

Form No:HCJD/C-121

ORDER SHEET

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

Case No: W.P.No.52043/2021

DG Khan Cement
Company Limited etc.

Versus

Federal Board of
Revenue 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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24.01.2023 Mr. Raza Imtiaz Siddiqui, Advocate for the Petitioners
alongwith Miss Sibgha Saqib and Barrister Fasih-ur-
Rehman, Advocates.
Mr. Muhammad Yahya Johar, ASC/Legal Advisor for
the Respondent-FBR.
Mr. Nasir Javaid Ghumman, Deputy Attorney General.

Through this constitutional petition under Article 199
of the Constitution of Islamic Republic of Pakistan, 1973
(the “**Constitution**”), the Petitioners have impugned show
cause notice dated 02.07.2021 and subsequent notice dated
16.08.2021 issued by Respondent No.4 under Section 11(2)
of the Sales Tax Act, 1990 (the “**1990 Act**”).

2. Mr. Raza Imtiaz Siddiqui, Advocate stated that the
issue in this case relates to adjustment of input tax by the
Respondents in terms of the provisions of Sections 7 and 8
of 1990 Act pursuant to the judgment passed by a learned
Division Bench of this Court in the case of *Nishat Mills
Limited versus Federation of Pakistan etc.* (2020 PTD
1641), in which the Assessing/Adjudicating Officer was
directed to interpret Section 8(1)(h) and (i) of 1990 Act on
case to case basis after determining facts of each case
without prejudice to the findings in this regard. He
contended that pursuant to the aforesaid judgment of the
learned Division Bench, the Respondents have proceeded
with the matter but wrongly interpreted relevant provisions
of 1990 Act, while dealing with the Petitioners’ claim of

input sales tax on supply of the equipment to their other plant and decided the case against them twice. He explained that the Respondents are now bent upon to decide the issue in hand without following proper procedure provided under 1990 Act by issuing the impugned show cause notice and subsequent notice. He next argued that in the judgment passed in **Nishat Mills Limited Case** (*supra*), learned Division Bench of this Court has interpreted provisions of Section 8 of 1990 Act and enunciated certain principles with regard to adjustment of the input tax by relying on the earlier judgment reported as *Coca-Cola Beverages Pakistan Ltd. versus Customs, Excise and Sales Tax Appellate Tribunal and others* (2017 PTD 2380) against which leave was also granted by the Hon'ble Supreme Court of Pakistan in Civil Petitions No.3222-L to 3227-L of 2017, vide order dated 11.12.2018. Mr. Raza Imtiaz Siddiqui, Advocate maintained that the issue of input tax has been dealt with in detail by learned Division Bench of this Court in Paragraph-5 of the *supra* judgment, the relevant portion of which is reproduced hereunder for ready reference:-

“We have examined the provisions of Sections 7 & 8 of the Act of 1990. Collective and plain reading of both the Sections (ignoring intermediary phrases imposing conditions of qualifying these provisions) shows that Section 7 is ‘entitling a registered person to deduct (adjust) input tax, for the purpose of taxable supplies, from the output tax’. The entitlement, to deduct/adjust input tax, is subject to the “purpose of taxable supplies”. Conversely, Section 8 is disentitling reclaim or deductions of input tax paid on the goods used for a purpose other than taxable supplies. The deduced basic principle is that input tax paid on goods can be deducted or reclaimed, “only if, such goods are used for the purpose of taxable supplies.”

He strenuously stated that the Respondents are not complying with the directions/observations given by the learned Division Bench of this Court in the afore-quoted

paragraph, thus, violating the provisions of Article 201 of the Constitution, which clearly states that any decision of a High Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all Courts subordinate to it as well as governmental authorities but in this case, the principles settled by the learned Division Bench of this Court in the judgment, cited above, are not being followed by the Respondents in *stricto sensu*.

3. Mr. Muhammad Yahya Johar, ASC has objected to maintainability of this petition by submitting that claim of the Petitioners regarding adjustment of input tax, is not justified being barred in terms of Section 8(1)(h) of 1990 Act, therefore, the same cannot be allowed.

4. In rebuttal, Mr. Raza Imtiaz Siddiqui, Advocate contended that neither the Petitioners are contributing to the taxable supply nor they have any nexus with the taxable supply, therefore, they are entitled to the relief sought for. He explained that prior to the issuance of show-cause notice the Petitioners had been requesting the Respondents to visit the site in actual to see pipes, etc. which have been used in expansion of plant. He placed on record the Annual Report 2019 showing the Plant Capacity and Actual Production by stating that after such expansion the production has been massively increased. Relevant part of the report is as under:-

Clinker (Metric Tonnes)		Capacity		Actual Production	
		2019	2018	2019	2018
Plant I- D.G. Khan	-note 39.1	810,000	810,000	675,816	899,585
Plant II – D.G. Khan	-note 39.1	1,200,000	1,200,000	1,259,480	1,244,058
Plant III- D.G. Khan	-note 39.1	2,010,000	2,010,000	1,962,150	2,269,770
Plant IV – Hub	-note.39.1	2,700,000	36,000	2,483,452	

However, he while confining his arguments to the extent of prayer clause (iv) of this petition, next argued that Petitioner No.1 has already requested Respondent No.4, vide letter dated 25.08.2021, to carry out an on-site/physical verification to determine whether the items, on which input tax has been claimed by Petitioner No.1, has been done in accordance with law or not, therefore, the Petitioners will be satisfied if a specific direction be issued to the said Respondent in this regard because Article 10-A of the Constitution provides right of fair trial and due process to all citizens in determination of their rights and obligations while under Article 4 of the Constitution it is an inalienable right of the citizens to be treated in accordance with law.

5. Arguments have been heard and record perused.

6. If a quick glance is taken on provisions of Section 8 of 1990 Act, it will manifest that the exclusion of adjustment/refund of input tax does not have a nexus with the taxable activity/supply of the registered person and parameters regarding adjustment of input tax are given in Sub-Sections (a) to (m) of this Section. The mechanism provided in Section 8 will be read together with the provisions contained in Sections 2 and 7 of 1990 Act when such kind of exercise regarding input tax is carried out by the competent authority. During the course of arguments, learned counsel for the Petitioners has also referred to the Doctrine of Textualism developed in the case of Reliance Commodities (Private) Ltd. versus Federation of Pakistan and others (PLD 2020 Lahore 632)=(2020 PTD 1464) in which this Court has vastly discussed scope of the Doctrine of Textualism by relying on the quote of a Judge of US Supreme Court, Justice Antonin Scalia, who discussed responsibilities of judges in interpreting the statutes and the regulations by holding as under:-

“In exploring the neglected art of statutory interpretation, the judges resist the temptation to use legislative intention and legislative history. Hence, it is incompatible with democratic government to allow the meaning of a statute to be determined by what the judges think the law gives meant rather than by what the legislature actually promulgated. Eschewing the judicial lawmaking that is the essence of common law, judges should interpret statutes and regulations by focusing on the text itself.”

In the present case, according to Mr. Raza Imtiaz Siddiqui, Advocate, Sections 2, 7 and 8 of 1990 Act are to be read together in totality because they are intertwined. Section 2 pertains to definition clauses; Section 7 defines the word ‘distributor’ whereas Section 8 of 1990 Act describes the scheme of law relating to the tax credit which is not allowed. He contended that the question whether general principles set to evaluate and interpret a Statute and more importantly, the concept of holistic examination of any law as opposed to singular picking and choosing certain sections/provisions of the law whilst ignoring others, being intertwined with one another, cannot be read in isolation and this Court has already developed the Doctrine of Intertwined in the case of Tariq Iqbal Malik versus M/s Multiplierz Group Pvt. Ltd. and 04 others (2022 CLD 468).

7. Moreover, the scope of impermissibility concerning to the adjustment of input tax with reference to the scope of the word “purpose” and/or “direct use” in production or manufacture of taxable goods/supplies has already been distinguished by a learned Division Bench of this Court in the judgment reported as Coca-Cola Beverages Pakistan Ltd. versus Customs, Excise and Sales Tax Appellate Tribunal and others (2017 PTD 2380). The only point involved in the matter is whether the inputs have been utilized for the purpose of taxable supplies or not and stance

of the Petitioners is that the items, on which input tax has been claimed by them, can only be used or have been used for the industrial establishment of the Petitioner No.1/DG Khan Cement Company Limited, therefore, they are fully entitled for adjustment of the input tax. The Respondent/Federal Board of Revenue (the “FBR”) functions under the Federal Board of Revenue Act, 2007 (the “2007 Act”) and in terms of Section 4(1) (a) and (k) of this Act, it has to act in implementing the provisions of all fiscal laws, by (i) taking appropriate action; (ii) making policy; and (iii) issuing rules & regulations or guidelines in a clear, transparent, effective and expedient manner. In the cases of Chenab Flour and General Mills etc. versus Federation of Pakistan through Secretary Revenue Division etc. (PLD 2021 Lahore 343) and Ramzan Sugar Mills Limited versus Federal Board of Revenue and others (2021 PTD 1321) this Court has already declared the FBR as a Regulatory Body to deal with all the tax related affairs under relevant provisions of the 2007 Act by holding as under:-

“the FBR is Regulator of all fiscal laws in the country and being a Regulator, it vests with the main goal of tax collection in the country”, therefore, the matter of seeking record and information under various Sub-Sections of Section 122 of the Ordinance, comes within the domain of the FBR as well as the government officers appointed under the Income Tax Ordinance and such matters need no interference by this Court as required under its constitutional jurisdiction.”

8. It is noted that the Petitioner in response to show cause notice dated 02.07.2021 has specifically made request on 25.08.2021 to the Respondents to visit manufacturing unit by deputing a team but this exercise has not been done so far. While the Respondents in report and parawise comments stated that they had already requested the

Petitioner to provide relevant record but the same has not been done except partial compliance of the order passed in I.C.A.No.72329 of 2019.

9. On 27.10.2021 Dr. Ishtiaq A. Khan, Commissioner Inland Revenue, Lahore appeared and was confronted whether prayer clause (iv) alongwith reply submitted by the Petitioner on 25.08.2021 has been taken into consideration before filing of this writ petition, he stated that this controversy could be resolved if the matter be referred to the concerned respondent to that extent. It is mattering to note here that the issue whether the inputs have been utilized for the purpose of taxable supplies or not, can only be conveniently resolved if an on-site/physical verification of the utilized inputs of Petitioner No.1 is made, which is also the statutory mandate of 1990 Act, and even otherwise there is no harm in law if such exercise is done for the entire satisfaction of both the Petitioner and the revenue hierarchy, before a final decision is rendered in the matter.

10. In view of the above provisions of the "Act", the case law relied by the parties and especially prayer (iv) made by the Petitioner, let a certified copy of this petition alongwith all the annexures be sent to the Respondent No.4 to decide the matter regarding constitution of a team of the qualified/expert persons to attain an on-site/physical verification clarifying the fact whether the items, on which input tax has been claimed by Petitioner No.1, has been done strictly as per provisions of 1990 Act or not. The said team then, if made, will visit the manufacturing premises of Petitioner No.1 in order to verify each and every invoice under the relevant heading so as to conclude whether the goods thereunder have been used for the purpose of taxable activity or making of taxable supply and after completion of the said exercise, the matter will be finally adjudicated by

the adjudicating authority after taking into consideration the legal points, relevant provisions of 1990 Act and the 2007 Act or any other law applicable thereto as well as the judgments mentioned above [specifically the judgment passed in **Nishat Mills Limited Case** (*supra*)], within the prescribed period provided under the law.

Disposed of accordingly.

(JAWAD HASSAN)
JUDGE

*Mājid