

Form No: HCJD/C-121
ORDER SHEET

**IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT**

Writ Petition No.42272 of 2023

M/s Abdullah Sugar
Mills Ltd.

Versus

Federation of Pakistan, etc.

S. No. of order/ Proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of parties or counsel, where necessary
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21.06.2023 Mr. Abad ur Rehman, Advocate for the petitioner.
Mr. Muhammad Mansoor Ali Sial, Assistant Attorney General
for Pakistan.
Mr. Muhammad Ashfaq Bhullar, Advocate for FBR.

The petitioner has invoked constitutional jurisdiction of this Court to challenge the show cause notice dated 05.06.2023 along with notice dated 13.06.2023 issued by the Deputy Commissioner Inland Revenue, LTO, Lahore.

2. In the impugned notice dated 05.06.2023 issued under Section 11(1) of the Sales Tax Act, 1990 ('Act'), it has been alleged that the petitioner, being registered person, has violated the provisions of Sections 2(9), 3(1), 6(2), 7(1), 26(1) of the Act read with Rule 18(9) of the Sales Tax Rules, 2006 ('Rules') and has been charged of non-payment of liability of Rs.404,416,691/- as also the non-filing of sales tax returns for the tax periods January, 2023 and February, 2023 which in addition to recovery of sales tax due, exposes the petitioner to default under Section 34(1)(a) of the Act and penalty under Section 33(5) of the Act. The other impugned notice dated 13.06.2023 has been issued in response to petitioner's letter dated 12.06.2023 wherein it has been clarified that the impugned show cause notice dated 05.06.2023 has

been issued under Section 11(1) of the Act on the basis of actual facts and figures pertaining to the tax period passed on self-admitted/declared daily production/dispatch reports submitted by the petitioner during imposition of Section 40B of the Act.

3. Learned counsel for the petitioner contends that being a registered person who failed to file returns for certain tax periods, case of the petitioner falls within the purview of sub-section (6) of section 11 and outside the scope of sub-section (1) of section 11 of the Act, therefore, the impugned show cause notice has been issued without lawful authority and the same is of no legal effect. He maintains that because of the non-obstante clause in sub-section (6) of section 11 *ibid*, the liability, if any, of the petitioner can be determined exclusively under the said provision. He elaborates that the scope of sub-section (1) of section 11 of the Act, as manifest from the text thereof, is confined to those persons who are liable to be registered but not actually registered and the petitioner's case, being that of duly registered person, does not fall within the ambit of the same. He finally contends that liability of the petitioner was only to be determined under sub-section (6) of section 11 of the Act in accordance with Chapter-17 of the Rules.

4. Conversely, learned counsel for the respondent-FBR, on watching brief, contends that liability under sub-section (6) of section 11 of the Act is the minimum tax liability which the petitioner has to pay and that does not absolve him of assessment and payment of the tax liability otherwise under the Act. In support of his contention, he has relied on sub-rule (5) of Rule 157. Learned Law

Officer has also opposed the petition while adopting the arguments of learned counsel for the revenue authorities.

5. Heard.

6. To properly appreciate respective contentions of learned counsel for the parties, it would be advantageous to reproduce the relevant provisions of Section 11 of the Act, which read as follows:-

11. Assessment of Tax and recovery of tax not levied or short-levied or erroneously refunded.—(1) *Where a person who is required to file a tax return fails to file the return for a tax period by the due date or pays an amount which, for some miscalculation is less than the amount of tax actually payable, an officer of Inland Revenue shall, after a notice to show cause to such person, make an order for assessment of tax, including imposition of penalty and default surcharge in accordance with sections 33 and 34:*

Provided that where a person required to file a tax return files the return after the due date and pays the amount of tax payable in accordance with the tax return alongwith default surcharge and penalty, the notice to show cause and the order of assessment shall abate.

(2) -----

(3) -----

(4) -----

(4A) -----

(5) -----

(6) *Notwithstanding anything contained in sub-section (1), where a registered person fails to file a return, an officer of Inland Revenue not below the rank of Assistant Commissioner, shall subject to such conditions as specified by the Federal Board of Revenue, determine the minimum tax liability of the registered person.*

(7) *For the purpose of this section, the expression "relevant date" means--*

(a) *the time of payment of tax or charge as provided under section 6; and*

(b) *in a case where tax or charge has been erroneously refunded, the date of its refund.*

7. It is manifest from the text of sub-section (1) of Section 11 of the Act that the same confers authority upon the officer of Inland Revenue to make an order for assessment of tax including imposition of penalty and default surcharge in accordance with Sections 33 and 34 of the Act in two situations associated with a person who is required to file a tax return: firstly, where he fails to file return for tax period by due date or secondly, in case where he pays an amount which for miscalculation is less than amount of tax actually payable. It is a mandatory prerequisite specified in the aforementioned provision that

before passing an order for assessment of tax, the person in default is given a notice to show cause. Proviso to subsection (1) of Section 11 of the Act states that the show cause notice and order for assessment shall abate where a person required to file a tax return, files the return after the due date and pays the amount of tax payable in accordance with tax return alongwith default surcharge and penalty.

8. Who is required under the Act to file a return is the crucial question here. In terms of section 14 of the Act read with Rule 4 of the Rules of 2006, every person engaged in the making of taxable supplies in Pakistan in the course or furtherance of any taxable activity carried on by him is required to be registered under the Act, falling in any of the categories mentioned in the said provision. The obligation to furnish returns in the prescribed form under section 26 of the Act is upon every registered person to indicate the purchases and supplies made during a tax period as well as the tax due and paid thereon alongwith such other information as has been prescribed.

9. In the case of Commissioner Inland Revenue, Gujranwala v. S.K. Steel Casting, Gujranwala (2019 PTD 1493), after elaborately analyzing the scope provisions including sections 2(25), 3, 6, 7, 8, 14, 23 & 26 of the Act and Rules 4, 5 & 6 of the Sales Tax Rules 2006, it has been held by a Division Bench of this Court that an unregistered person or a person liable to be registered cannot file its return as per provisions of the Act since no such mechanism/procedure has been provided in the Act for such a person to file its return.

10. It is thus abundantly clear that provision of subsection (1) of section 11 can be invoked only against a person required to file a return under the Act i.e. registered person and there is no weight in the submission of learned

counsel for the petitioner that the same visualizes proceedings against those who are liable to be registered but not registered. However, upon registration under the Act of a person, sub-section (1) of section 11 becomes invocable against even for such period of default during which the person was liable to be registered and furnish return under the Act.

11. Subsection (6) of section 11 of the Act provides for determination by an officer of Inland Revenue not below the rank of Assistant Commissioner of the minimum tax liability of the registered person who defaults in filing a tax return. Such determination is, however, subject to such conditions as specified by the Federal Board of Revenue. Rule 157 of the Sales Tax Rules, 2006 outlines the procedure to be followed for determining minimum liability in the following terms:-

157. Procedure to be followed for determining minimum liability.—(1) *Whether a registered person fails to file a return by the due date, an officer not below the rank of Assistant Commissioner, having jurisdiction, shall issue a notice to the registered person to file return within fifteen days failing which his minimum liability would be determined.*

(2) *If the registered person files the return within the time as stipulated in the notice, the notice shall abate. If otherwise, the officer shall proceed to determine the minimum liability in the manner as prescribed in the following rule.*

(3) *The Assessment order determining the minimum liability shall be communicated to the registered person.*

(4) *If the registered person files the return and pays the due amount of sales tax for the tax period alongwith additional tax and penalty under section 33(1) of the Sales Tax Act, 1990, within one month of the determination made as above, the order of minimum tax liability will be considered to have been withdrawn. In case the registered person does not pay the amount of sales tax determined for the tax period, the tax liability determined will be recovered under section 48 of the Sales Tax Act, 1990.*

(5) *The determination made in the aforesaid manner shall be the minimum liability, and the payment thereof shall not absolve the registered person of further liability which may accrue or be determined at a later stage through audit or otherwise on the basis of available record under the provisions of law.”*

12. There is no apparent inconsistency within the provisions of sub-section (1) and (6) of Section 11 of the Act inasmuch as those have been enacted for different purposes. While sub-section (1) of the Act confers

authority to determine final tax liability of a person who defaulted in filing a tax return for a tax period or paid an amount for some miscalculation less than the amount of tax actually payable, jurisdiction under sub-section (6) of Section 11 of the Act is confined to determination of minimum tax liability of such registered person in default. Rule 157 of the Sales Tax Rules, 2006 elaborately provides procedure to be followed for determining the minimum tax liability and sub-rule (5) of Rule 157 *ibid* categorically suggests that determination of minimum liability and payment thereof shall not absolve the registered person of further liability which may accrue or be determined on the basis of available record under the provision of law.

13. In the absence of any apparent inconsistency or patent conflict within the provisions of sub-section (1) and (6) of Section 11 of the Act, plea of the petitioner *qua non-obstante* nature of clause (6) of section 11 is of little help to assail the impugned show cause notice under section 11(1) of the Act. In the case of Muhammad Mohsin Ghuman and others v. Government of Punjab through Home Secretary, Lahore and other (2013 SCMR 85) the Supreme Court of Pakistan enunciated the law governing construction of non-obstante clauses in the following terms:-

*“It has to be read in the context of what the legislature conveys in the enacting part of the provision. It should first be ascertained what the enacting part of the section provides on a fair construction of words used according to their natural and ordinary meaning and the non obstante clause is to be understood as operating to set aside as no longer valid anything contained in relevant existing law which is inconsistent with the new enactment. The enacting part of a statute must, where it is clear, be taken to control the non obstante clause where both cannot be read harmoniously, for even apart from such clause a later law abrogates earlier laws clearly inconsistent with it. **The proper way to construe a non obstante clause is first to ascertain the meaning of the enacting part on a fair construction of its words. The meaning of the enacting part which is so ascertained is then to be taken as overriding anything inconsistent to that meaning in the provisions mentioned in the non obstante clause. A non obstante clause is usually used in a provision to indicate that that provision should prevail despite anything to the contrary in the***

provision mentioned in such non obstante clause. In case there is any inconsistency between the non obstante clause and another provision one of the objects of such a clause is to indicate that it is the non obstante clause which would prevail over the other clauses. It does not, however, necessarily mean that there must be repugnancy between the two provisions in all such cases. The principle underlying non obstante clause may be invoked only in the case of 'irreconcilable conflict'."

(Emphasis supplied by this Court)

14. For the foregoing reasons, the instant petition, being devoid of any merit, is *dismissed in limine*.

(RAHEEL KAMRAN)
JUDGE

Approved for reporting.

Judge

Asim Shahzad