ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

ITRA 77 of 2018

DATE	ORDER WITH SIGNATURE OF JUDGE

1. For hearing of CMA No.435/2024
2. For hearing of CMA No.125/2018
3. For hearing of main case

15.04.2026

Mr. Faheem Ali Memon, advocate for the applicant
Mr. Taimoor Ahmed Qureshi, advocate for respondent

This reference is pending since 2018 and learned counsel for respondent states that it is prima facie frivolous in nature as it merely seeks to re-agitate the questions of fact, which have been decided in favour of the respondent by the three concurrent statutory forums. Learned counsel refers to the findings contained in the impugned judgment which reads as follows:

> "13. We have heard both parties and find that the CIR(Appeals-I) has passed a very detail order considering the facts of the case of the appellant and the law we are reproducing some relevant text from the order which is as under:
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> The above observations of the honourable Chief Commissioner in this case are, very relevant and the learned Additional Commissioner was bound to distinguish the referred judgment of the division bench of the ATIR, Lahore in the case of Pyramid Gas and the above judgment of the ATIR and when he chose to overlook the entire judgment and the parallel case of Pyramid Gas, then this appeal is reduced to an "Open and Shut Case" because the leaned ATIR has already decided the issue in favour of the appellant in the identical case of Pyramid Gas which is on all fours on facts as well as in law. Given above position, I am bound by law to follow the decision of the learned ATIR in the case of Pyramid Gas being on all fours both on facts and law. There is no scope for any fact finding and re-determining the status of the appellant as an industrial undertaking or a manufacturer as the department has itself accepted that it is an identical case as that of Pyramid Gas on facts and law. The learned ATIR, Lahore in this case has already elaborately determined that the case of M/s. Pyramid Gas qualifies for exemption u/s 148 being an industrial undertaking.
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> On the merits also the appellant has shown to the learned Additional commissioner as well as before me that it imports bulk LPG mix as raw material for self-consumption at a different sea worthy pressure and then at its plant in Punjab, its pressure and composition is changed to the required standard for commercial or domestic users by blending the high pressure butane which is imported by road from Taftan border in special bowsers. It is explained by the appellant that its consumers require high pressure LPG, i.e. more propane and less butane. However, the two LPG handling terminals in Karachi do not allow the import of LPG with higher propane content due to safety reasons. The appellant, therefore, is required to import LPG with higher propane content via land route through Taftan border. The appellant then passes the two different LPG it imports through its LPG handling, mixing, bottling and filling plant to form an LPG with the correct propane content and pressure. Coloured photographs of the LPG plant showing different machines and equipment have also been produced which are placed on file. The appellant has shown that it qualifies all the conditions of being an industrial undertaking as envisaged W/s.2(29C) of the Ordinance, 2001.

All the above facts have also been stated by the appellant under the penalty of perjury as a sworn testimony and signed documents before the honourable High Court of Sindh in the Suit No.230 of 2017 filed by the appellant involving the same controversy. Such statements given under oath are presumed to be truthful or at least made in good faith in the absence of the contrary. Thus there is no reason to disapprove or disbelieve them.

It is also noted from the record that the appellant explained to the learned officer about us plant in Muzaffargarh Pubjab. But the learned officer has not discussed the same in the impugned order. The pictures produced before the honourable Sindh High Court as well as before me show that the plant is a large establishment. Considering the fact that LPG import of more than Rs.5 billion has been made in the year, it is easy to understand that it is not a small industrial establishment that could handle such large quantity of high explosive gases and its blending and bottling etc. Apart from consuming electricity at more than Rs.1 million through its installed electric meter reference number R 27157240567101, Account No.27572405671019, bearing the appellant's NTN and Sales Tax registration, the appellant also consumed diesel of more than Rs.2.4 million during the year on running its 2 diesel generators, 125 KVA and 82 KVA in order to meet power outages.

As regards the issue if the appellant is a manufacturer or not, it is important to mention here that the law has restricted the adjustability of tax collected w/s.148 of the Ordinance 2001 with the factum of being an "industrial undertaking". It is beside the point if a taxpayer is a manufacturer or not because the definition of "manufacturer" has been provided in a limited scope w/s. 153(7) of the Ordinance, 2001 and cannot be generalized for application to adjustability of tax collected at import stage w/s.148. Had this been the intent of the legislature, it would have provided the definition of manufacturer under the relevant clause of section 2 of the Ordinance, 2001 instead of section 153(7) ibid. this proposition has also been accepted by the honourable Chief Commissioner in his order u/s. 122-B dated 17.01.2017, the relevant excerpt is reproduced as under:

> "It is also held further that definition of manufacturer' as prescribed u/s.153(7) is not relevant in the instant situation. However on the factual plane, the petitioner is burdened with the task to prove that (a) its case qualifies as an 'industrial undertaking' and (b) its case fulfills the conditions specified in SRO 717(1)/2014. "

Despite above legal position, the appellant has been able to show that it squarely falls in the definition of manufacturer as provided u/s. 153(7) of the Ordinance, 2002 as well under the Sales Tax Act 1990.

The thrust of the arguments of the learned Additional Commissioner is that substantial" change is not brought in the resultant output product of the appellant and hence it does not qualify to be an industrial undertaking as envisaged u/s. 2(29C) of the Ordinance 2001. But in the referred judgment of the division bench of the honourable ATIR, Lahore in ITA No.1130/LB/2016 in the identical case of Pyramid Gas, it has specifically dealt with this issue and in para 8 to 16 reproduced above has explained the entire process of manufacturing as well as how it qualifies as in industrial undertaking. For the sake of brevity it is not repeated here.

Given above position and the judgment of the division bench of the learned ATIR, Lahore in ITA No.1130/LB/2016 dated 13.06.2016 in the identical case of Pyramid Gas (Pvt) Limited being on all fours on facts and law and this position has been accepted by the department, 1 am left with no option but to rule that the judgment of the ATIR is squarely applicable to the appellant. It is accordingly ordered that its status as an industrial undertaking be accepted by the department seeking guidance from the referred judgment of the ATIR, Lahore. Consequently, the return filed under the normal law will be accepted by the department subject to further amendment u/s. 122. As regards the charge of Super Tax, if the income of the appellant falls within the threshold of Super Tax the same shall be payable on the basis of normal return, otherwise not.

The appeal is disposed of in the manner and to extent as indicated above.

14. The judgment of DB of ATIR in case of Pyramid Gas (Pvt.) Ltd. ITA No.1130/L.B/2016) where the ATIR has given a finding of fact that the activities/process the company to be manufacturing and the company to be an industrial undertaking as defined in sec.2(29C) of the Income Tax

Ordinance, 2001. We are reproducing some relevant text from the order as under:

> *"9. The AR explained that while the Income Tax Ordinance, 2001 does not define the term manufacturer with specific reference to section 2(29C) therefore definition given in other sections or sister acts have to be applied. It was claimed that the above definitions of manufacturer covers the activity of the appellant i.e. missing, blending, remarking, packing, repacking therefore it has to be treated as Industrial undertaking and exemption certificate rejected by the respondent was not only without jurisdiction but also against the correct appreciation of law.*
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> *10. It was asked from the AR that how the end product is different from the original material used. The AR explained that the original material is a raw form Of PG which cannot be used in its imported form. The process of diluting, "mixing and, filtering enables to make the end product useable. The AR of the taxpayer contended conversion of something not useable in its ordinary form to something useabte or useable differently is also manufacturing.*
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> *11. It was explained that the imported LPG have density of propane 95% and butane 5% or in the ratio of 16% : 84% and even 60%: 70% ratio. The percentage of butane and propane changes from refinery to refinery. The AR explained that however, LPG used in vehicle in Pakistan the users in food industry required 65%; 35% ratio, requirement of other users of different category is also different. Therefore in order to make the right percentage of butane/propane ratio, processing, mixing and diluting squarely qualifies as manufacturing.*
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> *12. The departmental representative supported the order and contended exemption certificate whether appealable or not has long been laid to rest through judgment cited as 2007 PTD 2088 (Trib). Therefore this contention is not acceptable.*
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> *13. The departmental representative also contended that the appellant has availed remedy of revision by the Chief Commissioner as provided us. 122B therefore remedy of appeal was not available with the appellant.*
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> *14. However, the AR explained that there is no bar in availing alternate or more than one remedies as provided under the law. He contended that section 122B, section 129 or section 129 or section 131 has not put any bar on filing or admitting appeal in the event of availing remedy of revision.*
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> *15. The objection of the respondent department on the appeal of the appellant are found without merit. The learned DR was asked to distinguish the case from the judgment pronounced in 2007 PTD 2088. Further, no provision of the Ordinance has been quoted which prohibits availing remedy of appeal when revision has been filled. Therefore objections on the acceptability of appeal are found without merit.*
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> *16. On the issues, we have heard the parties and perused the relevant sections. Since, the term "manufacturer" has not been defined in Income Tax Ordinance, 2001 with reference to an Industrial Undertaking as defined in section 2(29C), therefore the definition is borrowed from allied act i.e. the Sales Tax Act, 1990. The said definition squarely covers the activities of the appellant to be manufacturing. Further, employment of more than 10 person and use of energy has remained an uncontroverted fact therefore we hold that the respondent commissioner was not justified to cancel the exemption certificate and we restore the same the CIR is directed to restore exemption certificate u/s. 148 and complete any formality in this regard within seven days of this letter.*
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> *17. Appeals is decided to the extent and manner indicated above.*

15. We also note that the Chief Commissioner of Inland Revenue while passing order ws.122B of the Income Tax Ordinance, 2001 has held "the order of the learned Tribunal in the case of the Pyramid Gad (Pvt.) Ltd. is on all fours with its case both in facts and law, where under identical circumstances the Divisional Bench of the Tribunal held that the taxpayer,

who was engaged in similar line of business, qualified as "industrial undertaking".

16. We have perused sections 2(29C) and 153(7) (IV) (a) (b) of the Income Tax Ordinance 2001. For better understanding of the matter the two provisions are reproduced below:

Section 2(29C)

"Industrial undertaking" means

(a) an undertaking which is set up in Pakistan and which employs,-

(i) ten or more persons in Pakistan and involves the use of electrical energy or any other form of energy which is mechanically transmitted and is not generated by human or animal energy; or

(ii) twenty or more persons in Pakistan and does not involve the use of electrical energy or any other form of energy which is mechanically transmitted and is not generated by human or animal energy; and which is engaged in,-

(i) the manufacture of goods or materials or the subjection of goods or materials to any process which substantially changes their original condition; or

(ii) ship-building; or

(iii) generation, conversion, transmission or distribution of electrical energy, or the supply of hydraulic; power, or the working of any mine, oil-well or any other source of mineral deposits; and

(iv) (b) any other industrial undertaking which the Board may by notification in the Official Gazette, specify.

Section 153(7)(IV)(a)(b)

"manufacturer" means a person who is engaged in production or manufacturing of goods, which includes :-

(a) any process in which an article singly or in combination with other articles, material, components, is either converted into another distinct article or product is so changed, transferred, or reshaped That is becomes capable of being put to use differently or distinctly; or

(b) a process of assembling, mixing, cutting or preparation of goods in any other manner;

The respondent has employed more then 10-employees and paid salaries to these employees, further use of electrical energy is also there and there is a detail process involved as explained by AR in detail and also confirmed from the photographs of the facility where processing as being carried out. It is therefore held that respondent is meeting the statutory requirements of these provisions.

17. We have gone through the order of learned Appellate Tribunal and observed CIR(A) and learned Appellate Tribunal and observed that finding of fact in the case of respondent and in the case of Pyramid Gas Pvt, Ltd, is same both the tax payers are engaged in similar business where in a detail process is involved. It is evident that it is not a case of commercial importer. The learned AR also submitted copies of facility where processing is being carried out which show tank, pipelines, motors, pumps, various gauges and other equipment and machinery which is Ted for mixing of two types of gases, filing, bottling according to various processes of safety. After going through the case laws, texts of exemption certificate, order passed by Chief Commissioner Inland Revenue w/s.122 B of the Income Tax Ordinance, 2001, status of the respondent as manufacturer as mentioned in Tax Payer Online Verification from FBR website, relevant sections i.e. 2(29C), 153(7) of the Income Tax Ordinance 2001and 2(16) of the Sales Tax Act. 1990 and photographs of the facility where processing is carried out, we have no hesitation in holding that respondent is an industrial undertaking as per sections 2(29C) and 153(7)(IV)(a)(b) of the Income Tax Ordinance, 2001 as it meets all prescribed conditions of these provisions.

> 18. The DR has also not been able to rebut the finding of the CIR (Appeals-I) and the arguments of the learned AR summarized above. The issues raised by the department have already been adjudicated and decided against the department in case of Pyramid Gas (Pvt.) Ltd ITA No.11307LB/2016 which is on all fours to that of the respondent and the CIR(Appeals) has passed a very detail and well-reasoned order to which we agree and which has not been rebutted by DR. Considering the above appeal filed by the department is dismissed and the order of the CIR(Appeals-I) is confirmed and requires no interference.
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> 19. The appeal is decided in the manner indicated above.

Learned counsel further points to the penultimate paragraph to demonstrate that the entire exercise is based on appreciation and evaluation of evidence, *denovo* adjudication in respect whereof is not merited in reference jurisdiction. Learned counsel for the applicant has repeatedly changed the questions of law, however, has not been able to distinguish or displace the case set forth by the respondent. Since no questions of law has been articulated before us, therefore, this reference application is dismissed.

A copy of this decision may be sent under the seal of this Court and the signature of the Registrar to the learned Appellate Tribunal, as required per section 133(8) of the Income Tax Ordinance, 2001.

Judge

Judge

Amjad