

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Iqbal Kalhoro, J.
Agha Faisal, J.

SSTRA 59 of 2007 : Digri Sugar Mills Ltd. vs. The Additional
Collector of Customs & Another

For the Applicant : Mr. Ahmed Hussain, Advocate

For the Respondents : Mr. Irfan Ahmed Memon
Deputy Attorney General

Mr. Ameer Bux Metlo, Advocate
Mr. Imran Ahmed Metlo, Advocate
Mr. Imran Ali Mithani, Advocate

Date/s of hearing : 12.04.2022

Date of announcement : 22.04.2022

JUDGMENT

Agha Faisal, J. Briefly stated, a show cause notice dated 21.07.2004 was issued to the respondent alleging supplies to unregistered persons and consequent thereto seeking recovery of further tax. The defense was rested on the argument that since the *admittedly* unregistered persons were persons liable to be registered per the Sales Tax Act 1990 (“Act”), therefore, no further tax could be levied. The department did not agree with the defense and an order in original dated 30.07.2004 was passed, adjudicating the recovery of the pertinent further tax, along with additional sales tax and penalty. In appeal, the learned Customs, Excise & Sales Tax Appellate Bench maintained the earlier findings vide the impugned order dated 30.11.2007 (“Impugned Order”). This reference assails the Impugned Order, the operation whereof remains suspended since the date when notice was issued herein.

It is imperative to mention that this reference was earlier *allowed*¹, vide judgment dated 08.05.2008, however, the honorable Supreme Court had set aside the judgment² and remanded the matter for *de novo* determination.

¹ Per the verbiage employed in the Judgment dated 08.05.2008.

² Civil Appeal 1265 of 2008; Order dated 06.02.2012.

2. In order to illustrate the *lis* before us, it is considered expedient to reproduce the show cause notice and the relevant findings of the order in original and the Impugned Order herein below:

Show cause notice

“Whereas it has been reported to the under signed by the Assistant Collector C&E-II, Sales Tax, Hyderabad, that while conducting scrutiny of sales tax record for the period from April 2004, in respect of M/s. Digri Sugar Mills Ltd. Digri, it has been observed that the said registered person has short paid the amount of further tax Rs.3.549 million on their taxable supplies to un-registered person. The non payment of further tax is violation of the provision of section 3(1A) and 6 of the Sales Tax Act, 1990. Thus the said short paid amount of further tax is recoverable under section 36(2) of the Sales Tax Act, 1990.

M/s. Digri Sugar Mills Ltd., Digri are hereby called upon to show cause within Ten (10) days of receipt of this notice as to why principal amount of Rs.3.549 million should not be recoverable from you under section 36(2) of the Sales Tax Act, 1990 along with additional tax under section 34 *ibid* and as to why penal action should not be taken against you under section 33(2)(cc) *ibid* for violation of above provision of the Sales Tax Act, 1990.

Hearing in this case is fixed for 29.07.2004 at 11:00 Hours in the office of the undersigned situated in Custom House, Site Area, Hyderabad, when the respondents should represent their case, either through duly briefed lawyer or an authorized representative.

In case, no written reply of show cause notice is received within stipulated time or no one appears for hearing on given date and time, it will be presumed that the above named defendants have nothing to offer in define and the case will be decided *ex parte* on merits and on the basis of facts available on record.”

Order in original

“I have examined the record of case and considered the written arguments put-forth by the department as well as the respondent, applied independent mind judiciously and come to the following conclusion:

Regarding the charges mention in the instant show cause notice, the claim of respondent that the case has already been decided by High Court of Sindh in favour of Sugar Mills in not maintainable as the case of the respondent was not relevant to the cases decided by Honorable High Court vide judgment dated 14.12.2000 in C.P. No.1457 of 1999, as the period of further tax in the instant show cause notice is after the aforesaid judgment. Similarly section 2 (25) of the Sales Tax Act, 1990 was amended in the light of the judgment referred to above, to stop the circumvention of law by certain tax payer who though liable to be registered failed to get themselves registered and get claimed immunity from further tax by virtue of earlier definition of registered person in section 2 (25) of the Sales Tax Act, 1990. In view of the above and clarification of C.B.R. vide No.173-STT/96 dated 16.11.2001, further tax is chargeable from un-registered buyer and the liability to deposit, the tax in treasury alone with the monthly Sales Tax return remains that of the registered supplier in terms of section 6 of the Act. The plea of the respondent that the issue of further tax is currently in the honourable Supreme Court of Pakistan, hence the proceeding to the instant case may be suspended till authoritative judgment is pronounced by the Apex Court, is not tenable, as the issue of further tax prior to amendment in Section 2(25) of the Sales Tax Act, 1990 vide Finance Act, 2001 is in the honourable court. The issue of further tax for the period after Section 2(25) was amended is already settled with the aforesaid amendment. Now there is no ambiguity as for the leviability of further tax under Section 3(1)(A) of the Act *ibid* is concerned. I am convinced that the further tax amounting to Rs.3.549 million along with additional sales tax computable under Section 34. at the time of payment under Section 36(2) of the Sales Tax Act, 1990. A penalty of Rs.5000/- or 3% of the tax involved whatever is higher is also imposed under Section 32(2)(cc) of the Act *ibid*.”

Impugned Judgment

“6. The case record and arguments by both the parties have been examined. It is an admitted fact that all the supplies had been made by the appellant after the amendments in Section 2(25) of the Sales Tax Act, 1990, which in the amended for reads as under:-

“‘registered person’ means a person who is registered or is liable to be registered under this Act.

Provided that a person liable to be registered but not registered under this Act shall not be entitled to any benefit available to a registered person under any of the provisions of this Act or the rules made thereunder:-”

The charging Sections for further tax are Sections 3(1A) and 3(3) of the Sales Tax Act, 1990, which are reproduced below:

Section 3(1A)

“Subject to the provision of sub-section (6) of section 8 or any notification issued thereunder where taxable supplies are made in Pakistan to a person other than a registered person there shall be charged, levied and paid a further tax at the rate of three percent of the value in addition to the rate specified in sub-section (1), sub-section (2) and sub-sections (4) and (5):

Provided that the aforesaid further tax shall not be charged, levied and paid if the said taxable supplies are made:

- (1) by a person registered as a retailer; or
- (2) by any registered person to a person whose income is not liable to tax under the Income Tax Ordinance, 1979 (XXXI of 1979) but has deduced income tax at source under sub-section (4) of section 50 of the said Ordinance; or
- (3) by a registered person on the supply of –
 - (i) electrical energy;
 - (ii) natural gas;
 - (iii) petroleum gas including liquefied petroleum gas;
 - (iv) petroleum products;
 - (v) substances registered a drugs under the Drugs Act, 1976 (XXXI of 1976) and medicaments as are classifiable under any heading of Chapter 30 of the First Schedule to the Customs Act, 1969 (IV of 1969);
 - (vi) vegetable ghee and cooking oil; and

(vii) fertilizers;"

Section 3(3). The liability to pay the tax shall be---

- (i) in the case of supply of goods of the person making the supply; and
- (ii) in the case of goods imported into Pakistan, of the person importing the goods."

It is therefore evident from the simple reading of above reproduced provisions of law that the non-registered buyers were liable to pay further tax as per provisions of Section 2(25) of the Sales Tax Act, 1990 and the appellant were bound to charge the further tax on supplies made to the non registered persons as per provisions of Section 3(1A) of the Sales Tax Act, 1990. The appellant were also provided opportunity to prove that they had complied with the provisions of Section 23 and Section 73 of the Sales Tax Act, 1990, whereunder a registered person supplying the goods to other registered person is required to issue sales tax invoice giving full information as prescribed and to receive the sales proceeds in excess of Rs.50,000/- through negotiable instrument respectively. The appellant have failed to prove that sales tax invoice as proscribed under Section 23 of the Sales Tax Act, 1990 had been issued and the amount of sale proceeds was received through a negotiable instrument as required under Section 73 of the Sales Tax Act, 1990. They have only submitted a statement showing the name of buyers and brokers without complete addresses and any evidence that these persons were the actual buyers and their turnover as manufacturers or retailers was higher than the minimum threshold prescribed for registration of these persons under the Sales Tax Act, 1990. It is therefore proved beyond any doubt that the appellant had not charged further tax deliberately despite knowing the legal position in this regard and had also not complied with the legal requirements in case of supplies made to registered persons. Thus, their contention that they had made supplies to registered persons as per definition given under Section 2(25) of the Sales Tax Act, 1990 is found incorrect and not legally tenable.

It is also imperative to mention that after the Judgment of Honourable Supreme Court in case of M/s. D.G. Khan Cement Company Limited Versus The Federation of Pakistan, PTCL-2004 CL-224 SC Pak the cases referred on behalf of appellant are of no help to their case.

In view of above findings, the appeal is found to be without merit and is therefore rejected."

3. The questions of law proposed for determination, whereupon notice was issued on 19.12.2007, were as follows:

1. *Whether further tax under sub-section (1A) of section 3 of the Sales Tax Act, 1990, is payable by the supplier on taxable supplies made to persons who were liable to be registered?*

2. *Whether additional tax under section 34 and penalty under section 33 of the Sales Tax Act, 1990, can be levied in the absence of willful default and deliberate and intentional evasion of sales tax?*

4. Applicant's counsel submitted that the definition of a registered person, per section 2(25)³ of the Act, included a person liable to be registered, hence, supplies to any person *liable to be registered* would not incur the application of further tax. The departmental counsel articulated that the verbiage of section 3(1A)⁴ of the Act, imposing the liability of further tax, is clear and any contrary interpretation would *prima facie* render the statutory provision otiose.

5. Heard and perused.

6. Section 3(1A) of the Act requires that further tax shall be charged, levied and paid where taxable supplies are made to an unregistered person. It is an admitted position that the supplies under scrutiny were in fact made to unregistered persons. Therefore, the only issue for this court to consider is whether the section 3(1A) of the Act could be rendered ineffective in view of the

³ The text of the said provision of law is reproduced in the reiteration of the Impugned Order supra.

⁴ The text of the said provision of law is reproduced in the reiteration of the Impugned Order supra.

applicant's overriding interpretation of a constituent of the definition section of the Act.

7. Mr. Ameer Bux Maitlo, Advocate had demonstrated from the honorable Supreme Court's pronouncement in *Zak Re Rolling Mills*⁵ that a challenge to section 3(1A) of the Act had not been sustained and the august court had held that further tax was payable in respect of supplies made to unregistered persons. It was, thus, advocated that the applicability of further tax had withstood the anvil of the august Court, hence, this matter ought to be clinched.

8. We have considered the verbiage of section 3(1A) of the Act and it unequivocally imposes the obligation of further tax upon supplies to unregistered persons. Even if the applicant's argument is taken at face value, being that section 3(1A) is countermanded by section 2(25) of the Act, it could not be sustained in view of settled law that a definition could not override the charging section of the law. It is our considered view that a definition given in a statute should be so construed as not to be repugnant to the context⁶ and a mere definition by itself could not create any charge, liability⁷ and / or exception. In any event the applicant's reading of the law would render section 3(1A) of the Act as redundant and the law requires that redundancy ought not to be attributed to legislation⁸.

9. The august Supreme Court has illumined that courts ought to abstain from deciding larger questions, if a case could be decided on narrower grounds and that it was preferred for the courts to confine determinations to questions pivotal for the determination of a case⁹. The verbiage of section 2(25) of the Act also contains a proviso precluding conferment of any benefit, in respect of supplies to registered persons, in respect of supplies to persons liable to be registered, however, since the question before us appears clinched in any event, therefore, we deem it prudent to eschew deliberation upon the

⁵ Per Umar Ata Bandial J in *Zak Re Rolling Mills (Pvt.) Limited vs. Appellate Tribunal Inland Revenue & Others* reported as 2020 SCMR 131. Reliance was also placed on *Tandlianwala Sugar Mills Limited & Others vs. Federation of Pakistan & Others* reported as 2001 SCMR 1398.

⁶ Per Mian Saqib Nisar J (as he then was) *Chairman Federal Board of Revenue vs. Al Technique Corporation of Pakistan Limited* reported as PLD 2017 Supreme Court 99 – "It is settled that a definition clause is foundational when construing provisions of law. The definition given in the Act should be so construed as not to be repugnant to the context and would not defeat or enable the defeating of the purpose of the Act. It must be read in its context and the background of the scheme of the statute and the remedy intended by it."

⁷ *Suresh Kumar v Fed of Pakistan* reported as PLD 2020 Sindh 62 – "It may be observed that the definition clause in any enactment or Ordinance by itself does not create any charge or liability nor does it provide for any exemption or concession against such charge or liability, whereas, it only defines or explains the various legal terms for the purposes of ease and reference to other provisions of such enactment."

⁸ *Collector of Sales Tax vs. Messrs Mega Tech Pvt Ltd* reported as 2005 SCMR 1166; *Iqbal Hussain vs. Pakistan* reported as 2010 PTD 2338.

⁹ Per Saqib Nisar J (as he then was) in *LDA & Others vs. Imrana Tiwana & Others* reported as 2015 SCMR 1739.

amplification in reading of the said provision and leave the matter for future consideration in an appropriate case¹⁰.

10. The fora below have unanimously considered this issue and rendered concurrent findings in favor of the exchequer and no exception in such regard could be identified by the applicant's counsel in the hearing before us. Therefore, in our view that the applicant's juxtaposition of the relevant definition vis a vis the charging section for further tax is unsustainable and nothing has been demonstrated before us to consider otherwise. This observation is also bolstered by the findings of the august Supreme Court in *Zak Re Rolling Mills*¹¹.

11. Adverting to the issue of penalties, it is trite law that a penalty may only be contemplated in the demonstrable presence of culpable *mens rea* attributed to the person¹². In the present case the Impugned Order clearly records a finding of actionable culpability with respect to the applicant¹³, hence, the apportionment of penalty appears rested thereupon. Since the learned Tribunal is the final arbiter of facts¹⁴ and its finding is manifest in the Impugned Order, to which no cavil was articulated by the applicant's counsel, hence, no interference is warranted in such regard. Therefore, the second question does not accrue any benefit to the applicant in the present case as the law does require a finding of culpability / *mens rea*, to justify a penalty, however, such a finding has in fact been rendered.

12. In view hereof it is considered appropriate, with respect, to abridge and reformulate¹⁵ the questions of law in order to efficaciously adjudicate the *lis* before us; therefore, we do hereby reformulate and frame the following question of law to be determined herein:

Whether, in the present facts and circumstances, further tax under sub-section (1A) of section 3 of the Sales Tax Act, 1990, was payable by the supplier on taxable supplies made to unregistered persons?

¹⁰ Per *Munib Akhtar J* in *Shahid Gul & Partners vs. DCIT Peshawar* reported as 2021 SCMR 27.

¹¹ Per *Umar Ata Bandial J* in *Zak Re Rolling Mills (Pvt.) Limited vs. Appellate Tribunal Inland Revenue & Others* reported as 2020 SCMR 131. Reliance was also placed on *Tandlianwala Sugar Mills Limited & Others vs. Federation of Pakistan & Others* reported as 2001 SCMR 1398.

¹² *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.

¹³ Paragraph 7 of the Impugned Order.

¹⁴ Per *Munib Akhtar J* in *Collector of Customs vs. Mazhar ul Islam* reported as 2011 PTD 2577.

¹⁵ *A. P. Moller Maersk & Others vs. Commissioner Inland Revenue & Others* reported as 2020 PTD 1614; *Commissioner (Legal) Inland Revenue vs. E.N.I. Pakistan (M) Limited, Karachi* reported as 2011 PTD 476; *Commissioner Inland Revenue, Zone-II, Karachi vs. Kassim Textile Mills (Private) Limited, Karachi* reported as 2013 PTD 1420.

13. In view of the reasoning and rationale contained herein the question reframed for determination by this Court is answered in the affirmative, hence, in favor of the department and against the applicant. This reference application stands disposed of in the above terms.

14. 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 Inland Revenue, as required per section 47(5) of the Sales Tax Act, 1990.

JUDGE

JUDGE