

IN THE HIGH COURT OF SINDH, KARACHI

C. P. No.D-1029 of 2013

Date Order with signature(s) of Judge(s)

PRESENT:

MR. JUSTICE AQEEL AHMED ABBASI
MR. JUSTICE MAHMOOD A. KHAN

Priority

1. For hearing of CMA No.4884/2013 (Stay)
 2. For hearing of CMA No.4656/2013 (Stay)
 3. For hearing of main case
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18.12.2019

Ms. Wajiha M. Mehdi a/w Mr. Muhammad Jahangir, advocates for
petitioner
Mr. Muhammad Aminullah Siddiqui, Assistant Attorney General
Mr. Iqbal M. Khurram, advocate for respondents 2 and 3

ORDER

Through instant petition, the petitioner has challenged the jurisdiction of respondent 2 and 3 (Collectorate of Customs, Model Customs Collectorate of Appraisalment, Custom House, Karachi), who had lodged FIR No.MCC/Misc/72/2013-R&D dated 04.03.2013 against the petitioner on the allegations that petitioner claimed of being a manufacturer of tea is false as petitioner has no manufacturing facility available at the registered premises, whereas, amount of 3% additional sales tax and 2% withholding income tax at the import stage has been allegedly evaded by the petitioner in respect of imports made by the petitioner during the relevant period. It has been further alleged that the petitioner has mis-declared the goods declaration by claiming exemption from payment of 3% additional sales tax and 2% withholding income tax at import stage which exemption is available to the manufacturers only. In addition to challenging the jurisdiction of respondents 2 and 3, the petitioner has also challenged the subsequent actions of the customs authorities, including sealing of the godowns in violation of law.

2. Notices of instant petition were issued to the respondents vide order dated 13.03.2013, who were restrained from making any arrest pursuant to impugned FIR and were further directed to de-seal the premises of the petitioner. Whereafter, comments have been filed on behalf of the respondents wherein it has been stated that since the petitioner has no manufacturing facility nor engaged in manufacturing activity, therefore, the claim of exemption from payment of 3% additional sales tax and 2% withholding income tax at import stage was false as the petitioner was not entitled to any such exemption. It has been further stated in the comments that from information gathered by the respondents from EOBI and SITE, it reflects that the petitioner's premises is used as a godown whereas the petitioner is engaged in the textile trade. However, record shows that the respondents have not conducted any physical inspection of the premises by associating the petitioner, to verify such assertion of the respondents that petitioner do not have any manufacturing facility, hence not entitled to exemption from payment of additional sales tax and withholding income tax at imports.

3. Learned counsel for petitioner at the very outset submits that since the customs authorities have no jurisdiction whatsoever to proceed against the petitioner in respect of any alleged liability of sales tax and the income tax, whereas the status of petitioner as manufacturer, and claim of exemption from payment of 3% additional sales tax as well as 2% withholding income tax, has been duly recognized by the relevant Inland Revenue Authorities, who have already issued certificate of exemption under Section 159(1) of the Income Tax Ordinance, 2001, read with clause (9A) of Second Schedule to the Income Tax Ordinance, 2001, read with section 148(1) of the Income Tax Ordinance, 2001, whereas, there is no change in the status of petitioner as a 'Manufacturer', granted by the relevant Sales Tax Department. According to learned counsel, unless there is an order from the competent authority i.e. Inland Revenue

Authorities regarding change of status of the petitioner as a 'Manufacturer' or withdrawal of exemption from payment of 3% additional sales tax and 2% withholding income tax, no adverse inference can be drawn by the customs authorities, who have no jurisdiction in the instant case particularly, when there is no allegation of evasion of customs duty in the impugned FIR. Per learned counsel, the legal controversy agitated through instant petition whereby the petitioner has challenged the jurisdiction of customs authorities to take cognizance and to register FIR in respect of alleged violation of the provisions of Sales Tax Act, 1990 and Income Tax Ordinance, 2001 has already been decided by Superior Courts including the Divisional Bench of this Court in various reported judgments, including 2015 PTD 702 (*Muhammad Measum v. Federation of Pakistan*), PTCL 2015 CL 704 (*Muhammad Measum and others vs. Federation of Pakistan through Secretary & Others*), 2014 PTD 901 (*Hashmani Hotels Ltd. v. Government of Pakistan & Others*), PTCL 2008 CL 45 (*Hashmani Hotels Ltd. v. Government of Pakistan & Others*), 2004 PTD 301 (*Al-Haj Industrial Corporation vs. Collector of Customs*), NLR 1990 Tax 85 (*Crescent Pak Industries vs. CBR & Others*), 2017 PTD 1497 (*Ori-Tech Oil Pvt. Ltd. vs. Manager Registration*), 2016 PTD 365 (*Zaheer Ahmed vs. Directorate of Intelligence*). It has been prayed by the learned counsel for petitioner that the legal controversy involved in the instant petition is identical to the legal issue decided in the case of Muhammad Measum and others vs. Federation of Pakistan through Secretary & Others (2015 PTD 702), therefore, requests that the FIR may be quashed and the criminal proceedings initiated by the customs authorities pursuant to impugned FIR may be declared to be without jurisdiction and lawful authority.

4. While confronted with herein above submissions of the learned counsel for petitioner and the cited judgments of this Court particularly, the case of Muhammad Measum and others vs. Federation of Pakistan through Secretary & Others (2015 PTD 702), learned counsel for respondents could not controvert such

factual and legal position, however, submitted that respondents may be allowed to initiate the adjudication proceedings against the petitioner after proper verification of the fact that petitioner has no manufacturing facility, hence not entitled to exemption from payment of additional sales tax @ 3% and withholding income tax @ 2%, in accordance with law.

5. Learned counsel for petitioner while exercising the right of rebuttal, submitted that the adjudication proceedings, if any, in respect of the alleged violation of the provisions of Sales Tax Act, 1990 and Income Tax Ordinance, 2001 cannot be initiated by the Customs Authorities as the same is the domain of the relevant Inland Revenue Authorities i.e. Sales Tax Department and the Income Tax Department, who can take cognizance of the matter and can proceed against the petitioner in accordance with law. However, unless there is proper adjudication regarding tax liability under the Sales Tax Act, 1990 and the Income Tax Ordinance, 2001, criminal proceedings, otherwise, cannot be initiated against the petitioner.

6. We have heard learned counsel for the parties, perused the record with their assistance and have also examined the case law relied by the learned counsel for the parties in the instant case.

7. Prima facie, the issue regarding jurisdiction of Customs Authorities in respect of alleged violation of the provisions of Sales Tax Act, 1990 and Income Tax Ordinance, 2001 has already been decided against the Customs Authorities in the aforesaid judgments. It will be advantageous to refer to the judgment of a divisional bench of this Court in the case of Muhammad Measum and others vs. Federation of Pakistan through Secretary & Others (2015PTD 702), wherein, under similar facts and circumstances, the FIR lodged by the Customs Authorities and the criminal proceedings pursuant to such FIR have been quashed. Relevant findings on the subject controversy as contained in paras 21

to 24 of the aforesaid judgment are reproduced hereunder for the sake of convenience and reference:

“21. From perusal of the above, it appears that any person who fails to deposit the amount of tax due or any part thereof, in the time or manner laid down under this Act or rules or orders made there under, shall be liable to pay a penalty of 10,000 rupees or 5% of the amount of tax whichever is higher, provided that the amount of tax or any part thereof is paid within 15 days from the due date, the defaulter shall pay a penalty of 5000 rupees for each day of default and further provides that no penalty shall be imposed if any miscalculation is made for the first time during the year. The aforesaid clause further provides, that if the amount of tax due is not paid even after the expiry of period of 60 days of the notice for such payment by an officer of Inland Revenue, not below the rank of Assistant Commissioner Inland Revenue, the defaulter shall further be liable upon conviction by a Special Judge, to imprisonment for a term which may extend to 3 years or with fine which may extend to the amount of tax involved or with both. The aforesaid provisions which have been invoked by the Customs Authorities in the FIR, even do not provide for registration of an FIR, directly without issuance of a notice with a grace period of 60 days by the Assistant Commissioner, Inland Revenue concerned, whereas, neither the Customs Authorities had any jurisdiction in the matter nor any notice required as aforesaid, was even issued and the FIR has been registered by invoking the aforesaid provisions without following the mandatory requirement provided itself in the aforesaid clauses of Section 33 of the Sales Tax Act, 1990. Therefore, even if we were to hold that the Customs Authorities had any jurisdiction in the matter, which they had not, no FIR could be registered under the aforesaid sections/penal clauses by the Customs Authorities until a notice for making payment and a grace period of 60 days for making payment of such alleged short payment/levy of Sales Tax was issued to the petitioners.

22. Insofar as the invoking the provisions of section 148 of the Income Tax Ordinance, 2001, are concerned, the same also appear to be misconceived in as much as, the said provision only deals with the manner and mechanism for Collection of advance tax on the goods at import stage. By implication, it does not convert the levy of Income Tax into a Customs duty merely for the fact that it is being collected at import stage. The jurisdiction conferred upon the Collector of Customs under section 148 of the Income Tax Ordinance, 2001, is only by way of convenience and as an administrative measure, and under no circumstances and by no stretch of imagination the collection of advance income tax at the import stage would convert it into a customs duty, for the recovery of which the provisions of section 32 of the Customs Act, 1969, punishable under clause (14) of section 156(1) *ibid*, could be invoked. Hence, the FIR in this respect is also unwarranted, without jurisdiction and any lawful authority and is liable to be quashed.

23. Before parting with this judgment, we may as a matter of record clarify that, though there are other provisions under the Sales Tax Act, 1990, which may confer jurisdiction on the officers of Customs for collection of Sales Tax at import stage in the same manner as if it was a customs duty, however none of these provisions have been referred to or argued before us by any of the learned counsel for the respondents, therefore, we have not dilated upon such authority or the jurisdiction of the Customs Authorities under such circumstances. Whereas, the facts of

the instant matters are peculiar in nature, hence the findings and the observations hereinabove are in relation to the provision of S.R.O. 670(I)/2013 dated 18-7-2013 which governs the Zero rating of Sales Tax in the instant matters. The said S.R.O. was even otherwise time bound and has already expired on 30-6-2014. Nothing hereinabove shall be construed to the contrary, whereas we have left open the interpretation and the implication of the said provisions of the Sales Tax Act, 1990, to be decided in an appropriate case as and when the same are brought before this Court.

24. In view of herein above facts and circumstances of the instant case on 23-9-2014 we had allowed the aforesaid petitions in the following terms:

"For the reasons to be recorded later on, the FIR No. 03/2014 dated 29-6-2014 and the, proceedings emanating therefrom are hereby quashed. The order dated 8-7-2014 passed by the Commissioner, Inland Revenue, Zone-II, R.T.O. Sukkur of Retrospective Cancellation of provisional certificate issued under S.R.O. No. 670/(I)/2013 dated 18-7-2013 in respect of the petitioner is hereby vacated, with directions to the concerned Commissioner to provide an opportunity of being heard to the petitioner before passing any order in this regard. However, the G.Ds. filed by the petitioner claiming the benefit of aforesaid S.R.O. before expiry date i.e. 30-6-2014 shall be processed by the Customs Department in accordance with law, whereas, the request of the petitioner for issuance of Delay and Detention Certificate shall also be examined strictly in accordance with law."

8. In view of above facts and circumstances of this case, we are of the opinion that legal issue involved in the instant case regarding jurisdiction of Customs Authorities in respect of sales tax and income tax liability is covered by aforesaid judgment of divisional bench of this Court, therefore, we find substance in the contention of learned counsel for petitioner, seeking quashment of FIR No.MCC/Misc/72/2013-R&D dated 04.03.2013, which is hereby quashed, whereas, criminal proceedings emanating from the aforesaid FIR are also declared to be illegal and without lawful authority.

9. The petition stands allowed in the above terms, however, with an observation that quashment of aforesaid FIR and criminal proceedings emanating therefrom, would not prevent the relevant Inland Revenue Authorities to take appropriate action against the petitioner in case of any violation of provisions of Sales Tax Act, 1990 and Income Tax Ordinance, 2001, whereas, issue regarding status of petitioner as a 'Manufacturer' and claim of exemption

from payment of 3% additional sales tax and 2% withholding income tax can also be examined by the relevant authorities in accordance with law.

10. Learned counsel for petitioner at this juncture, submits that during the pendency of instant petition, amount of 3% additional sales tax and 2% withholding income tax in respect of the consignments of the petitioner already arrived at port were directed to be secured by the petitioner by submitting postdated cheque in the sum of Rs.38,52,605/- before the Nazir of this Court, which may be directed to be returned to the petitioner. The Nazir is directed to return the postdated cheque of petitioner after proper verification and identification.

The petition stands disposed of in the above terms along with listed applications.

JUDGE

JUDGE

Gulsher/PS