APPELLATE TRIBUNAL INLAND REVENUE, DIVISION BENCH-I, ISLAMABAD

STA No.81/PB/2018
(Tax Period July 2013 to June 2017)

STA No.82/PB/2018
(Tax Period July 2014 to June 2015)

M/s Cherat Cement Company Ltd., Lakarai Nowshera	Appellant
Vs	
Commissioner Inland Revenue (Audit-IV),Corporate Zone, RTO, Peshawar.	Respondent

Appellant By:	Mr. Isaac Ali Qazi, Advocate
Respondent By:	Mr. Saeed Ullah Bhatti,DR

STA No.83/PB/2018
(Tax Period July 2013 to June 2017)

STA No.84/PB/2018
(Tax Period July 2014 to June 2015)

Commissioner Inland Revenue (Audit-IV),Corporate Zone, RTO, Peshawar.	Appellant
Vs	
M/s Cherat Cement Company Ltd., Lakarai Nowshera	Respondent

Appellant By:	Mr. Saeed Ullah Bhatti,DR
Respondent By:	Mr. Isaac Ali Qazi, Advocate
Date of Hearing:	09.01.2023
Date of Order:	20.02.2023

ORDER

M. M. AKRAM (Judicial Member): The titled cross-appeals have been filed by the appellant/Registered Person as well as Department against Order-in Appeal Nos.191 & 198 of 2018 both dated 08.03.2018 passed by the learned Commissioner Inland Revenue (Appeals), Peshawar for the tax periods from July 2013 to June 2017 and July 2014 to June 2015 respectively on the grounds as set forth in their respective memos of appeals. The fact of the case and the issues involved in all these appeals are the same, therefore, these appeals are being decided through this common order.

2. **STA No.81/PB/2018**

Brief facts giving rise to the appeal are that during the scrutiny of the purchase record and input tax claimed by the appellant pertaining to the tax periods from July 2013 to June 2017 observed that the appellant claimed an input tax of **Rs.49,634,713/-** on account of following goods (acquired otherwise than as stock in trade) which were inadmissible in terms of section 7, 8(1)(a, b, c, h, i) read with SRO 490 (I)/2004 dated 12.06.2004 amended by SRO 450(1)/2013 dated 27th May 2013:-

Description	Tax Period	Input tax
Deformed Bars/Steel Bars	July-2015 to June-2016	32,834,822
	July-2016 to June-2017	72,999
Cables	July-2013 to June-2014	1,021,152
	July-2015 to June-2016	4,639,230
	July-2016 to June-2017	3,896,633
Input Tax claimed on petroleum product i.e. Diesel used in vehicles pertaining to M/s Pir & Cor. Their Contractor as per agreement	July-2013 to June-2014	2,312,400
	July-2015 to June-2016	2,312,245
	July-2016 to June-2017	2,545,232
		49,634,713

As such the amount of inadmissible input tax at Rs.49,634,713/- was, therefore, recoverable from the appellant under section 11(2) of be Sales Tax Act 1990**("the Act")** along with default surcharge (to be calculated at the time of deposit) under section 34 and penalty@ 5% as prescribed under S. No. (5) of column No. 02 of the table to section 33 of the Act. Show cause notice was issued to the appellant and after considering the reply, the assessing officer reduced the tax liability from Rs.49,634,713/- to Rs.2,885,521/- which relates to the input tax claimed on deformed bars/steel bars, cables used in WHR blocks i.e Rs.1,787,953/- and input tax claimed on account of diesel amounting to Rs.1,097,568/- (Tax period July 2013 to June 2014). Felt aggrieved, the appellant preferred the appeal before the learned CIR(A) who vide order dated 08.03.2018 partially accepted the appeal. The input tax claimed against diesel

was allowed. Still feeling aggrieved, both parties assailed the impugned appellate order before this tribunal.

3. **STA No.82/PB/2018**

The facts of the case in the said appeal are that during scrutiny of the purchase record and input tax claimed by the appellant in respect of tax periods 2014-2015, it was observed that the appellant have claimed input tax of **Rs.36,051,230/-** on account of following goods (acquired otherwise than as stock in trade) which is inadmissible in terms of section 7, 8(1)(a, b, c, h, i) read with SRO 490 (I)/2004 dated 12.06.2004 amended by SRO 450(1)/2013 dated 27th May 2013.

S. No.	**Description of Goods**	**Tax Period**	**Show Caused Input tax**	**Inadmissible Input tax**
1	Sany truck (Imported PCT Heading 8705.1000)	BE No.108014 dated 15.01.2015	2,430,062	2,430,062
2	PVC Cables (PCT Heading 8544,4990)	BE No.115601 dated 28.01.2015	194,072	194,072
3	Batteries (Nos 52)	Jan-2015	78,234	78,234
4	Split Acs, Wall mounted Split, Refrigerators	July-2014 to June-2015	288,226	288,226
5	Lubricants (No of Invoices =52)	July-2014 to June-2015	2,600,418	2,600,418
6	Office Equipment's Declared in Annual Audited Accounts	July-2014 to June-2015	351,050	351,050
7	Furniture & Fittings Declared in Annual Audited Accounts	July-2014 to June-2015	272,170	272,170
			6,214,232	**6,214,232**

ii. SALES TAX WITHHOLDING TAX PAYABLE IN 2014-15**.**

During Scrutiny & audit of annual audited accounts for the year 2014-15 it was observed that the appellant had received advertisement services having value at Rs.6,055,000/- as per the following detail but did not deduct the tax under section 3(7) of the Act read with Sales Tax Special Procedure (Withholding) Rules, 2007.

S.No	Headings	Total Amount Declared	Sales Tax Withholding Tax Payable
01	Advertisement	6,055,000	908,250

iii. Non-payment of further tax amounting to Rs.115,720/- on the sale of scrap and office equipment.

iv. Withholding sales tax payable Rs.308,967/-.

Accordingly, a show cause notice was issued to the appellant. After considering the reply, the assessing officer reduced the amount from Rs.37,384,167/- to Rs.9,830,620/- vide assessment order No.63/2017. Felt aggrieved, the appellant registered person filed the appeal before the assessing officer who vides order dated 08.03.2018 partially accepted the appeal whereby he allowed the input tax of Rs.2,430,062/- claimed against Sany Truck and input tax of Rs.2,324,033/- against diesel. However, the rest of the input tax claimed against steel bars, wires, cables, electric appliances, etc used in non-taxable activities was upheld and the issue of withholding tax and further tax was also confirmed. Still feeling aggrieved, both parties have assailed the impugned appellate order before this tribunal.

4. The case was heard on 09.01.2023. By referring to clause (h) of sub-section (1) of section 8 of the Act, it is the case of the learned AR for the appellant that the input tax adjustment has been disallowed in contravention of law. Relying on the principle of consistency, he argued that WHR, Silos, and Assembly are also an integral part of the plant as WHR Building has no utility except to collect heat which was previously used to be released in the atmosphere and has now been recollected through that Waste Heat Recovery Unit, after which, it is injected in the boiler to produce steam to run a steam turbine to produce electricity which ultimately energized the cement manufacturing plant to produce a taxable good, hence, like Silos, Production line, the WHR unit is also an integral part of the plant and machinery. Similarly, Admin Block is also anintegral part of the production because it housed all the men who manage the men, materials, and machinery of the manufacturing plant; hence, both of the units/buildings are used directly in the manufacturing

of taxable goods. In support, reliance was placed on the judgment titled ***M/s Khairpur Sugar Mills Ltd Appeal,*** STA No. 426/KB/2017 dated 05.04.2018 (Karachi Bench). It is further submitted that section 8 has to be liberally construed in favour of the taxpayer to avoid double taxation. Reliance was placed on 1999 SCMR 1442; 1999 PTD 1892; 2005 PTD 2012; 2006 PTD 2066.

5. On the contrary, the learned DR has vehemently opposed the contentions of the appellant, he stated that the adjustment is a statutory right, it does not accrue in favour of the taxpayer unless the pre-conditions of the statute are fulfilled. He relied on the bar of adjustment against the indirect use of goods in production. Hence, the adjustment was lawfully disallowed.

6. We have given our careful consideration to the rival contentions and perused the record. First, we take up the appellant registered person's appeals. In both appeals, the following issues are involved for our determination:-

i. **STA No.81/PB/2018**

   a) Disallowance of input tax under section 8(1)(h) of the Act amounting to Rs.1,787,953/-which relates to the input tax claimed on Deformed bars/steel bars, cables used in WHR unit and admin block.

ii. **STA No.82/PB/2018**

   a) Disallowance of input tax under section 8(1)(h)& (i) of the Act amounting to Rs.4,813,384/- which relates to the input tax claimed on Deformed bars/steel bars, cables, split ACs, office equipment, etc used in WHR unit and admin block.

   b) Non-deduction of withholding tax at Rs.147,421/-.

   c) Non-payment of further tax at Rs.115,720/-.

At the heart of this case lies the question of the admissibility of input tax adjustment with respect to certain goods. As a super summary of the findings of

the Impugned Order, the adjustment of input tax *inter alia* with respect to steel bars in Solos and the foundation of Assembly Line-II was allowed for being an integral part of the production. However, it was disallowed to the extent of goods (wires, cables, and deformed steel/bars, etc) used in the Waste Heat Recovery (WHR Unit) and Admin Block for not being an integral part of the production plant. Before dilating upon the controversy, let us look at the scheme of the Act.

SCHEME OF THE ACT

7. The Sales Tax Act introduces an indirect tax to be levied, charged, and collected on imported goods or taxable supplies of goods, and the same is collected by the supplier on behalf of the Government, while the incidence of the tax is finally borne by the consumer of the imported goods or of the taxable supplies of the goods. The charging section 3 of the Sales Tax Act lays down the foundational parameters of the sales tax, which are: firstly, the quantum of the tax is based on the value of the goods imported into Pakistan or the taxable supplies made in Pakistan by a registered person; secondly, the incidence of the tax is triggered or made chargeable when the goods are imported into Pakistan or when the registered person makes taxable supplies in the course or furtherance of any taxable activity carried out by him; and finally, the liability to pay the tax is on the person importing the goods in respect of the imported goods, or on the person making the supplies in respect of taxable supplies made in Pakistan. Further, it can be seen from the legal framework that sales tax on goods under the Sales Tax Act, 1990 is paid under a value-added tax (VAT) mode. The purpose of imposing a tax under VAT mode is to ensure that each taxpayer only pays sales tax on the value it adds to a product or material. This is only possible if each taxpayer can deduct the input tax it has paid on any goods consumed, or services received, by it for the purposes of manufacturing,

producing, or marketing the goods it sells, from the output tax payable on those goods. One of the essential features of VAT mode taxation is the passing on the input tax, to be credited against the output tax, till the final output tax is borne by the ultimate consumer under section 7(1) of the Act, 1990. Under this provision to calculate its final tax liability, a registered person is entitled to deduct input tax paid or payable during a tax period to make taxable supplies against the output tax paid or payable for that tax period on those taxable supplies. The tax which is paid or payable by the appellant at the time of purchases is called "Input Tax" as per section 2(14) of the Act and is adjustable against output tax as per section 2(20) chargeable on the supplies of finished products. Thus, under the scheme of the Act, inter alia a manufacturer is entitled to claim an input tax credit for sales tax on purchases paid or payable by it against the output tax on the sales of its products, which is payable to the Federal Government, to calculate its final tax liability under Section 7 of the Act.

ADJUSTMENT OF INPUT TAX

8. The Act in question provides a mechanism of the input tax as against output tax and the refund if so accrued. The said mechanism is governed by the provisions of section 7 (determination of tax liability) and section 8 (Tax Credit not allowed) and perusal thereof reflects that in terms of Section 7 (subject to Section 8 and Section 8B), a taxpayer is entitled to deduct input tax paid or payable for the purposes of taxable supplies made or to be made by him from output tax due from him in respect of a particular tax period. There are other restrictions and mechanisms under Section 7 of the Act, which for the present purposes are not relevant; however, one may make note of the fact that such admissibility of input tax adjustment or refund is qualified by and through section 8 ibid. Lastly, Section 8 of the Act puts an embargo and restriction, providing inter alia that a tax credit shall not be allowed and a registered person shall not

be entitled to reclaim or deduct input tax paid for any purpose other than for the taxable supply made or to be made by him; and again on any other goods, which are notified by the Federal Government and so on and so forth.

9. In the instant case, the subject goods were first notified in terms of section 8(1)(b) vide SRO. 490(I)/2004 dated 12.06.2004 duly amended by SRO. 450(I)/2013 dated 27.05.2013 and thereafter now form part of the Act in section 8(1)(h) & (i). The appellant's precise case is that the items in question are directly used in facilitating and improving the manufacture of the end product; as a consequence, are a direct constituent of the taxable supply, and therefore, covered when section 7 is read with section 8 are read harmoniously; hence, there was no occasion to deny input tax adjustment under the provisions of 8(1)(h) & (i) of the Act. However, we are not inclined to agree with this contention as this issue is already settled by a learned Division Bench of the Hon'ble Sindh High in the case titled AMZ Spinning and Weaving mills (Pvt) vs appellate Tribunal, Customs, Sales Tax and Federal Excise, Karachi, (2006 PTD 2821) by holding that on account of a non-obstante clause in section 8, it shall override and prevail over the provisions of section 7 and that the disentitlement to seek adjustment is based upon the provision of section 8(1)(b) itself and the very purpose of enacting section 8(1)(b) was to deny adjustment of input tax also on such items which though are used in the manufacture and production of taxable goods or supplies, but the Federal Government in its discretion denies to extend the such benefit to the taxpayer. The ratio of the aforesaid judgment in pith and substance also applies to 8(1)(h) & (i) of the Act since previously the goods, on which Input Tax Adjustment was denied, were notified through Notification under 8(1)(b) of the Act, whereas, presently not only a Notification to that effect has been issued i.e. S.R.O. 450; but so also now the goods on which Input Tax Adjustment or refund is inadmissible have been incorporated in

section 8(1)(h) & (i) of the Act. We are of the view that it is the prerogative of the Legislature to allow and/or deny Input Tax Adjustment. For ease of reference section 8(1)(h) & (i) is reproduced below:-

> "**8. Tax credit not allowed.** – (1) Notwithstanding anything contained in this Act, a registered person shall not be entitled to reclaim or deduct input tax paid on –
> (a) the goods or services used or to be used for any purpose other than for taxable supplies made or to be made by him;
> (b) any other goods or services which the Federal Government may, by a notification in the official Gazette, specify;
> …….
> **(h)** goods used in, or permanently attached to, immoveable property, such as building and construction materials, paints, **electrical** and sanitary fittings, **pipes, wires and cables,** but excluding pre-fabricated buildings and such goods acquired for sale or re-sale **or for direct use in the production or manufacture of taxable goods;**
> **(i)** vehicles falling in Chapter 87 of the First Schedule to the Customs Act, 1969 (IV of 1969), parts of such vehicles, electrical and gas appliances, furniture, furnishing, office equipment (excluding electronic case registers), but **excluding such goods acquired for sale or re-sale;**"[Underlined to supply emphasis]

It can be seen that the sentence used in section 8(1)(h) i.e ***"Goods for direct use in the production or manufacture of taxable goods"*** refers to items that are used directly in the process of production or manufacturing a taxable product. These goods may be used as raw materials, components, or supplies in the production of process, and are typically subject to taxes when they are sold or used in the production of taxable goods. For example, if a company manufactures shoes, the leather, thread, and other materials used to make the shoes would be considered "goods for direct use in the production or manufacture of taxable goods." These goods would be subject to tax when they are sold or used in the production process. On the other hand, items that are not

directly used in the production or manufacture of taxable goods, such as office supplies, or equipment, would not be considered "goods for direct use in the production or manufacture of taxable goods."The expression "Direct use" generally refers to the use of an item in a manner that is immediately necessary or essential for a particular purpose. In the context of goods used in the production or manufacture of taxable goods, "direct use" typically refers to the use of an item as a raw material, component, or supply in the production process, as opposed to its use in a general or administrative sense.

10. The intent and purpose of 8(1)(h) & (i) of the Act and so also SRO.450(I)/2013 reflects that the Legislature has decided that these materials, which have been so notified, are not a direct constituent of a taxable supply, whereas, even otherwise it is settled in the case of AMZ Spinning cited supra that Input Tax Adjustment can even be denied on materials, which are a direct constituent of a taxable supply. Similarly, to begin with, the scope of section 8, we want to clarify that unlike section 7, which is a beneficial provision for conferring a right of deducting input tax, section 8 carries certain restrictions and contains the bar on the said right of adjustment. Among others, section 8 is a safeguard to prevent misuse of the right of input tax adjustment, especially with respect to goods not directly or integrally part of the taxable supply. Reference can be made to the case of ***Collector of Customs v.Sanghar Sugar Mills***, PLD 2007 SC 517, where the Hon'ble Supreme Court held as follows:-

> "*Section 7 of the Sales Tax Act, which is a beneficial section, entitles a registered person to deduct input tax, from output tax, however, section 8 provides certain eventualities and the powers of the Federal Government through a notification in the official Gazette specify the goods under which the input tax is not available and in this respect the Federal Government while exercising powers under the aforesaid section has issued notification prescribing the goods on*

which the adjustment of input tax was disallowed. This may be in order to forestall the possible misuse of the input adjustment against the procurement of such goods which are not direct constituents/ingredients of the finished goods or which have multiple usages as well and also in line with the provisions of section 8 that the goods were used not for the purpose of manufacture or production of taxable goods or taxable supplies. The refusal of input tax adjustment within the purview of the legal provision or legally competent notifications do not absolve the assets from the settled/due liability.' [Underlined to supply emphasis]

11. Now we come to the crux of the matter. It is admitted by all that the input tax adjustment was denied with respect to goods (wires, cables and deformed steel/bars, furniture, office equipment, etc) used in the Waste Heat Recovery (WHR Unit) and Admin Block. The contentious point is whether the same was an integral part of the production plant or not. As reproduced above, there is an express bar on input adjustment with respect to wires, cables, bars, furniture, equipment, etc in clauses (h) and (i). The exception is where such goods are directly used in the manufacturing process or goods acquired for sale or re-sale respectively. Clearly, both the WHR unit and Admin Block are not a direct and integral part of the production plant. They simply provide indirect support, having no direct nexus with the production line. When confronted, the learned AR also could not provide any documentary proof or business information to establish the causal link between the goods in question with the manufacturing activity. It is a well-settled canon of statutory interpretation that redundancy cannot be attributed to the words of the statute to render them superfluous or nugatory. Each and every word of the statute has to be given effect. See ***Searle IV Solution v. Federation of Pakistan***, 2018 SCMR 1444; ***Pakistan Television Corporation v. CIR, Islamabad***, 2017 SCMR 1136; ***OGDCL v. FBR***, 2016 PTD 1675 [Islamabad]. The term *direct use* has been employed by

the legislature in its wisdom to formulate a fiscal policy, which cannot be rendered meaningless by this forum. Being fortified with the view of the Hon'ble Supreme Court of Pakistan in the ***Sanghar Sugar Mills case (supra)***, binding in terms of Article 189 of the Constitution of Pakistan, 1973 we are unable to agree with the learned AR and disregard the legislative policy of disallowing input adjustment on goods not directly used for the production purposes or acquired for sale or re-sale. As a result, the orders of the learned CIR(A) are maintained on the said issue.

12. As far as the issue of non-deduction of withholding tax at Rs.147,421/- is concerned, this tribunal has already decided this issue in favour of the appellant registered person. The following question were posed before this tribunal in the case bearing **STA No.102/PB/2014** (Tax period Feb 2013 to Nov 2013) and S**TA No.40/PB/2015**(Tax period Dec 2013 to Sep 2014)

i). Whether under the facts and in the circumstances of the case, the provision of sub-section (4A) of section 11 of the Sales Tax Act, 1990 inserted through the Finance Act, 2016 has a retrospective effect and applies for the tax periods from December, 2013 to June, 2014?

ii). Whether under the facts and in the circumstances of the case, the provision of subsection 11(2) of the Sales Tax Act, 1990 was relevant and the case of the respondent registered person falls under the said provision?

This tribunal after thoroughly probing into the matter answered the above questions in the negative in favour of the registered person in the following manner:-

> *"13. In view of the above deliberation, the answer to question No. (i) is in negative, the provisions of sub-section (4A) of section 11 inserted through the Finance Act, 2016 would not apply retrospectively for the tax periods before the tax period of June, 2016.*
>
> *14. To answer the second question as to whether the provision of subsection 11(2) of the Sales Tax Act, 1990 was relevant and the case of the appellant falls under the said provision? We have to glance at the provisions of sub-sections (2) of section 11, in*

juxtaposition with sub-section (4A) of section 11 of the Act, as reproduced above. In sub-section (2) of section 11 give the mandate that where a person has not paid the tax due on supplies made by him or has made a short payment on supplies or claimed input tax credit or refund which is not admissible under this Act. The Officer of Inland Revenue shall after a notice to show cause to such person, make an order for assessment of tax actually payable by that person. Whereas sub-section (4A) of section 11 of the Act provides that where a person who is required to withhold sales tax under the provision of this Act or the rules made thereunder fails to withhold the same or fails to deposit the same shall be charged to tax after issuance of show cause notice, determine the amount in default. In the instant case, undisputedly, there is no allegation on the part of the department that the respondent registered person had not paid the tax due on its supplies or had made a short payment on its supplies, or had claimed input credit or refund which was not admissible to them under the Act. Rather the respondent did not deduct/withhold the sales tax as per rule 2 of Sales Tax Special Procedure (Withholding) Rules, 2007 while making payments to the recipients. We, therefore, have no two opinions that the respondent's case is not covered in sub-section (2) of section 11 of the Act. The legislature itself while enacting the latest provision of sub-section (4A) inserted through the Finance Act, 2016 in section 11 of the Sales Tax Act, 1990, was conscious of the fact that earlier the default of withholding tax of a person is not covered in the sub-section (2) of section 11 ibid. While inserting sub-section (4A) in section 11 of the Act the withholding default of the person was included therein. This subsequent inclusion by a positive act of legislation is conclusive proof of the fact that the same was earlier not included in the provisions of section 11 of the Act. Consequently, we hold that under sub-section (2) of section 11 of the Act, the default of withholding tax by the respondent is not covered in the said sub-section and the orders passed by the Assessing Officer are illegal, void ab-initio, and without jurisdiction. It is settled law that amendments are made in the statute to bring a change in the law. Reliance may be placed on the judgment of the Hon'ble Supreme Court of Pakistan titled as ***Commissioner of Income Tax/Wealth Tax Companies Zone-II, Lahore Vs M/s Lahore Cantt Cooperative Housing Society, Lahore and 7 others*** *(2009 PTD 799). In the said judgment it was held by the Hon'ble Supreme Court that the societies are not covered by the definition of the Company as provided in section 2(16)(b) of the repealed Income Tax Ordinance, 1979. While enacting the Income Tax Ordinance of 2001, such Cooperative Societies were included in the definition of a Company. This subsequent inclusion of Cooperative Societies by a positive act of legislation is conclusive proof of the fact that the same were excluded in the earlier enactment. Therefore, for the foregoing reasons, the answer to this question is also in negative."*

By following the above judgment of this tribunal, this issue is decided in favour of the appellant registered person.

13. The last issue relates to the further tax imposed by the assessing officer on sales of scrape and office equipment. The appellant contends that the aforesaid supplies were made to the end consumer, therefore, in terms of SRO 648(I)/2013 dated 09.07.2013, it was not required to collect and deposit the further tax. However, the appellant failed to establish that the goods were actually made to the end consumers. The record further shows that the appellant failed to provide any record in support of his version before the lower authorities as well. Hence, the order passed by the learned CIR(A) is maintained on this account.

DEPARTMENT APPEALS (STA No.83 & 84/PB/2018)

14. The department has preferred the appeals on the following issues which were decided in favour of the respondent registered person by the learned CIR(A):-

i. Adjustment of the input tax crediton diesel used/utilized in the vehicles pertaining to M/s Pir & Co.

ii. Adjustment of the input tax on the vehicle i.e Sunny Truck.

On the first issue, the learned DR contends that according to the agreement made between the respondent and M/s Pir & Co (herein referred to as contractor), the 0.3 liters per ton of diesel will be provided to the contractor in lieu of payments payable in connection with loading & transporting of limestone from a limestone quarry located at the site. In this way, such diesel is used in the business taxable activity of M/s Pir & Co (Contractor), not in the taxable activity of the respondent. Hence the respondent unit has violated the provision of section 8(1)(a) of the Sales Tax Act, 1990 read with SRO 490(1)/2004 dated 12-06-2004 as amended by SRO 450(1)/2013 dated 27-05-2013. He explained that the learned CIR(A) has erred in law in deciding the issue in favor of the

respondent registered person by accepting their stance without consulting the supportive documents provided by the appellate department i-e Loading & Transportation of limestone from the respondent unit limestone quarry to the Crusher Agreement dated 29-05-2013 and has deleted inadmissible input tax credit claimed on such diesel used in the taxable activity of contractor. The learned CIR(A) has allowed the input tax on the basis of the fact that the appellant department has already vacated the demand at Rs. 6,072,309/- for the tax period July-2015 to June-2017 vide assessment order No. 62/2017 dated 28.12.2017 as the transaction was not in the business activity of the contractor. He pointed out that the CIR(A) has ignored the facts and without concerning the supporting documents i-e Loading and Transportation limestone Agreements separately for July-2013) to June-2015 and July-2015 to June- 2017 and has decided the input tax credit in favor of the respondent unit for the tax periods under consideration whereas there is crystal clear difference in both the Agreements especially in contract price mentioned at S.No. 11. The assessing officer vide Assessment Order No. 62/2017 dated 28.12.2017 has vacated the input tax credit for the tax period July-2015 to June-2017 due the reason that in price contract (S.No. 11) of Agreement dated 26-06-2015 effective from July-2015, **no any diesel commodity is involved to be provided to contractor** in lieu of payment against Transportation and Loading of limestone. On the contrary, the learned AR for the appellant has supported the order of the learned CIR(A).

15. We have heard both parties and perused the record. The submissions made on behalf of the appellant have substance. However, none of the party has placed on record the agreements executed in respect of the tax periods under consideration and the period relevant to the tax periods agreement from July 2015 to June 2017 wherein the assessing officer has accepted the plea of the

registered person on the ground that in the subsequent period, no any diesel commodity is involved to be provided to the contractor. The learned CIR(A) has not looked into the agreement executed in respect of the tax period July 2015 to June 2017 to the such perspective of the assessing officer and simply allowed the input tax on the ground that the assessing officer accepted the plea of the registered person in the subsequent period. Under the circumstance, this issue is remanded back to the learned CIR(A) with the direction to consider the contentions of the appellant enumerated above and after providing an opportunity to both parties to pass a speaking order in accordance with law.

16. As far as the second issue is concerned, the learned DR apprised that the inadmissible input tax at Rs.2,430,062/- which the respondent had claimed against the purchase of vehicle i.e SANY TRUCK imported having PCT headings 8705.1000, has allowed by the learned CIR(A) by ignoring section 8(1)(i) of the Act read with SRO 490(1)/2004 dated 12-06-2004 as amended by SRO 450(1)/2013 dated 27- 05-2013 wherein specifically on the vehicles falling in Chapter 87 of the First Schedule to the Customs Act, 1969 (IV of 1969), the input tax shall not be admissible if acquired otherwise than as "stock in Trade". Hence the decision is illegal and unlawful. On the contrary, the learned AR for the respondent supported the impugned order.

17. The only issue involved in the instant appeal is the disallowance of input tax claimed by the appellant which relates to the vehicles and parts of such vehicles. The assessing officer disallowed the said claim under section 8(1)(i) read with SRO 490(I)/2004 dated 12.06.2004 which was subsequently confirmed by the learned CIR(A). The learned CIR(A) while deciding the appeal of the appellant observed that:-

> "9. From a careful reading of the above-quoted judgment of the Honourable Supreme Court of Pakistan, it becomes evident that the

> instant case is distinguishable. The Supreme Court Judgment relates to the import of Off-highway dump trucks which were purposely built and were ready to be used in the cement manufacturing unit. Secondly, those Off-highway dump trucks were specifically designed for use in difficult terrain where the activity of mining, quarrying, and construction of big buildings is carried out. Those Off-Highway dump trucks, on account of their specific utility, had low payload capacity as well as low speed in comparison with the ordinary dump trucks that we see every day on roads and highways. Other than such use, the Off-Highway dump truck cannot be economically used as an ordinary means of transportation of goods. **On the contrary, the appellant had purchased chassis of ordinary trucks, as evident from their purchase invoices, which are being used for the day-to-day transportation of goods. These chassis were neither imported as finished dump trucks (off-highway) nor were locally purchased ready to be used as off-highway dump trucks. These chassis were not specific purposely built. These Chassis of ordinary trucks can be used as an ordinary means of transportation of goods and cannot be regarded as part and parcel of the industrial process of a cement factory."**

We tend to agree with the findings of the learned CIR(A). A similar issue came before this Tribunal in the case titled ***M/s Mustehkam Cement Company (Pvt.) Ltd***, (2003 PTD 1566) wherein it observed that:-

> *"6. We find that section 8(1)(b) of the Act, uses the word "goods" and the Table to S.R.O. 556(I)/96. dated 1-7-1996, specifies "vehicles of respective headings of Chapter 87" of the Pakistan Customs Tariff to be one such "goods" on which the entitlement of a registered person to claim input tax credit shall be disallowed. We do not find ourselves in agreement with the learned counsel for respondent No. 1 that the word "respective-headings" will imply the exclusion of dumper trucks classifiable under PCT Heading 87.04. Chapter 87 of the PCT contains 16 main headings from No.87.01 to 87.16 and "Motor vehicles for the transportation of goods" (including Dumpers) are classified under heading 87.04 of the First Schedule to the Customs Act, 1969 (popularly known as Pakistan Customs Tariff or the PCT). Therefore, when we say "dumper of leading 87.04", this stands included in terminology vehicles of the respective heading of Chapter 87.". No other interpretation is possible. As regards the counsel's plea that the Dumper should be treated as machinery, we find that this is a far-fetched idea. Even under the First Schedule to*

the Customs Act, 1969. Dumpers are classified under Chapter 87 (Vehicles other than Railway or Tramway Rolling Stock) under section XXII (Vehicles, Aircraft, Vessels and Associated Transport Equipments) and not under section XVI (Machinery and Mechanical Appliances) Covering Chapter 84 (Nuclear Reactors, Boilers, Machinery, and Mechanical Appliances). or Chapter 85 (Electrical Machinery arid Equipment). There is no- evidence to show that the Federal Government included such dumper trucks in the definition of "plant and machinery" in terms of Sr. No.39 of the then Sixth Schedule to the Act. Whether treated by respondent No.1 to be a machinery or to be a vehicle the fact remains that the dumper trucks are vehicles classified under Chapter 87 of the First Schedule to the Customs Act, 1969, and has to be viewed and treated as such for the purposes of Notification No.S.R.O. 556(I)/96, dated 1-7-1996 the word "business" of a registered person includes all his activity whether in the office building or the mine or quarry or the manufacturing premises or in the storage or marketing premises of that registered person, The transportation of limestone etc. from the quarry (owned by or leased to or authorized to a registered person engaged in the business of manufacture and supply of cement) to the manufacturing premises of that registered person in a part of business activity of that person. Even otherwise, it has been held that the supply of limestone and gypsum (minerals) is a taxable activity for sales tax purposes. However, producers of taxable cement can enjoy exemption on such minerals excavated by them and consumed in-house under Sr. No.43 (previous Sr. No.34) of the Sixth Schedule to the Sales Tax Act, 1990. We have no doubt that the dumper trucks are owned by cement factories for use in their business premises. For reasons given above, we find that provisions of section 8(1)(b) of the Sales Tax Act, 1990, read with Sr. No. 1 of the Table to S.R.O. 556(I)/96, dated 1-7-1996 are very clear and the dumper trucks (of Chapter 87) imported by respondent cement factory are not entitled to the input tax credit. We; accordingly, set aside the impugned consolidated Order-in-Appeal No.240-41/99, dated nil (dispatched on 1-1-2000) in so far as it relates to the case of the respondent No.1 Messrs Mustehkam Cement Company Ltd.

The order passed by the Additional Collector of Sales Tax, Peshawar, vide Order-in-Appeal No.19 of 1998, dated 30-4-1998 (dispatched on 29-6-1998) is hereby confirmed and restored. The appeal filed by the Collector of Sales Tax and Central Excise, Peshawar, stands disposed of as accepted accordingly."

By following the above judgment and keeping in view the provision of section 8(1)(i), the subject vehicle falls in Chapter 87 of the First Schedule to the Customs Act, 1969, therefore, the appellant is not entitled to claim input tax on such vehicle. Accordingly, the order passed by the learned CIR(A) is modified and as a result, the appeal filed by the department is accepted.

18. for what has been discussed above, the cross-appeals filed by the appellant registered Person as well as Department are disposed of in the above terms.

19. This order consists of (19) pages and each page bears my signature.

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

Sd/-
(MUHAMMAD IMTIAZ)
ACCOUNTANT MEMBER