JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

I.T.R NO.145/2010

COMMISSIONER INLAND REVENUE (LEGAL) LTU, ISLAMABAD.

VS

M/S FAUJI FERTILIZER CO. LTD., RAWALPINDI.

Applicant by : Mr. Babar Bilal, Advocate.

Respondent by : Mr. Shahbaz Butt, Advocate.

Date of hearing : 03.01.2022

SAMAN RAFAT IMTIAZ, J. This is a reference application under Section 133 of the Income Tax Ordinance, 2001 ("Ordinance, 2001") against the Order dated 25-03-2009 passed by the learned Appellate Tribunal Inland Revenue, Islamabad ("Impugned Order").

2. The following question of law has been urged to have arisen out of the Impugned Order passed by the learned Appellate Tribunal:

> *"Whether on the facts and circumstance of the case the ITAT was justified in allowing the benefit of rebate to the assessee under Para A(2C) of Part-IV of First Schedule to the repealed Income Tax Ordinance notwithstanding the facts that the assessee is manufacturer whereas only whole seller, commercial importers are entitled to the benefit to this rebate."*

3. Brief facts are that the Respondent is a public limited company deriving income from manufacturing, purchase, import and sale/supply of fertilizer. Return of the assessment year 2000-01 was filed. This return did not qualify for self-assessment. Proceedings were started for assessment under normal law. The Respondent agitated the assessment at the appellate stage. The learned CIT (A) disposed of the taxpayer appeal vide Order dated 15-06-2004 ("CIT(A) Order").

4. On the issue of rebate under para A(2C) of Part IV of the First Schedule to the Income Tax Ordinance, 1979 ("1979 Ordinance"), the CIT(A) Order directed the assessing officer to verify whether details as required in the said provision had been provided by the Respondent as contended and in case it was so, to

allow the rebate to the Respondent in line with an earlier appellate order dated 18-06-2003 passed by the learned Appellate Tribunal whereby the decision of the CIT(A) was upheld which in turn directed the assessing officer to give the said rebate to the Respondent for the assessment years 1993-1994 to 1996-1997.

5. Both the Applicant and the Respondent being dissatisfied with the findings in the learned CIT (A) Order on various grounds then filed second appeal before the learned Appellate Tribunal. Regarding the issue of rebate, the learned Appellate Tribunal held that the directions given by the learned Appellate Tribunal in the aforesaid order dated 18-06-2003 were correct; that the learned CIT(A) has rightly allowed the relief and as such his order (i.e. 15-06-2004) was confirmed.

6. The learned counsel for the Respondent raised a preliminary objection regarding maintainability of the instant reference on the ground that a reference application is not maintainable against a remand order. The learned counsel relied upon judgments reported as *M/s E.M. Oils Mills and Industries Ltd. through Director versus Commissioner of Income Tax, Audit Division II, Companies III, Karachi (2011 PTD 2708)* and *M/s Bostan International versus Commissioner of Income Tax, Zone C, Karachi (2010 PTD 1275)* as well as an unreported judgment of Learned Division Bench of the Hon'ble Lahore High Court, Lahore titled as *M/s CSK Ltd. versus The Commissioner Inland Revenue, RTO, Gujranwala & others (STR No. 56688 of 2019)*.

7. On the other hand, the learned counsel for the Applicant drew our attention to paragraphs 42 and 43 of the Impugned Order, whereby the learned Appellate Tribunal has confirmed the CIT(A) Order dated 15-06-2004 in respect of the rebate under para A(2C) of Part IV of the First Schedule to the 1979 Ordinance.

8. A perusal of the said paragraphs of the Impugned Order reveals that the learned Appellate Tribunal has confirmed the order of the CIT(A) which held the Respondent entitled to the rebate claimed in light of earlier order of the learned Appellate Tribunal provided that the assessing officer can verify that the requisite details as required by the provision of the 1979 Ordinance allowing the rebate have indeed been filed by the Respondent. As such, the matter has been decided on merits as to whether or not the subject rebate is available to the Respondent and only the factual aspect of procedural compliance has been

remanded back. In view of the foregoing, the order of the learned Appellate Tribunal cannot be described as a remand order from which no question of law arises. Therefore, we find the instant reference maintainable.

9. On merits, the learned counsel for the Applicant has contended that only commercial importers and whole sellers are allowed rebate under para A(2C) of Part IV of the First Schedule to the 1979 Ordinance whereas the Respondent is a manufacturer and as such not entitled to the said benefit. He has relied upon the case of *Olympia Industries (Pvt) Ltd., Lahore versus Assistant Collector, Central Excise & Sales Tax; Sheikhupura Division, Lahore and 2 others (2002 PTD 776),* wherein the Honorable Lahore High Court held in view of the definition of the term "wholesaler" as given in the Sales Tax Act, 1990 and the meaning of the word "wholesale" as per the Dictionary of Marketing published by Peter Collin Publishing that the business of wholesale entails both buying and selling and as such sale of goods by a manufacturer of such goods cannot, therefore, be termed as wholesale even though such sale may be made in large quantities.

10. It is, therefore, important to consider the language used in the provision in question i.e., para A (2C) of Part IV of the First Schedule to the Income Tax Ordinance, 1979, which is accordingly reproduced hereunder:

> *"2-C Where the total income of an assessee includes any profit and gains derived from import of goods or* ***wholesale business****, that tax payable by him shall be reduced by an amount equal to five per cent of the said tax, if he furnishes complete details of sale indicating the amount of sales and the names and full addresses of the purchasers"* [Emphasis added].

11. A bare perusal of the said provision of law shows that the rebate in question is available to an assessee whose total income includes any profit or gain derived, *inter alia,* from "wholesale business". This is in contradistinction to the contention of the learned counsel for the Applicant that the rebate under para A (2C) of Part IV of the First Schedule to the Income Tax Ordinance, 1979 is only available to a "wholesaler" or "whole seller", which appears to be based on a presumption that wholesale business can only be undertaken by a wholesaler.

12. The term "wholesale" has not been defined in the 1979 Ordinance, in the absence of which the ordinary dictionary meaning has to be resorted to as per rules of interpretation. The learned counsel for the Respondent has contended that the copy of the relevant page that he has provided is from Black's Law Dictionary, however, this cannot be ascertained from the copy itself. In any

event, the meaning of "wholesale" and "wholesaler" given in Black's Law Dictionary, (Revised Fourth Edition) is as follows:

> *"WHOLESALE, Selling to retailers or jobbers rather than to consumers. Stolze Lumber Co. v. Stratton, 386 Ill. 334, 54 N.E.2d 554, 558. A sale in large quantity to one who intends to resell. Guess v. Montague, D.C.S.C., 51 F.Supp. 61, modified on other grounds, C.C.A.S.C., 140 F.2d 500. A sale of goods by the piece or in large quantities. Fleming v. American Stores Co., D.C.Pa., 42 F.Supp. 511, 522."*
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> *"WHOLESALER. One who buys in comparatively large quantities, and who sells, usually in smaller quantities, but never to the ultimate consumer of an individual unit. He sells either to a "jobber," a sort of middleman, or to a "retailer," who sells to the consumer. Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., C.C.A.N.Y., 227 F. 46, 47; Fischbach Brewing Co. v. City of St. Louis, 95 S.W.2d 335, 340, 231 Mo.App. 793."*

13. It is noted that the term "wholesale" as per Black's Law Dictionary as reproduced herein above, essentially means sale in large quantity to someone other than the end consumer. The business of wholesale, therefore, need not involve buying even though a wholesaler as per its dictionary meaning is one who is engaged both in buying and selling. Viewed from this angle, it would appear that a manufacturer selling in bulk to anyone other than the end consumer may also have as part of his total income, profit or gain derived from wholesale business.

14. The case of *Olympia Industries (Pvt) Ltd., Lahore (Supra)* relied upon by the learned counsel for the Applicant is not relevant for purposes of the provisions of the Income Tax Ordinance, 1979 as the said case was in relation to the term "wholesaler" as defined in the Sales Tax Act, 1990. It is a rule of interpretation of laws, as held by the apex Court in ***Syed Mukhtar Hussain Shah Versus Mst. Saba Imtiaz (PLD 2011 SC 260)*** that when a word or expression is given a definite meaning in one Act of Parliament, it does not mean that it shall ipso facto have the same meaning in another Act of Parliament. A definition thus appearing in one Act cannot be used to interpret the same word appearing in another Act until it is specifically so referred and borrowed with a clear command of law. The matter at hand pertains to the word "wholesale" as used in a provision of the 1979 Ordinance for which the definition provided for the term "wholesaler" in the Sales Tax Act, 1990 cannot be considered *para materia* due to the difference between "wholesale" and "wholesaler" as discussed above.

15. Moreover, as noted above, similar treatment was given to the Respondent by the learned Appellate Tribunal vide order dated 18-06-2003 for the assessment years 1993-1994 through 1996-97, which the learned Appellate Tribunal has confirmed to be correct in light of the following excerpt reproduced in the Impugned Order:

> *"He explained that the rebate was allowable to whole-seller and the assesse company was also a whole-seller because the company was selling urea fertilizer to dealers in bulk and then the dealers sell the same to the farmers/agriculturist.*
>
> *49. We have considered the above ground of the departmental appeals and also the ground of the learned AR in rebuttal to the said ground. As there was nothing plausibly argued on behalf of the department to negate the findings of the learned Appeal Commissioner in that regard, therefore, the action of the learned Appeal Commissioner in that regard was unexceptionable. Accordingly the departmental grounds on that score are rejected and the departmental appeals would fail in that respect."*

16. There is nothing on the record to show whether the department had challenged the order dated 18-06-2003 passed by the learned Appellate Tribunal. Be that as it may, it appears from the Impugned Order that the ground taken before it in relation to the subject rebate in the instant case was that the learned CIT(A) was not justified to adjudicate upon the issue of rebate with reference to decision in appeal in earlier year without appraising the facts of the year under consideration. It is noted, however, that the Applicant has failed to apprise this Court of any facts in relation to the year under consideration which merit a different treatment toward the Respondent in respect of the rebate under para (A2C) of Part IV of the First Schedule to the 1979 Ordinance than what was accorded in the earlier year by the learned Appellate Tribunal.

17. In view of the foregoing discussion, since the term used in the provision of law under discussion is "wholesale business" which in its ordinary sense does not require buying as an essential element, we are of the considered view that the rebate allowed by the provision in question would also be available to a manufacturer engaged in wholesale business and such manufacturer cannot be deprived of the said benefit simply because he does not fall within the definition of "wholesaler".

18. In view of the above, our answer to the question of law urged before us is in the affirmative i.e., that the ITAT was indeed justified in allowing the benefit of rebate under Para A(2C) of Part-IV of First Schedule to the repealed Income Tax Ordinance i.e., 1979 Ordinance to the assessee as the same is available to

any assessee, including manufacturers whose income includes profit or gains derived from wholesale business.

19. This reference application is therefore decided against the department-applicant.

20. Office shall send a copy of this judgment under seal of the Court to the learned Appellate Tribunal in accordance with Section 133(5) of the 2001 Ordinance.

(BABAR SATTAR)
JUDGE

(SAMAN RAFAT IMTIAZ)
JUDGE