

**22nd OF 2024 KTBA ONE PAGER
CASE LAW UPDATE
(OCTOBER 21, 2024)**

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Dear Members,

A brief update on a judgment by the Appellate Tribunal Inland Revenue, Islamabad on “**No Further Sales Tax on Drugs/Pharmaceutical Products**” is being shared with you for your knowledge. The order has been attached herewith the update.

This update is in line with the efforts undertaken by our “**CASE LAW UPDATE COMMITTEE**” to apprise our Bar members with important court decisions.

You are equally encouraged to share any important case law, which you feel that should be disseminated for the good of all members.

You may contact the Committee Convener Mr. Shams M. Ansari or at the Bar’s numbers 021-99212222, 99211792 or email at info@karachitaxbar.com & ktba01@gmail.com

(Syed Zafar Ahmed)
President

(Asim Rizwani Sheikh)
Hon. General Secretary

22nd OF 2024 KTBA ONE PAGER CASE LAW UPDATE (October 21, 2024)

NO FURTHER SALES TAX ON DRUGS/PHARMACEUTICAL PRODUCTS

Appellate Authority: ATIR, ISB Bench

Appellant: Kamal Laboratories

Section: 3(1A) of the Sales Tax Act, 1990 (the Act)

Judgement was passed on August 20, 2024.

Background: Demand of further tax under Section 3(1A) of the Act on supplies of Drugs/Pharmaceutical Products to un-registered person was raised despite that Sales Tax on Supply of Drugs/Pharmaceutical Products is subject to 1% Sales Tax regime and is payable only by Importer or Manufacturer in terms of Section 3(2)(aa) of the Act read with Serial No. 81, Eight Schedule to the Act.

Decision of the Tribunal:

First Ruling of the ATIR:

Wholesaler / Retailer are not liable to Register

Since Sales Tax on Drugs/Pharmaceutical Products is only required to be paid by manufacturer or importer within the supply chain in terms of Serial No. 81, Eight Schedule to the Act, its subsequent supply by wholesalers or retailers would be exempt from obligation of payment of sales tax. Hence, wholesalers and retailers are not required to be registered under the Act.

Second Ruling of the ATIR:

Final Discharge of Sales Tax Liability within Supply Chain

Serial 81, Eight Schedule to the Act explicitly states that tax paid by manufacturer or importer is final discharge of sales tax liability within the supply chain. Hence, imposition of further tax places an unwarranted burden on supplier who will have to consequently pass on such cost to end consumer, resulting in an unintended imposition of further tax on the public. Considering the above circumstance, it was observed that such outcome did not align with intent of the legislature.

COMMENTS / CRITIQUE

Through the judgement goes in favour of the taxpayer, the decision poses few questions, which we at KTBA are of considered opinion, should be brought forth to our members

i- Misplaced Reliance over Judgements

While holding the above two rulings, reliance was placed on a Supreme Court [SC] Judgement, 2016 PTD 648 in case of Digicom Trading (Pvt) Ltd wherein it was held that further tax under Section 3(1A) cannot be levied in addition to Section 3(2)(b) & 3(6) of the Act as SRO 460 of 2013 was issued under Sections 3(2)(b) & 3(6) read with Section 13 of the Act. The instant case however, is distinguishable from Digicom. Moreover, the SC set aside Digicom case in 2022 on technical grounds of High Court's jurisdiction for declaring the notification as ultra vires. It held that the tax department has the right to interpret on SRO and a High Court cannot deprive such right under writ jurisdiction.

Another, SC Judgement 2023 SCMR 681 of Hajvairy Steel Industries and a Lahore High Court judgment of Beso Steel Re-rolling Mills (Pvt) Ltd were referred to, wherein it was held that further tax is not applicable under Section 3(1A) of the Act considering the phrase 'final discharge' mentioned in Rule 58H of the Sales Tax Special Procedure Rules, 2007 [Rules 2007]. Legal position, however, involved in the instant case and SC judgment is disguisable as Rules 2007 were issued under Section 71 of the Act i.e. overriding provision at that particular time over Section 3(1A) of the Act. The phrase 'final discharge' was not discussed by SC in a standalone manner but under ambit of Section 71 of the Act.

ii- Subsequent supply Drugs/Pharmaceutical Products is not Exempt

It has been held that subsequent supplies by wholesalers or retailers who deal in Drugs/Pharmaceutical Products are exempt from payment of sales tax without considering that exemption is provided under Section 13 only read with Sixth Schedule to the Act, while here since the subsequent supply of Drugs/Pharmaceutical Products is not covered under Section 13 or Sixth Schedule, therefore, it cannot be considered strictly as exempt.

iii- FBR's Clarification Letter

A Clarification was issued vide C.No. 3(16) ST & FE-Policy / 2022 / 230285 dated 14 November 2022 that further tax under Section 3(1A) of the Act is required to be charged on supplies made to a person who has not obtained registration number or who is not an active taxpayer, which was against the settled principle that interpretation of statute is not FBR's domain.

iv. Real Subject Matter of Interpretation unattended

Drugs/Pharmaceutical Products are subject to sales tax under Section 3(2)(aa) read with Serial No. 81, Eight Schedule to the Act. Further Tax is levied under Section 3(1A) in addition to Section 3(2)(aa). SRO 648 of 2013 dated 9 July 2013 does not provide any exemption from payment of further tax on supply of Drugs/Pharmaceutical Products. This judgement therefore, it is apprehended of may be subjected to confronting arguments by the department on the ground that no judgement is given on as to whether the FBR has the powers of levying further tax under Section 3(1A) on goods covered under Eight Schedule read with Section 3(2)(aa). This we understand remains the actual subject of interpretation that as to whether Section 3(1A) of the Act overrides the conditions specified in Eight Schedule or not. It is notable that Section 3(2) merely overrides Section 3(1) and not the Section 3(1A). Appellate forums must have to account for the condition of 'final discharge of liability in supply chain' and cannot be considered as redundant.

EARLIER JUDGEMENT OF ATIR, LAHORE BENCH'S DATED 29 APRIL 2024

When the similar issue was adjudicated before the ATIR LHR Bench earlier in STA No. 2266/LB/2023 it was held that taxpayer was liable to pay further tax. The ATIR LHR Bench held that, however, merely on the basis of non-production of records in support of contention that supplies were made to doctors, patients and medical stores. It did not touch upon the legal premise all. The ATIR, ISB Bench (later decision) did not refer to the judgment of Lahore Bench as well.

CONCLUSION:

The judgment by ATIR ISB Bench does not answer the substantial question of law i.e. whether Section 3(1A) overrides the conditions specified in Eight Schedule or not. Besides, an unwarranted opinion has surfaced to have considered the subsequent supply as exempt. While similar to the Ninth (9th) Schedule to the Act on Sales Tax for cellular phone, subsequent supply of Drugs/Pharmaceutical Products as well, is taxable but without requirement for making any sales tax payment in supply chain. This is why therefore, Retailer & Wholesaler are not required to make payment of sales tax but are very much liable to register under Section 14 of the Act.

DISCLAIMER:

This update has been prepared for KTBA members and carries a brief narrative on a detailed Judgment and does not contain an opinion of the Bar, in any manner or sort. It is therefore, suggested that the judgment alone should be relied upon. Any reliance on the summary in any proceedings would not be binding on KTBA.

APPELLATE TRIBUNAL INLAND REVENUE, DIVISION BENCH-1,
ISLAMABAD

STA No.245/IB/2024
(Tax Period, July-2022 to June-2023)

M/s Kamal Laboratories, 11, Civil Lines,
Rawalpindi.
NTN:2677445

Appellant

Vs

The Commissioner Inland Revenue,
Cantt Zone, RTO, Rawalpindi.

Respondent

Appellant by:

Mr.Muhammad Sajid, Advocate

Respondent by:

Mr.Niaz Ahmed, DR

Date of hearing:

20.08.2024

Date of order:

20.08.2024

ORDER

M. M. AKRAM (Judicial Member): The titled appeal has been filed by the appellant Registered Person against the impugned Sales Tax Order in Appeal No.202/2023-2024 dated 28.03.2024 passed by the learned CIR (Appeals-III), RTO, Rawalpindi for the tax periods under consideration on the grounds as set forth in the memo of appeal.

2. The key facts of the case, as outlined in the contested order, are that during the scrutiny of the sales tax returns submitted by the appellant for the tax periods between July 2022 and June 2023, it was discovered that the appellant had made supplies falling under serial No. 81 of Table-1 of the Eight Schedule of the Sales Tax Act, 1990 ("**the Act**") to unregistered persons. However, the appellant allegedly failed to charge and pay Further Tax under section 3(1A) of the Act amounting to Rs. 6,829,954/-, in violation of sections 3(1A), 22, 23, and 26 of the Act. Consequently, a show-cause notice was issued, and the subsequent proceedings culminated in the impugned order, which imposed

liability for a Further Tax amounting to Rs. 6,829,954/-. This amount was deemed recoverable along with a default surcharge under section 34 and a penalty of Rs. 341,498/- as stipulated under serial No. 5 of the Table to section 33 of the Act. Dissatisfied with this decision, the appellant filed an appeal with the Commissioner IR (Appeals-III) Rawalpindi, who rendered a decision via Sales Tax Order in Appeal No. 202/2023-2024 dated 28.03.2024. Still aggrieved by this decision, the appellant has now brought the matter before this forum, challenging the impugned order on multiple grounds.

3. This case came up for hearing on 20.08.2024. We have heard the parties and reviewed the record. The core issue in this case concerns the imposition of further tax under section 3(1A) of the Act on the sale of drugs to unregistered persons. The context for this levy is that prior to the enactment of the Finance Supplementary Act, 2022, drugs registered under the Drugs Act, 1976 (XXXI of 1976) were exempt from sales tax under section 13(1) of the Act, in conjunction with the former entry No. 103 in Table I of the Sixth Schedule. The Finance Supplementary Act, 2022, however, removed this exemption by omitting the specified entry from the Sixth Schedule. As of 01.07.2022, the Finance Act, 2022 introduced a new entry in the Eighth Schedule of the Act, which encompasses the applicant's business activities. Under section 3(2)(aa) of the 1990 Act, goods listed in the Eighth Schedule are subject to tax at a special rate, contingent upon certain conditions. The relevant provision states:

"Section 3(2) Notwithstanding the provisions of sub-section (1): –

(aa) goods specified in the Eighth Schedule shall be charged to tax at such rates and subject to such conditions and limitations as specified therein; and"

As a result, all manufacturers and importers of registered drugs were required to pay sales tax at a rate of 1%, which constituted the full and final discharge of

their tax liability within the supply chain. For clarity, the relevant entry of the Eighth Schedule to the Act is reproduced below:

S. No.	Description	Heading Nos of the First Schedule to the Customs Act, 1969 (IV of 1969)	Rate of Sales Tax	Condition
81.	Manufacture or import of substances registered as drugs under the Drugs Act, 1976 (XXXI of 1976)	Respective heading	1%	Subject to the conditions that: (i) <u>Tax charged and deposited by the manufacturer or importer, as the case may be, shall be final discharge of tax in the supply chain</u> (ii) No input tax shall be adjusted by the manufacturer or importer

[Underlined to supply emphasis]

The aforementioned legal provision clearly indicates that the tax is required to be paid solely by the manufacturer and importer within their supply chains, implying that subsequent supplies by wholesalers or retailers would be exempt from this obligation. Consequently, wholesalers and retailers are not required to be registered under the law. Additionally, the provision explicitly states that the tax paid by the manufacturer or importer shall be considered the final discharge of tax liability within the supply chain. Imposing further tax due to the non-registration or inactive status of a recipient taxpayer places an unfair burden on the supplier, who is then likely to pass this cost onto the end consumer. This situation adversely affects public access to medicines and harms the health sector—outcomes that would not align with the intent of the legislature. Additionally, our courts have consistently held in various cases that

the provisions of section 3(1A) do not apply when the due tax has been paid as a final discharge of liability. Reliance is placed on *CIR v. Hajvairy Steel Industries*, (2023 SCMR 681) and *Digicom Trading v. Federation of Pakistan*, 2016 PTD 648 [Sindh]. A similar issue was addressed by the Hon'ble Lahore High Court in the case of *M/s Beco Steel Re-rolling Mills (Pvt) Ltd vs. FOP and others*, (W.P. No. 448/2016). In its order dated 21.03.2018, the court declared the show cause notice issued by the department to be ultra vires, ruling that the petitioner had been paying sales tax under Chapter IX of the Sales Tax Special Procedure Rules, 2007. According to rule 58H of these rules, the payment of sales tax was deemed the final discharge of the registered person's sales tax liability under the Act. Consequently, the petitioner was not required to pay further tax under section 3(1A) of the Act.

A somewhat similar issue was also considered by the Hon'ble Sindh High

Court in the case of *Digicom Trading (Pvt.) Ltd vs. FOP*, (2016 PTD 648), where it was held that:

"7..... Once the mechanism has been prescribed by the Federal Government by the issuance of a Notification in terms of various provisions of the Act, including Section 13(2)(a) of the Act *ibid*, the question of payment of any additional tax in terms of Section 3(1)(A) of the Act, for supply of goods to unregistered person(s) does not arise. The provision of Section 3(1)(A) could only be invoked in respect of goods which are being charged Sales Tax under Section 3(1) of the Sales Tax Act, 1990 at the rate specified therein at ad-valorem basis which is presently @17%. Once the mode and manner and the rate of Sales Tax have been altered, modified or fixed by the Federal Government either through subsections (2)(b) & (6) of Section 3, read with Sectional)(b) of the Sales Tax Act, 1990, as well as under Section 13, **no further tax can be demanded once the liability of Sales Tax is discharged on the basis of a special procedure as contemplated under S.R.O. 460(1)/2013.**"(Emphasis supplied)

6. For what has been discussed above and by respectfully following the judgments of the Hon'ble Courts, the appeal of the appellant registered person is accepted and the impugned orders passed by the lower authorities are annulled.

Sd/-
(M. M. AKRAM)
JUDICIAL MEMBER

Sd/-
(IMRAN LATIF MINHAS)
ACCOUNTANT MEMBER

CERTIFICATE U/S 5 OF THE LAW REPORT ACT

This case is fit for reporting as it settles the principles highlighted above.


(M. M. AKRAM)
JUDICIAL MEMBER



IN THE APPELLATE TRIBUNAL INLAND REVENUE,
LAHORE BENCH, LAHORE

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[STA No.2266/LB/2023](#)

M/s.BM (Pvt) Limited, Lahore

Appellant

Versus

The CIR, CTO, Lahore

Respondent

Appellant by: Mr. Abdur Rehman Haider, Advocate.

Respondent by: Mr. Yousaf Ismail, DR.

Date of hearing: 15.03.2024

Date of order: 29.04.2024

Brief Facts

Appellant: A private limited company selling medicines.

Dispute: The company argues they shouldn't be charged an additional 3% sales tax on top of the 1% final tax already paid on medicine sales to unregistered persons.

Background:

- The company sells medicines and pays a final tax of 1% as per the Sales Tax Act.
- During a tax audit, authorities noticed sales to unregistered persons and demanded an additional 3% tax under Section 3(1A) of the Act.
- The company appealed the additional tax demand.

Arguments:

- **Company:** They claim the final tax paid under clause 81 of the Act exempts them from further tax. They also argue they weren't given a proper hearing and the additional tax creates an unfair burden, especially for sales to patients who don't need to register.

- **Tax Department:** They argue the final tax doesn't override the general tax provisions under Section 3(1) and unregistered persons are subject to additional tax. They cite a Federal Board of Revenue ruling supporting their position.

Tribunal's Decision:

- The tribunal sided with the tax department. They found the company failed to provide evidence to support their claims.
- The additional tax of Rs. 8,120,252 was upheld along with a reduced penalty of 5% of the tax amount.
- The tribunal based their decision on the company's inability to prove their version of events and cited legal principles regarding the burden of proof.

Key Points:

- The case hinges on whether the final tax paid exempts the company from additional tax on sales to unregistered persons.
- The tribunal ruled that the final tax doesn't override the general tax provisions for unregistered persons.
- The company's lack of evidence to support their claims was crucial in the decision.

ORDER

TARIQ IFTIKHAR AHMED (JUDICIAL MEMBER) Through instant appeal, the appellant has assailed the appellate order No. 16-A-II dated 18.10.2023 recorded by the learned CIR (Appeals-II), Lahore under section 45-B(2) of the Sales Tax Act, 1990 ('the Act').

2. Brief facts of the case are that the appellant a Private Limited Company is engaged in the business of Medicines and as per clause 81 of the Eight Schedule to the Sales Tax Act, 1990 the sales tax had been charged and paid by registered person/company @ 1% on its sales of Rs. 270,675,062/- which comes to Rs.2,706,751/-. However, during the scrutiny of sales tax returns filed by the appellant for the tax period from July 2022 to April 2023, it was observed by the concerned authority that the appellant had failed to pay further tax of Rs.8,120,252/- against supplies of Rs.270,675,062/-made to persons who had not obtained sales tax registration number which was held recoverable along with default surcharge u/s 34 and penalty u/s 33(5) & 13) of the Sales Tax Act, 1990

3 Aggrieved with the aforesaid treatment, the appellant filed appeal before the CIR(Appeals-II), Lahore who vide order dated 18.10.2023modified the order of the assessing officer for the reasons recorded therein. Against the impugned appellate order, the appellant/registered person has been contested in further appeal before this forum on grounds set out in the memorandum of appeal.

4. The AR of the appellant contended that the authorities below are not justified to charge further Sales Tax on Medicine sales of the appellant @3% in addition to final tax imposed @ 1% /s 3(1B)(2) (aa) of the Sales Tax Act 1990 read with clause 81 of the 8th schedule of the Sales Tax Act 1990. He further contended that the appellant has been condemned, unheard as no opportunity of personal hearing was granted and order was passed haphazardly, hence the show cause notice and the order passed is illegal without lawful jurisdiction and unwarranted. He also added that the interpretation by the department officer is against basic principle and logic. The AR learned also aggrieved that the Sales of medicines on retail for general patients and medical stores as well as to doctors does not call for such high taxation and the interpretation is against already settled set of principles. The doctor, patients and medical stores neither liable to Sales Tax registration or they have been registered by FBR. So, burden cannot be shifted to the appellant, hence, the imposition of penalty and additional surcharge is illegal and unwarranted.

5. On the other hand, the learned DR strongly opposed the contentions put forth by the learned and stated ample opportunities of being heard were provided by the assessing officer it on the due date of hearing neither anybody attended the proceedings or responded to the notices. He further contended that it is evident that the conditions of final tax chargeability specified in Sr.No.81 of the Eighth Schedule of the Act do not override the chargeability of further tax under section 3(1) of the Act and it unambiguously implies that the supply of pharma goods to unregistered persons/Inactive Persons is liable to be charged further tax at the rate mentioned in sec 3(1A) of the Act and in this regard he defended the impugned orders of the authorities below for the reasons recorded therein..

6. We have heard the arguments advanced by the rival parties and perused the relevant record on file. After having taken regard to the facts of the case in its entirety, we are of the considered view that the contentions raised by the AR of the taxpayer have no substance. We have also looked into the matter carefully and came to the conclusion that the appellant neither before the assessing officer nor at the appellate stage has been able to establish his declared version with any documentary or material evidence, hence the learned CIR(A) has rightly decided the case in the following manner. -

6 Apart from the above, the controversy regarding chargeability of further tax on pharmaceutical goods paying 1% tax has been resolved by the Federal Board of Revenue vide Board's Letter C.No.3(16) ST& FE- Policy/2002/230285-R dated 23.11.2002 wherein it has been clarified that further tax is chargeable on supply of pharmaceutical goods supplied by the manufacturer/importer to un-registered/ inactive persons. Therefore, the argument regarding non-applicability of further tax on the supplies of medicine/ drugs falling under the 8th Schedule carries no weight hence cannot be accepted. As regards the contention of the appellant that supplies were made to general patients who were not legally required to be registered is also untenable as the same is not supported with any valid and concrete documentary evidence of supply to

patients. Therefore, further tax of Rs.8,120,252/- along with default surcharge till the time of deposit is rightly held to be recoverable from the appellant u/s 34 of the Sales Tax Act, 1990.

However, penalty of Rs.8,120,252/- ie equal to 100% of the amount of sales tax involved imposed under section 33(13) of the Sales Tax Act. 1990 is found to be harsh and unwarranted; hence the same is reduced to penalty equal to 5% of the amount of sales tax involved under Section 33(5) of the Sales Tax Act, 1990.

Even before us instead of producing documentary evidence to substantiate his version regarding the discrepancies established by the authority, he reiterated the grounds of appeal. It is settled proposition of law that the onus to establish the veracity of declared version was on the part of the respondent taxpayer. The reference is made to the provisions contained in Article 117 & 118 of the Qanoon-e-Shahadat Ordinance, 1984 which stipulate as under: -

"117. Burden of proof: (1) whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

118. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side".

7. Consequently, in view of the aforementioned discussion as well as after having gone through the available relevant records, we do not warrant any interference in the Order No. 16-A-II of the learned CIR (Appeals), Lahore dated 18.10.2023 which certainly does not suffer from any factual or legal infirmity and is hereby maintained. Accordingly, this would result into dismissal of the departmental appeals pertaining to assessment years 2006 and 2009 in the manner as indicated above.

(TARIQ IFTIKHAR AHMAD)

JUDICIAL MEMBER

(IMRAN MUNIR)

ACCOUNTANT MEMBER