging to another person, the transfer or delivery of such goods to the owner or to a person nominated by him:

Provided that the Federal Government, may by notification in the official Gazette, specify such other transactions which shall or shall not constitute supply;

Section 2 (41): “taxable supply” means a supply of taxable goods made 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;”

Section 2 (39): “taxable goods” means all goods other than those which have been exempted under section 13.”

Section 2 (46): “value of supply” means;

- (a) in respect of a taxable supply, the consideration in money including all Federal and Provincial duties and taxes, if any, which the supplier receives from the recipient for that supply but excluding the amount of tax:

Provided that– (i) in case the consideration for a supply is in kind or is partly in kind and partly in money, the value of the supply shall mean the open market price of the supply excluding the amount of tax;

- (ii) in case the supplier and 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; and

(iii) in case a taxable supply is made to a consumer from general public on installment basis on a price inclusive of mark up or surcharge rendering it higher than open market price, the value of supply shall mean the open market price of the supply excluding the amount of tax.

(b) in case of trade discounts, the discounted price excluding the amount of tax; provided that the tax invoice shows the discounted price and the related tax and the discount allowed is in conformity with the normal business practices;

(c) in case where for any special nature of transaction it is difficult to ascertain the value of a supply, the open market price;

(d) in case of imported goods, the value determined under section 25 of the Customs Act, including the amount of customs-duties and central excise duty levied thereon;

(e) in case where there is sufficient reason to believe that the value of a supply has not been correctly declared in the invoice, the value determined by the Valuation Committee comprising representatives of trade and the Inland Revenue constituted by the Commissioner; and

(f) in case the goods other than taxable goods are supplied to a registered person for processing, the value of supply of such processed goods shall mean the price excluding the amount of sales tax which such goods will fetch on sale in the market:

(g) in case of a taxable supply, with reference to retail tax, the price of taxable goods excluding the amount of retail tax, which a supplier will charge at the time of making taxable supply by him, or such other price as the Board may, by a notification in the official Gazette, specify:

Provided that, where the Board deems it necessary it may, by notification in the official Gazette, fix the value of any imported goods or taxable supplies or class of supplies and for that purpose fix different values for different classes or description of same type of imported goods or supplies:

Provided further that where the value at which import or supply is made is higher than the value fixed by the Board, the value of goods shall, unless otherwise directed by the Board, be the value at which the import or supply is made”;

Rule 13 (3) of the Sales Tax Special Procedures Rules, 2007 reads as under:-

Rule 13 (3): In case of an IPP, HUBCO, KAPCO or WAPDA Hydroelectric Power, the value of supply shall be the amount received by such IPP or, as the case may be, HUBCO, KAPCO or WAPDA Hydroelectric Power, on account of Energy Purchase Price only and any amount in excess of Energy Purchase Price received on account of Capacity Purchase Price, Energy Price Premium, Excess Bonus, Supplemental Charges, etc., shall not be deemed as a component of the value of supply: (emphasis supplied)

Provided that in case WAPDA or KESC disputes any amount, WAPDA or, as the case may be, KESC, shall issue a certificate showing such amount and the tax involved therein and such certificate shall be deemed to be a Credit Note for the IPP for the purposes of section 9 of the Act, and shall be accounted for in the return for the tax period in which such Credit Note is issued:

Provided further that in case an IPP, for the like reasons, receives any amount from WAPDA or KESC in respect of supply made during any previous tax period, tax on such amount shall be accounted for in the return for the period in which it is received.”

Definitions of supply and taxable supply clearly show that there has to be transfer of goods in order to constitute supply. Admittedly, there is no supply of goods against the payment of CPP as it is merely a consideration received by the petitioner to maintain and upkeep the power plant facility and also constitutes a part of the consideration for the singular supply that is supply of electricity by the petitioner to WAPDA. Rule 13 (3) recognizes just one supply under the EPP and then elaborates that for the purposes of calculating the value of this

supply, the payment (consideration) received under CPP, etc. will not be included. Rule 13 (3) does no more, it simply excludes certain payments from being included in the value of supply. In other words it excludes CPP from being considered while calculating the value of supply i.e., supply of electricity to WAPDA. Rule 13 (3) does not, in any manner, provide or suggest that exclusion of CPP from determining the value of supply (supply of electricity to WAPDA) amounts to a non-taxable supply. Even otherwise, any such interpretation put on Rule 13 (3) would have been violative of the Act and inconsistent with the definitions of supply, taxable supply, taxable goods and value of supply provided under the Act. Therefore, the assumption that mere exclusion of CPP from tax for the purposes of Rule 13 (3), leads to a non-taxable supply is hopelessly misconceived and repulsive to the scheme of the Act and the Rules. Reliance is placed on an unreported judgment dated 22.11.2012 passed in W.P. No.12851/2012 in the case titled *M/s Baba Farid Sugar Mills Ltd. V. Federation of Pakistan, etc.* wherein an almost identical legal question was answered in the same terms.

8. It also important to examine Chapter-IV of the Sales Tax Rules, 2006 (“**Rules, 2006**”) which deals with APPORTIONMENT OF INPUT TAX envisaged under section 8 (2) of the Act. Rule 24 of the Rules, 2006 provides that the provisions of this Chapter shall apply to the registered persons who make taxable and **exempt supplies simultaneously**. In the present case, there is only ONE SUPPLY and, therefore, the question of two simultaneous supplies does not arise, besides there is no supply being made against CPP, hence there is no existence of an “exempt supply” as per Rule 24, under the Agreement.

9. While section 8 (2) of the Act does not apply to the present case, the petitioner is free to reclaim or deduct input tax under the provisions of sections 7 and 8 (1) of the Act.

10. For the above reasons section 8 (2) of the Act has no applicability to the supply of electricity made by the petitioner to WAPDA under the Agreement. The questions of law raised in this reference, as well as, references mentioned in Schedule-A of this judgment, are answered in the above terms.

11. Office shall send a copy of this order under the seal of the Court to the learned Appellate Tribunal Inland Revenue as per Section 47 (5) of the Sales Tax Act, 1990.

(Faisal Zaman Khan)
Judge

(Syed Mansoor Ali Shah)
Chief Justice

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APPROVED FOR REPORTING

SCHEDULE-A

Sr. No.	Sales Tax Reference
1.	S.T.R No.116/2015
2.	S.T.R No.117/2015
3.	S.T.R No.118/2015
4.	S.T.R No.119/2015
5.	S.T.R No.120/2015
6.	S.T.R No.121/2015
7.	S.T.R No.122/2015
8.	S.T.R No.123/2015

(Faisal Zaman Khan)
Judge

(Syed Mansoor Ali Shah)
Chief Justice

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