IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 938 of 2018

Plaintiff:	**Shan Foods (Pvt.) Ltd. through Mr. Hyder Ali Khan Advocate.**
Defendant: No. 1.	**Pakistan through Mr. Osman A. Hadi Assistant Attorney General.**
Defendants: No. 2 & 3.	**Commissioner Inland Revenue & another through Mr. Shahid Ali Qureshi Advocate.**
Date of hearing:	**12.03.2019, 10.04.2019.**
Date of order:	**31.05.2019**

J U D G M E N T

Muhammad Junaid Ghaffar J. This is a Suit wherein the Plaintiff has impugned Show Cause Notice dated 28.03.2018 whereby, the Department has alleged short levy of Sales Tax for tax period from July 2013 to June 2017 on the ground that no exemption is available to the Plaintiff under Sixth Schedule of the Sales Tax Act, 1990.

2. Learned Counsel for the Plaintiff has contended that the impugned Show Cause Notice is without lawful authority and jurisdiction; that the goods in question i.e. iodized salt is being sold in retail packing under a brand name and Plaintiff is entitled for exemption of Sales Tax under Serial No.107 of the 6th Schedule to the Sales Tax Act, 1990, whereas, the Department is mistakenly applying Serial No.29 of the said Schedule as the Plaintiff never claimed exemption against Serial No.29; that prior to insertion of Serial No.107 of the 6th Schedule, the said exemption was available through SRO 551(I)/2008 dated 11.06.2008 against Serial No.14, which qualified the exemption on import and supplies thereof, however, when this Notification was rescinded on 26.6.2014, the entry

was incorporated against Serial No.107 in the said Schedule but now the condition is not similarly worded; hence the exemption is available independently to import and supply, therefore, the impugned Show Cause Notice is without jurisdiction and bad in law; that under Section 3 and 13 of the Sales Tax Act, 1990, import and supply have been dealt with separately, and therefore, the exemption under Serial No.107 in respect of import and supply is to be read disjunctively; that in entry 107 the word ***"and"*** is to be read disjunctively as otherwise this entry 107 would remain redundant; that it is not possible that a person imports a product and then make a supply of the same thereof in retail packing; that it is settled law that in respect of interpretation of statutes absurdity is to be avoided; that in fact after rescinding of Notification on 26.02.2014 the earlier entry including entry No. 29 has been impliedly repealed and therefore, in view of such arguments he has prayed for a judgment and decree by setting aside the impugned Show Cause Notice. In support he has relied upon ***Abbasia Cooperative Bank V. Hakeem hafiz Muhammad Ghaus (P L D 1997 SC 3), Attock Cement Pakistan Ltd. V. Collector of Customs (1999 P T D 1892), Collector of Customs V. S. M. Ahmed and company (1999 S C M R 138), Habib Safe Deposir Vault (Pvt.) Ltd. V. Sindh (2016 P T D 1180), Iqbal Hussain V. Federation of Pakistan (2010 P T D 2338), Citibank NA V. Commissioner Inland Revenue (2014 P T D 284), Association of Builders and Developers of Pakistan V. Sindh (2018 P T D 1487), Digicom Trading (Pvt.) Ltd. V. Federation of Pakistan and another (2016 P T D 648), Khadim Hussain V. Additional District Judge, Faisalabad (P L D 1990 SC 632), Abdul Razzak V. Karachi Building Control Authority (P L D 1994 SC 512), College of Physicians and Surgeons Pakistan V. Wafaqi Mohtasib (P L D 2003 Karachi 667),***

Jawad Ali V. Election Commissioner (1999 C L C 19), Sarfraz Ahmed Tarrar V. Punjab (P L D 2007 Lahore 57), Federation of Pakistan V. Haji Muhammad Sadiq (2007 P T D 67), Nizar Ali V. Karachi Water and Sewerage Board (2004 C L C 578), Market Committee Khudian V. town Committee Khudian (1992 S C M R 1403), Qazi Hussain Ahmed V. General Pervez Musharraf (P L D 2-002 SC 853), Shah Foods (Pvt.) Limited V. Pakistan & others (2005 SC M R 1166), Aftab Shahban Mirani V. Muhammad Ibrahim (P L D 2008 SC 779), Shell (Pakistan) Ltd. V. Pakistan (2013 P T D 1012), Commissioner of Income Tax V. Abdul Mateen (2008 P T D 182), Al-Karam CNG V. Pakistan (2011 P T D 1), C.W.S. India Ltd. V. Commissioner of Income Tax (1995 P T D 741), Mumtaz Ali Khan Rajban V. Pakistan (P L D 2001 SC 169), Tanveer Hussain v. Divisional Superintendent, Pakistan Railways (P L D 2006 SC 249), Commissioner Inland Revenue V. Al-Mehdi International (2013 P T D 2125), Muhammad Sheraz V. Chief Secretary (PLD 2014 Pesh. 170), Shaw Wallace & Co. Ltd. V. State of Karnataka (1993 91 STC 37), Kirloskar Electric Co. Ltd. V. Karnataka (AIR 1999 Karnataka 60), Pradip Kumar Maity V. Chinmoy Kumar Bhunia (2013) 11 SCC 122), American International School System V. Muhammad Ramzan (2015 S C M R 1449), Pakistan Tobacco Co. Ltd. V. Karachi Municipal Corporation (P L D 1967 SC 241), State Life Insurance Corporation of Pakistan V. Mercantile Mutual Insurance Company Limited (1993 S C M R 1394), S. Zafar Ejaz V. chairman, Steel Mills Corporation (1998 C L C (C.S) 777) and Gul cooking Oil and Vegetable Ghee (Pvt.) Ltd. (2007 P T D 526).

3. On the other hand, learned Counsel for Defendants No.2 & 3 has contended that the contention of Plaintiff is misconceived as they are

selling iodized salt with their brand and they fall appropriately in Entry No.29, whereas, Entry No.107 is only applicable in case of import and supply together; that if the contention of the Plaintiff is accepted then there is no purpose of retaining Entry No.29 in the same Schedule, which does not grant such exemption as claimed; that Entry No.107 is exclusively for import specific transaction; that entry 107 only applies to an importer as well as supplier of iodized salt in retail packing and not otherwise; that according to the Department the exemption is not available under entry 29, whereas, it is not the case of the Department nor it has been alleged in the Show Cause Notice that entry 107 is relevant or not; that exemption provision are to be strictly construed, whereas, here in this matter the word ***"and"*** cannot be read as disjunctively; that entry 29 and entry 107 are not overlapping but serve different purposes; that if two views are possible while interpreting a statute or a notification the one in favour of the Revenue has to be adopted and therefore, the Suit is liable to be dismissed. In support he has relied upon ***Oxford University Press V. Commissioner of Income Tax, Companies Zone-I, Karachi and others (2019 S C M R 235), Central Board of Revenue and another V. WAPDA and another (2014 P T D 1861), Liaquat National Hospital V. Province of Sindh and 2 others (P L D 2015 Sindh 123), Varan Tours Rawalpindi V. The Federation of Pakistan and others (P T D 2004 CL 27), Federation of Pakistan V. Durrani Ceramics and others (P L D 2015 SC 354) and Commissioner IR V. M/s IGI Insurance Company Limited (2018 P T D 114).***

4. I have heard both the learned Counsel and perused the record. The Plaintiff claims to be engaged in the principal business of manufacture and sale of spices and other food items, and it supplies salt under the

brand names of *Neutra Salt Plus* and *Maa Lahori Namak* in retail packing bearing its brand name and trademark. For making such supplies, the Plaintiff claims exemption (presently in consideration) under entry 107 of the 6th Schedule to the Sales Tax Act, 1990, whereas, the case of the department is that this Entry does not apply to facts of the case of the Plaintiff as it is only applicable when a taxpayer imports the iodized salt under its brand name and then supplies the same. On 26.09.2018 for the reason that only a legal controversy is involved the following issues were settled:-

"1. Whether the Plaintiff is entitled for exemption of Sales Tax under S.R.O. No.551(I)/2008 dated 11.06.2008 and Serial No.107 of the Sixth Schedule to the Sales Tax Act, 1990 for the tax periods July 2013 to June 2017 or the goods in question are more appropriately covered under Entry 29 of Table-I to the 6th Schedule of Sales Tax Act, 1990?

2. Whether the terms **'import and supply'** as used in Serial No.107 of the Sixth Schedule to the Sales Tax Act, 1990 have to be read disjunctively?

3. What should the decree be?"

5. To have a better understanding and for ease of reference, it would be appropriate to refer to Entry Nos.29 and 107 of the 6th Schedule and so also Serial No.14 of erstwhile SRO 551(I)/2008 dated 11.06.2008, which reads as under:-

"29.	Table salt including iodized Salt excluding salt sold in retail packing bearing brand names and trademarks."	2501.0010
	Inserted w.e.f. 2014	
"107	Import and supply of iodized Salt bearing brand names and Trademarks whether or not sold in retail packing."	2501.0010

SRO 551(I)/2008 dated 11.6.2018 upto 26.6.2014

"14.	Iodized salt bearing brand Names and trademarks Whether or not sold in retail packing."	Import and supplies thereof.

6. Perusal of the aforesaid SRO as well as relevant exemption under the 6th Schedule reflects that prior to 2014 there were two exemptions in field. The one was contained against Serial No.29 in the 6th Schedule, which still continues and i.e. for *table salt including iodized salt excluding salt sold in retail packing bearing brand names and trademarks*. Thereafter notwithstanding this entry, on 11.06.2008, SRO was issued under Section 13 of the Sale Tax Act, 1990, whereby, in addition to Entry No.29, a further exemption from Sales Tax was granted to *iodized salt bearing brand names and trademarks whether or not sold in retail packing*; however, in that, a rider was that it only applied to "*import and supplies thereof*". It further appears that this Notification remained in field till 26.6.2014 when it was rescinded through SRO 533(I)/2014 and simultaneously Entry No.107 was incorporated in the 6th Schedule of the Sale Tax Act 1990. However, at the time of transposition of this clause 14 of SRO 555 into Entry 107 in the Schedule, the wording so incorporated was somewhat different than the Notification of 2008 inasmuch as the word "*thereof*" was dispensed with. Now the exemption applies to *import and supply of iodized salt bearing brand names and trademarks whether or not sold in retail packing*. Therefore, it appears that after 2014 there is a conscious omission of words "*thereof*" from the exemption on iodized salt being sold with brand names vis-a-vis the earlier condition given in the SRO. The arguments of the learned Counsel for the Defendants No.2 & 3 that Entry 107 ibid still applies in the same manner as in the Notification, does not appear to be very convincing because of specific change in the words

used while insertion of Entry No.107 in the 6th Schedule. If that had been the intention, then perhaps there was no need to change the language as apparently similar wording as used in the Notification ought to have been inserted verbatim, which otherwise still exists in the 6th Schedule in respect of other goods, including goods mentioned against Serial No.103 of the same Schedule where the word "*import and supply thereof*" has still been used. Therefore, I am of the view that this argument of the Defendant's Counsel is not tenable and must be repelled. Even otherwise and as rightly contended by the learned for the Plaintiff that while interpreting a statute the words "and", can always be read as "or" as per the dicta laid down in the cited cases.

7. There appears to be a conscious change in incorporating entry No.107 in the Sixth Schedule after rescinding Notification on 26.06.2014 as already highlighted hereinabove. If the contention of the Department is accepted to be correct then the transposition of the notification into entry 107 of the Sixth Schedule ought to have ben identically worded but it is not so. Therefore, it is a case wherein, the word ***"and"*** has to be read disjunctively by holding that the iodized salt bearing brand names and trademarks, whether or not sold in retail packing is exempted from the levy of Sales Tax on ***imports*** and ***supply*** independently and it is not necessary that the transaction of import and supply must occur together. It is also very clear under Sales Tax Act under Section 3 that *import* and *supply* are two distinct and separate transactions on which Sales Tax is leviable. It would be advantageous to refer to relevant portion of Section 3 of the Sales Tax Act which reads as under:-

> **"3. Scope of tax.**– (1) Subject to the provisions of this Act, there shall be charged, levied and paid a tax known as sales tax at the rate of 1 [seventeen] per cent of the value of–

> (a) ***taxable supplies*** made by a registered person in the course or furtherance of any [taxable activity] carried on by him; and
> (b) ***goods imported*** into Pakistan, [irrespective of their final destination in territories of Pakistan].

8. Perusal of the aforesaid Section which is the charging Section as well, reflects that subject to the provisions of this Act, there shall be charged, levied and paid a tax known as sales tax at the rate of seventeen per cent of the value of *(a)* ***taxable supplies*** *made by a registered person in the course or furtherance of any taxable activity carried on by him; and (b)* ***goods imported into*** *Pakistan, irrespective of their final destination in territories of Pakistan.* From perusal of the above it appears to be very clearly legislated that import and supply are two distinct transactions under the Sales Tax Act, 1990. The Sales Tax would be payable when either there is a taxable supply; or, an import. These two transactions have been distinctly mentioned in the charging section, drawing an inference that these are not similar or identical transactions. Therefore, on a plain reading of the same, it appears that the contention of the department is not correct.

9. Similarly when Section 13 of the Act is examined which deals with exemption from levy of Sales Tax, a somewhat similar treatment is noted. For convenience relevant part of Section 13(1) is reproduced as under:-

> **"[13. Exemption**.– (1) Notwithstanding the provisions of section 3, supply of goods or import of goods specified in the Sixth Schedule shall, subject to such conditions as may be specified by the 4 [Federal Government], be exempt from tax under this Act [.]

10. Subsection (1) as above states, notwithstanding the provisions of section 3, <u>*supply of goods*</u> or <u>*import of goods*</u> specified in the Sixth Schedule shall, subject to such conditions as may be specified by the Federal Government, be exempt from tax under this Act. Now here again the

exemption which has been provided is distinctive as well as independent in respect of *supply of goods* or *import of goods*. Here again the legislative intent is that supply and import are distinct and separate transactions; therefore, the contention of the Department does not appear to be correct, that entry 107 can only be applied when iodized salt is first imported in retail packing, and then supplied by the same person being a single transaction. This even otherwise, legally as well as practically, not possible as there could be a case that goods are imported by one person and thereafter, they are supplied by another person; hence, the said transaction could not even otherwise be monitored so as to fulfill the condition against entry 107 as interpreted by the Department. The case of the department could only have had some merits, if the transposition from SRO 555 to Entry 107 of the 6th Schedule would have been similarly worded i.e. ***"import and supply thereof"***. The conscious omission of words "thereof" does not in any manner support their contention as presented. The Court is not supposed to add or insert any word which has not provided in the statue by the legislature. What the department wants is to read the words "thereof" in entry 107 ibid, which has been left out or is no more there. This can't be done by the Court.

11. Time and again the Courts have interpreted the word "***and***" as well as the issue that whether it has to be read as disjunctively or conjunctively. There is a series of judgment in this context; however, the most relevant insofar as the present facts are concerned is the case of ***Iqbal Hussain through Authorized Attorney Versus Federation of Pakistan through The Secretary, Revenue Division and 2 others*** **(2010 PTD 2338).** In this case the issue was regarding interpretation of a Customs Tariff heading i.e. 93.02 and the word "and" appearing therein. The department's case was that it has to be read

conjunctively, whereas, the petitioners case was that it has to be read disjunctively. The Court came to the conclusion that the contention of the Petitioner is correct. The relevant findings of the learned Division Bench of this Court are as under;

> It will be seen that the entire case turns on the proper meaning and interpretation of the words with such PCT 9302.0012 and the other subheadings are prefaced namely: "Of prohibited bores and of calibers higher than 0.32". The F.B.R. in terms of its ruling dated 22-6-2009 held that the word "and" as used in the heading meant that both the conditions had to be fulfilled, i.e., the imported arms had to be both of a prohibited bore and also of a caliber higher than 0.32. In other words, the F.B.R. read the word "and" conjunctively. Since admittedly the subject pistols are of a non-prohibited bore, one of the conditions was not fulfilled and hence, according to the F.B.R. and the concerned Collector, the pistols did not fall under PCT 9302.0012. On the other hand, learned counsel for the petitioner submitted that the two conditions spelled out in the heading had to be read disjunctively so that even if one of the conditions were fulfilled, the imported arms would fall under the heading. He submitted that 'since it was undisputed that the subject pistols were of a caliber higher than 0.32 (having a caliber of 0.3544) the subject pistols did come within the heading and were therefore to be classified under PCT 9302.0012. In other words, his case was that the word "and" as used in the heading should be read as "or", or as though there was a comma after the word "bores" as used in the heading. The question that falls for determination is which of the two interpretations gives the true meaning of the heading.
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> *It is of course, a well settled principle of statutory interpretation' that in appropriate circumstances, the word "and" can be read as "or" or vice versa. The learned counsel for the petitioner in this regard referred to a case reported as Khadim Hussain and others v. Additional District Judge Faisalabad and others PLD 1990 SC 632.* In our view, in order to determine whether the word "and" has to be read conjunctively or disjunctively, the proper meaning of the term "prohibited bores" will have to be ascertained. Now this term is defined neither in the Customs Act nor in the First Schedule, i.e. the Import Tariff. However, this is a term well understood in the context of the 1965 Ordinance under which, as noted above, the Federal Government has issued a notification in the exercise of its powers under section 11-A. Since the term "prohibited bores" does not have any ordinary grammatical meaning, in our view it should be given the same meaning which is assigned to it under and for the purposes of the 1965, Ordinance. That Ordinance also does not, as such, define "prohibited bores" but rather confers a statutory power on the Federal Government to specify the arms which are to be regarded as falling in this category. It follows that meaning assigned by the Federal Government to this term should be regarded as the applicable meaning for the purpose of interpreting and applying the heading in the Import Tariff which is under consideration. That meaning has been assigned by the Federal 'Government in terms of its notification dated 18-8-1991 reproduced above. The entry from this notification that is relevant for present purposes is entry (iv) of Paragraph 1 which is as follows:--
>
> "Revolvers or Pistols over 46 inches Bore"
>
> It will be seen at once that if, as we conclude, the term "prohibited bore" is to have the same meaning as assigned to it in the 1965 Ordinance, then on a conjunctive reading of the word "and", the second condition, namely that "of calibers higher

> than 0.32" would be rendered` redundant. The reason is that prohibited bore pistols have been defined as having a bore of over 46". Since all pistols falling within the term "prohibited bore" would, by definition, be of a bore in excess of 46", the additional condition that they have a caliber (or bore) in excess of 32" would obviously be redundant. *It is a well settled principle of statutory interpretation that if two reasonable interpretations are possible, but one leads to redundancy while the other avoids surplusage, it is the latter interpretation that has to be preferred. Therefore, in our view, the proper interpretation of the heading is that the word "and" as used therein should be read disjunctively and not conjunctively since that would avoid the latter part of the heading from becoming redundant.* It follows that in our opinion, the proper interpretation and application of the heading is that it applies either if the pistols being imported are of a prohibited bore or are of a bore greater than 32". In the present case therefore, the proper classification of the subject pistols was indeed PCT 9302.0012 as claimed by the petitioner and not PCT 9302.0092 as held by the F.B.R. and the respondent Department.

12. Insofar as the impugned Show Cause Notice is concerned, the same was issued for the period starting from 2013 to 2017 and also includes the recovery of Sales Tax when the exemption was available under SRO No. 555 dated 11.06.2008 for the year 2013-2014 and in view of the stance of the Plaintiff itself, for that period, the exemption could not have been claimed against entry No. 107 of the Sixth Schedule. For this reason while deciding the injunction application vide order dated 30.05.2018 to the extent of 2013-2014, Plaintiff was directed to respond to the Show Cause Notice, whereas, for the subsequent years the Defendants were restrained from proceeding further in respect of the impugned Show Cause Notice; however, it appears that issue No.1 also includes the validity of the exemption in respect of the Show Cause Notice issued for the year 2013-2014 which needs to be amended as well.

13. In view of hereinabove fact and circumstances of this case, I am of the view that the word "***and***" in Entry 107 is to be read disjunctively or as "OR" and therefore, Issue No.1 is reframed in the following manner, *"Whether Plaintiff is entitled for exemption of Sales Tax under serial No. 107 of the Sixth Schedule for the tax period 2014 onwards or the goods in question are more*

appropriately covered under entry 29 of the Sixth Schedule" and the issue is answered in favour of the Plaintiff by holding that the Plaintiff is exempted from payment of Sales Tax in respect of the goods in question under entry 107 of the Sixth Schedule of the Sales Tax Act for the tax period 2014 onwards and the goods in question do not fall under Entry 29 as claimed by the Department. Similarly, Issue No. 2 is answered in the affirmative.

14. Insofar as Issue No. 3 is concerned, the Suit of the Plaintiff is decreed by declaring that the Show Cause Notice dated 28.03.2018 for the tax period 2014 onwards is without lawful authority and is hereby set aside. However, in compliance of the directions of the Hon'ble Supreme Court vide judgment reported as ***Searle Solution (Pvt) Limited v Federation of Pakistan*** (**2018 SCMR 1444**) the Plaintiff had deposited an amount of Rs. 38,048,727.00 being 50% of the disputed amount as noted in orders dated 17.8.2018 and 7.9.2018. The Hon'ble Supreme Court while giving such directions in Para 17 had observed that "…. *that a minimum of 50% of the tax calculated by the tax authorities is deposited with the authorities as a goodwill gesture, so that on conclusion of the suit, according to the correct determination of the tax due or exempt (as the case may be),* ***the same may be refunded*** *or the remaining balance be paid*. In view of such position since the Suit stands decreed as above, the department is directed to refund the amount deposited pursuant to directions of this Court to the Plaintiff within 30 days from the date of this judgment. If this is not done, then the Plaintiff may claim the said amount as input tax adjustment against its Sales Tax liability, if any, in the next two tax returns (half in each return), or thereafter in the subsequent tax returns till it is finally adjusted, as the case may be.

15. Suit stands decreed in the above terms. Office is directed to prepare decree accordingly.

Dated: 31.05.2019

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