

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Muhammad Junaid Ghaffar, J.
Agha Faisal, J.

CP D 183 of 2019	:	Sindh Petroleum & CNG Dealers Association & Others vs. Federation of Pakistan & Others
CP D 236 of 2019	:	Star CNG (Pvt.) Ltd & Others vs. Federation of Pakistan & Others
CP D 257 of 2019	:	Al Mustafa CNG Station & Others vs. Federation of Pakistan & Others
CP D 262 of 2019	:	Excel Ener Gas (Private) Limited & Others vs. Federation of Pakistan & Others
CP D 270 of 2019	:	Globe Petroleum & Others vs. Federation of Pakistan & Others
CP D 291 of 2019	:	Bestway Service Station & Others vs. Federation of Pakistan & Others
CP D 311 of 2019	:	Al Makkah CNG Station & Others vs. Federation of Pakistan & Others
CP D 360 of 2019	:	Shahwani & Abbasi Enterprises & Another vs. Federation of Pakistan & Others
CP D 432 of 2019	:	Dadal Shah Filling CNG & Others vs. Federation of Pakistan & Others
CP D 447 of 2019	:	Al-Saud CNG & Others vs. Federation of Pakistan & Others
CP D 654 of 2019	:	Mohammadi Petroleum & CNG Station & Others vs. Federation of Pakistan & Others
CP D 949 of 2019	:	Ganatra CNG Station & Others vs. Federation of Pakistan & Others
CP D 1101 of 2019	:	Malik Enterprises (Pvt.) Ltd & Others vs. Federation of Pakistan & Others
CP D 1742 of 2019	:	Faizi CNG & Others vs. Federation of Pakistan & Others
For the Petitioners	:	Barrister Mohsin Kadir Shahwani Mr. Karim Abbasi, Advocate Mr. Abdur Rahman, Advocate
For the Respondents :	:	Mr. Kafeel Ahmed Abbasi <i>Deputy Attorney General</i> Mr. Asim Iqbal, Advocate Mr. Akbar Sohail, Advocate Mr. Muhammad Aqeel Qureshi, Advocate Mr. Muhammad Bilal Bhatti, Advocate
Date of hearing	:	11.02.2021
Date of announcement	:	11.02.2021

JUDGMENT

Agha Faisal, J. The crux of this determination is whether a company can be delegated the right and responsibility to adjudicate, impose and recover default surcharge, per section 34 of the Sales Tax Act, 1990 ('Act'), from its subscribers. The present petitions were argued on this solitary issue and shall be determined conjunctively vide this common judgment.

Factual background

2. Briefly stated, the Sui Southern Gas Company Limited ("SSGC") issued notices ("Impugned Notice/s") to the petitioners requiring them to pay un-adjudicated default surcharge, per the Act, within seven days, failing which their gas supply was liable to be disconnected. Subsequent thereto special bills were also sent to the petitioners seeking recovery of the aforementioned amounts ("Impugned Bills"). The Impugned Notices sent to the petitioners were almost identical, the difference being the amounts sought to be recovered respectively, hence, it is considered illustrative to reproduce the contents of one such representative notice herein below:

"SUB: LTU ORDER TO RECOVER DEFAULT SURCHARGE

Dear Sir,

Please find enclosed Deputy Commissioner Inland Revenue (DCIR), Large Taxpayer Unit (LTU) Notice Number DCIR/E&C-03/Zone-III/LTU/2018-19/ dated 26 December 2018 which directs that since CNG Stations failed to pay Sales Tax 'on timely basis' under Section 3 (8) of Sales Tax Act 1990 to Sui Southern Gas Company Limited (SSGC) for on wards deposit in Government treasury therefore payments subsequently received are liable to imposition of default surcharge in terms of Section 34 of Sales Tax Act 1990. Accordingly, SSGC has been directed to recover Default Surcharge from your CNG Station, for on wards deposition in Government treasury.

In this connection, it would be recalled that Section 3 (8) of Sales Tax Act 1990 (read with SRO 236 (I)/2014 dated 31 March 2014) required that SSGC charge Sales Tax @ 17%% of Total Value Added Cost of CNG as notified by OGRA against which the CNG Stations obtained Stay Order from Sindh High Court. However the Sindh High Court ultimately decided the matter in favour of FBR vide Judgment in Case CP No. D-3266 & others and the Balochistan High Court also decided the case in favour of FBR in Judgment in Case CP Nos. 109 & others dated 24 October 2017. This principle has also been upheld by Supreme Court in Judgment titled "Shabbir Husseini M/s Highway Gasoline & Others".

In order to comply LTU Notice, you are therefore required to pay Rs. 717,867/- within seven days of receipt of this Letter. In case of non-payment as mentioned above, gas supply would be liable for disconnection without any further notice in accordance with Contract for the Supply of Gas."

3. The historical perspective in such regard is that the petitioners (and others) had assailed¹ the levy of sales tax charged on the value of compressed natural gas (“CNG”), at the stage when the same is purchased by the CNG stations. *Ad Interim* orders were rendered in favour of the petitioners, subject to deposit of the impugned tax before the Nazir of this court. The Earlier Petitions were dismissed, vide judgment dated 06.10.2015, and the Nazir was directed to remit the amount secured to the concerned department.

4. The office of Inland Revenue (“Department”) issued a letter, dated 29.10.2015, to SSGC stipulating that the collection of payment and sales tax of sales made to CNG stations is solely SSGC’s responsibility under the Act and since the Earlier Petitions had been dismissed, the stipulated amount of tax payable may immediately be deposited therewith. Pursuant thereto notice/s under section 48 of the Act were issued, *inter alia*, to banks, in an effort to secure / recover the demand made by the Department upon SSGC.

5. The SSGC challenged the departmental action before this court²; however, the said petition was withdrawn³ by the SSGC in view of some private settlement between the parties⁴. It is considered pertinent to reproduce the contents of the statement dated 01.12.2015, placed on record by SSGC in the SSGC Petition, subsequent whereof the aforementioned petition was withdrawn:

“It is most respectfully submitted that this Honourable Court may be pleased to dispose of the instant petition in view/terms of the Respondent letter dated 18-11-2015, addressed to the petitioner company wherein the respondent requested the petitioner Company to issue recovery notices to the CNG consumers and if they do not pay the amount of sales tax to SSGC within ten days of issuance of the said notice, their gas supply shall be disconnected, and shall not be restored until the outstanding/arrears of sales tax is paid by them. It was further stated in the said letter that sales tax once paid by CNG stations to SSGC shall be required to be deposited in Government treasury by SSGC within one week of receipt under the head sales tax. It was further mentioned that his payment of above arrears of sales tax recovered from CNG stations shall not become part of monthly sales tax returns filed by SSGC and therefore, no liability of non-recovery of subject sales tax can be imposed on SSGC in any way and no coercive action for the recovery of the disputed amount shall be taken against SSGC. In response to the respondent letter dated 18-11-2018, the petitioner company issued notices to the CNG stations/consumers. If the CNG consumers failed to pay the outstanding dues within the prescribed period as mentioned in the recovery notices, the petitioner company will take action in accordance with law against them and will disconnect their gas connections. (Photocopy of letter dated 18-11-2015 and specimen of letter issued by the petitioner company to CNG consumers are attached and marked A/1 & A/2 respectively).”

(Underline added for emphasis)

¹ CP D 3266 of 2014 and connected petitions (“Earlier Petitions”).

² In CP D 6808 of 2015 (“SSGC Petition”).

³ Vide order dated 03.12.2015.

⁴ I.e. SSGC and the Department.

Subsequent to the withdrawal of the SSGC Petition and pursuant to the private agreement *inter se*, the Impugned Notices and the Impugned Bills were issued to the petitioners, hence, the present petitions.

Arguments of the respective learned counsel

6. It was articulated on behalf of the petitioners that there was no question of levy of default surcharge being apportioned pertaining to a period when the stay orders were in force in the Earlier Petitions. It was further demonstrated from the record that certain petitioners had deposited the relevant amounts with the Nazir of this Court, as mandated in the *ad-interim* orders obtained. It was stated that in the event the requisite deposit was not made by the certain persons, the *ad-interim* orders would not have been operative, however, no notices in respect of such alleged non-compliance were ever received from the SSGC. It was stressed that the adjudication and levy of default surcharge was the sole prerogative of the Department and prior to such an exercise having been conducted the demand, threatening coercive action, from the SSGC cannot be sustained. It was thus concluded that the Impugned Notices and the Impugned Bills ought to be set aside.

7. Per learned Deputy Attorney General, it was incumbent upon the Department to adjudicate the issue of default surcharge and pass orders thereupon independently; and further that there was no cavil to the impugned demand, coupled with the threat of coercive action, by the SSGC being otherwise than in conformity with the law.

Mr. Asim Iqbal Advocate and Mr. Muhammad Aqeel Qureshi, Advocate, representing SSGC and Department respectively, simply argued that since public revenues were involved, therefore, the action taken was to expedite the recovery process. However, they admitted that no independent adjudication had been initiated by the Department, either against SSGC and / or the petitioners, with respect to the default surcharge being demanded from the petitioners.

8. We have heard the respective learned counsel and have also considered the law, documentation and record to which our surveillance was solicited. In view of the admitted fact that no proceedings were ever initiated by the Department to adjudicate the imposition of default surcharge, it is considered appropriate to circumscribe to ambit hereof to consider whether issuance of the Impugned Notices and Impugned Bills by SSGC were permissible within the law.

Ambit of the statutory provisions

9. It is considered illustrative to initiate this deliberation by reproducing section 34 of the Act herein below:

“34. Default Surcharge.– (1) Notwithstanding the provisions of section 11, if a registered person does not pay the tax due or any part thereof, whether wilfully or otherwise, in time or in the manner specified under this Act, rules or notifications issued thereunder or claims a tax credit, refund or makes an adjustment which is not admissible to him, or incorrectly applies the rate of zero per cent to supplies made by him, he shall, in addition to the tax due, pay default surcharge at the rate mentioned below:

(a) the person liable to pay any amount of tax or charge or the amount of refund erroneously made, shall pay default surcharge at the rate of 3 [KIBOR plus three per cent per annum], of the amount of tax due or the amount of refund erroneously made; and...

(c) in case, the default is on account of tax fraud, the person who has committed tax fraud shall pay default surcharge at the rate of two per cent per month, of the amount of tax evaded or the amount of refund fraudulently claimed, till such time the entire liability including the amount of default surcharge is paid.

(2) For the purpose of calculation of default surcharge,

(a) in the case of inadmissible input tax credit or refund, the period of default shall be reckoned from the date of adjustment of such credit or, as the case may be, refund is received; and

(b) in the case of non-payment of tax or part thereof, the period of default shall be reckoned from the 16th day of a month (following the due date of the tax period to which the default relates) to the day preceding the date on which the tax due is actually paid.

Explanation. For the purpose of this section tax due does not include the amount of penalty.”

10. It is imperative to advert to the Sales Tax Special Procedures Rules 2007 (“Rules”), in force with respect to the period under scrutiny; however, since rescinded⁵. Rule 19⁶ demarcates the application of the Rules with respect to collection and payment of sales tax on CNG and Rule 20⁷ determines the person where upon the responsibility / liability to collect / deposit sales tax rests. In the event that the relevant tax was not collected /

⁵ Vide Finance Act 2019.

⁶ 19. Application.-- The provisions of this Chapter shall apply for collection and payment of Sales Tax on Natural Gas including Compressed Natural Gas (CNG) and Liquefied Petroleum Gas (LPG) imported, produced, transmitted and supplied by gas well-head companies and gas transmission and distribution companies licensed under the Natural Gas Rules, 1960, including their distributors, dealers, sales agents, retailers or by any other person hereinafter called the "person" for the purposes of this Chapter and dealing in importation, production or distribution and supply of Natural Gas including Compressed Natural Gas and Liquefied Petroleum Gas.

⁷ 20. Levy and collection of sales tax.-- (1) Every person who supplies natural gas shall be liable to registration and shall charge and pay sales tax at the rate specified in sub-section (1) of section 3 of the Act.

(2) Sales tax on natural gas shall be levied and collected at the following stages and in the following manners, namely:...

(c) in case of supply of natural gas by a gas transmission and distribution company, the person responsible to charge, collect and deposit sales tax shall be the gas transmission and distribution company and the value for the purpose of tax shall be the total amount billed including price of natural gas, charges excluding the amount of late payment surcharge, rents, commissions and all duties and taxes, local, Provincial and Federal, but excluding the amount of sales tax as provided in clause (46) of section 2 of the Act:

Provided that CNG stations, if not already registered, shall obtain registration under Chapter I of the Sales Tax Rules, 2006, and shall also file quarterly sales tax return in the manner given in rule 7;....

deposited by the person encumbered in such regard, the department remained well within its rights to initiate the appropriate proceedings for recovery of the same.

11. In the present facts and circumstances, it is apparent that the Department did initiate some proceedings⁸ against SSGC, however, no proceedings were admittedly initiated with respect to the petitioners. Even the proceedings against SSGC were subsequently withdrawn by the Department vide its letter dated 18.11.2015 ("Withdrawal Letter"), contents whereof are reproduced herein below:

"Sub: RECOVERY OF SALES TAX FROM CNG STATIONS
CP No. D-6808/2015 re. SSGC v FBR & others

Kindly refer to captioned petition and observations of the Hon'ble Court made during the hearing on November 17, 2015 in the Chamber of Chief Justice.

2. In terms of arrangements agreed before the honourable Chief Justice, you are, hereby, requested to issue a Recovery/Disconnection Notice to the CNG stations, that as they have defaulted in depositing the differential amount of sales tax with the Nazir of the Hon'ble High Court of Sindh, Karachi (for the period during which the interim Stay granted by the High Court was operating during petition), the whole amount of arrear up to the month of September, 2015, is now payable by them in lump sum, appraising them that if they do not pay the amount of Sales tax to SSGC within ten days of issuance of the said notice, their gas supply shall be disconnected, and shall not be restored until the outstanding / arrears of Sales Tax is paid by them. The Sales Tax once paid by CNG stations to SSGC shall be required to be deposited in Government treasury by SSGC within one week of receipt under the head Sales Tax. Please note that this payment of above arrears of Sales Tax recovered from CNG stations shall not become part of monthly Sales Tax returns filed by SSGC and therefore, no liability of non-recovery of subject Sales tax can be imposed on SSGC in any way.

3. For those CNG stations who have partially / completely complied with interim Court Orders and deposited the amount with Nazir, the evidence would be obtained from CNG stations by SSGC and will be provided to LTU.

4. In the meanwhile, no coercive action for the recovery of the disputed amount shall be taken against you. In the meantime, Recovery Notices dated 29 October 2015 u/s 48 of Sales Tax Act by FBR / LTU issued to SSGC banks as well as customers stand withdrawn.

5. The copy of this notice will be filed in the CP 6808/2015 for the consideration of the Hon'ble Court and appropriate orders in view of the progress of recovery till the next date of hearing i.e. 01-12-2015.

6. Kindly acknowledge receipt of this letter and update the position of issuance of notices/recovery latest by 20-11-2015.

7. Your co-operation in this regard shall be appreciated and appropriately highlighted before the Hon'ble Court."

(Underline added for emphasis)

12. Learned counsel for the petitioners drew our attention to documentation, available on file, demonstrating that certain petitioners had duly deposited the security, to avail the interim relief in the Earlier Petitions

⁸ As illustrated by the letter dated 29.10.2015, followed by the notice/s under section 48 of the Act.

and that said amount amounts were remitted to the concerned department post dismissal of the Earlier Petitions. However, the Impugned Notices and Impugned Bills were served upon such petitioners as well. It is considered appropriate to eschew any deliberation herein in such regard, in order to avoid delving into the realm of factual controversies; however, it is *prima facie* apparent that the issuance of the Impugned Notices / Bills has not been preceded by the requisite adjudication process by the relevant authority.

13. It is trite law that before initiating any recovery proceedings adjudication by the department is necessary⁹; a recovery notice without issuing a show cause and adjudication is illegal¹⁰; and in the absence of an adjudicated *mens rea* no surcharge may be imposed¹¹. In the present facts and circumstances, the Impugned Notices / Bills were admittedly issued devoid of any show cause notice, adjudication process and finding of culpable *mens rea*; hence, the Impugned Notices and the Impugned Bills, issued by SSGC, are determined to be illegal and consequently *void ab initio*.

Abdication of statutory duty

14. However, the matter cannot rest here as the conduct of the Department and SSGC, *prima facie* disregarding the letter of the law to the manifest detriment of the exchequer and the petitioners, merits consideration of this Court. The Department appears to have neglected its statutory duty, for the recovery of public revenues, and even withdrew its proceedings against SSGC in such regard. We have not been assisted with any law that sanctions such a private treaty¹², whereby the Department absolved SSGC of any culpability, despite maintaining initially that the collection of payment and sales tax of sales made to CNG stations is solely SSGC's responsibility, and directed that an un-adjudicated coercive recovery drive be unleashed against the petitioners.

15. The process of adjudication at the departmental level is quasi-judicial in nature and the honorable Supreme Court has held in the *Hamza Nasir case*¹³ that there could be no delegation of powers in such regard. The august Court

⁹ *Sohail Jute Mills Limited vs. Federation of Pakistan* reported as PLD 1991 SC 329.

¹⁰ *S. Sana Enterprises vs. Federation of Pakistan* reported as 2013 PTD 438; *GMH Traders & Manufacturers vs. Deputy Director Investigation Officers* reported as 2009 PTD 1894; *Exide Pakistan Limited vs. Deputy Collector* reported as 2004 PTD 1449; *Assistant Collector Customs vs. Khyber Electric Lamps* reported as 2001 SCMR 838; *Moon Elite Enterprises vs. M C Lyallpur* reported as 1991 CLC 796.

¹¹ *Muhammad Waheed vs. Customs Appellate Tribunal* reported as 2016 PTD 35; *NICON (Private) Limited vs CIR RTO* reported as 2016 PTD 2748; *Commissioner of Income Tax vs. Habib Bank Limited* reported as 2007 PTD 901; *DG Khan Cement Company Limited vs. Federation of Pakistan* reported as 2004 PTD 1179.

¹² As demonstrated vide the Withdrawal Letter, reproduced supra.

¹³ Per Umar Atta Bandial J in *Commissioner Inland Revenue Zone III RTO II Lahore vs. Hamza Nasir Wire & Others* reported as 2020 SCMR 1822.

maintained further that the exercise of quasi-judicial power could neither be delegated nor exercised on the instructions of a third party; in reliance upon the *Zahid Javed case*¹⁴, illuminating observations wherefrom are reproduced herein below below:

“37. ... In the foregoing paras, we have discussed that the term “Quasi Judicial Power” refers to powers which cannot be delegated and are to be exercised by the Persona Designata mentioned in the statute. Such powers, functions or duties can neither be delegated to any other person or authority nor can be exercised on the recommendation of any other authority or person. The powers, functions and duties provided under the scheme of the Act are to be performed or discharged by the person or authority designated by the statute and none other. ...”

16. In the present scenario, no adjudication process was even initiated, against any person whatsoever, and notwithstanding the same a coercive recovery drive was delegated to a third party, itself *prima facie* within the ambit of the default alleged. In addition hereto, the uncontroverted documentation suggests that an agreement was reached between the Department / FBR and the CNG Dealers' Association for payment of the amount in question in installments. If that be so, then initiation of proceedings, for recovery of default surcharge, via a third party, is all the more unjustifiable. And lastly, no exercise was ever carried out to determine the actual persons / defaulters who had failed to deposit the principal amount of sales tax in court and were still, unexplainably, given benefit of the interim orders.

17. During the course of the hearing the existence of the SSGC Petition came to light. Despite repeated queries, the learned counsel was unable to assist us with regard to the status thereof¹⁵. In such regard we were constrained to call for the case file of the relevant petition from the record room and a careful perusal thereof raised the following facts to the surface:

a. Recovery proceedings¹⁶ for the aggregated quantum of the alleged default surcharge had been initiated by the Department, against SSGC, post dismissal of the Earlier Petitions, holding SSGC entirely liable in such regard.

b. A private agreement was entered into between the Department and SSGC, as exemplified by the Withdrawal Letter reproduced supra, whereby the Department absolved SSGC of any liability, provided that SSGC directed an un-adjudicated coercive recovery drive against its subscribers.

¹⁴ *Zahid Javed Vs. Tahir Riaz* reported as *PLD 2016 Supreme Court 637*.

¹⁵ Notwithstanding the fact that SSGC's legal representation before us was the same that had filed, proceeded with and withdrawn the SSGC Petition on behalf of SSGC.

¹⁶ As illustrated by the letter dated 29.10.2015, followed by the notice/s under section 48 of the Act.

c. Even the draft of the Impugned Notice appears to have been agreed *inter se*, and the *pro forma* was attached to the Statement filed by SSGC in the SSGC Petition.

d. No authorization was manifest to empower the Department to enter into a private treaty vitiating the entire statutory mechanism, culminating in an ostensible adverse effect upon public revenues.

e. Subsequent to the private treaty, mentioned *supra*, the Department's letter to SSGC dated 29.10.2015, wherein it was stated that the collection and payment of sales tax, in respect of sales made to CNG stations, was solely SSGC's responsibility under the Act, and the notice/s under section 48 of the Act were said to stand withdrawn.

18. In view hereof we are constrained to require the Secretary Revenue Division / Chairman FBR (respondent no. 2 herein), Member Inland Revenue (Operations) and Member Legal - FBR to conduct an inquiry into this *prima facie* abdication / dereliction of duty, having a direct impact upon public revenues; and initiate appropriate proceedings against those considered to be liable. The report regarding the above be submitted, through the office of the learned Attorney General, before this Court within four (04) weeks from today.

19. In view hereof, these petitions are disposed of in terms delineated herein below:

i. The Impugned Notices and the Impugned Bills, issued by SSGC to the petitioners, are determined to be *void ab initio*; hence, set aside.

The Department shall remain at liberty to initiate appropriate proceedings, if it is in possession of cogent material, against person/s responsible, under the law in force at the relevant time, for collection / payment of the relevant public revenues, subject to the law.

ii. The Secretary Revenue Division / Chairman FBR (respondent no. 2 herein), Member Inland Revenue (Operations) and Member Legal - FBR are directed to conduct an inquiry, as observed *supra*, and the report in such regard be submitted, through the office of the learned Attorney General, before the learned Registrar of this Court within four (4) weeks from today.

20. The office is instructed to communicate copies hereof forthwith to the respondents, Secretary Revenue Division, Chairman FBR, Member Inland Revenue (Operations), Member Legal - FBR and the learned Attorney General for Pakistan for compliance.

JUDGE

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