# IN THE HIGH COURT OF SINDH AT KARACHI

High Court Appeal No.109 of 2019
And
High Court Appeal No.139 of 2019

Present:
Mr. Justice Irfan Saadat Khan
Justice Mrs. Kausar Sultana Hussain

## JUDGMENT

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| Date of hearing: | 15.04.2019. |
| Appellant: (In HCA No.109 of 2019) | Multiline Enterprises through Mr. Ali Asad Gondal, Advocate. |
| Respondent (In HCA No.109 of 2019) | Province of Sindh through Secretary Ministry of Agriculture through Mr. Meeran Muhammad Shah, Additional Advocate General Sindh. |
| Appellant (In HCA No.139 of 2019) | Province of Sindh through Secretary Ministry of Agriculture through Mr. Meeran Muhammad Shah, Additional Advocate General Sindh. |
| Respondent: (In HCA No.139 of 2019) | Multiline Enterprises through Mr. Ali Asad Gondal, Advocate. |

***IRFAN SAADAT KHAN, J.*** These cross appeals have been filed against the judgment and decree dated 24.12.2018 and 07.01.2019, respectively, passed by the learned Single Judge in Suit No.1014 of 2012.

2. Briefly stated the facts of the case are that the above referred suit was filed by Multiline Enterprises (hereinafter referred to as **"the appellant"**) against the Province of Sindh (hereinafter referred to as **"the respondent"**) for recovery of money with the following prayers:

*(a) For the recovery of Rs.35,048,260/- with future mark-up at rate of 6 month KIBOR (Ask Side) plus 4% per annum from the date*

*of payment of the additional taxes till the date of receipt of payment by the plaintiff.*

(b) *The suit may kindly be decreed with all other costs, charges and expenses incurred by the plaintiff during the pendency of the suit.*

(c) *Any other relief which the Hon'ble Court may deem fit in the circumstances of the case may also be granted.*

3. It is the claim of the appellant that the respondent invited bids for procurement of Crawler Tractors (Bulldozers) alongwith spare parts, vide Tender No.DAE/Stores-934/2082/10 dated 23.09.2010. However before the contract could be assigned to the successful bidder a Petition bearing No.D-445 of 2011 was filed before this Court mentioning therein that the respondent have failed to fulfill the parameters as required for the bid. The Court however directed the respondent to proceed with the signing of the contract vide order dated 09.03.2011 and thereafter the appellant and the respondent entered into a contract No.DAE/Stores-934/560 dated 10.03.2011. The appellant's bid was accepted at Rs.11.50 million per Bulldozer and the award made on 29.01.2011 was also accepted by the appellant vide letter dated 23.02.2011. It is, however, noted that a bench of this Court while disposing of the Petition bearing No.D-445 of 2011 directed the parties to accept the bid at Rs.11 million per Bulldozer rather than Rs.11.5 million per Bulldozer. It is noted that at the time when the contract was signed between the parties exemption was available to the appellant with regard to payment of sales tax and the income tax at import stage vide SRO of 2006. However subsequently the exemption on the sales tax and the income tax payable at import level was withdrawn vide SRO No.477(I)/2011 dated 03.06.2011. The appellant immediately informed the respondent about withdrawal of the exemption vide above SRO and asked them to bear the enhanced amount of taxes. Dispute then arose between the parties as to who would pay the enhanced amount of taxes. According to

the appellant it is the respondent who will pay those taxes, whereas the respondent denied the same, as according to them, if there has been an enhancement of taxes, the same is the burden of the appellant. The appellant then paid a sum of Rs.28,160,000/- as sales tax and Rs.6,888,260/- income tax as enhanced tax and demanded from the respondent to pay the same vide letter dated 22.09.2011 in terms of Section 64-A of Sales of Goods Act, 1930 (hereinafter referred to as **"the Act-1930"**). However when the respondent denied to pay the same thereafter the instant suit was filed. The matter proceeded before the learned Single Judge, who after hearing the parties partly decreed the suit in favour of the appellant by holding that the appellant was liable to pay sales tax as per the contract dated 10.03.2011 duly amended on 04.05.2011, thus is entitled to recover an amount of Rs.22,959,536/- with mark-up at the rate of 6% per annum from the date of filing the suit till its realization. The learned Single Judge, however, declared the claim of payment of income tax by the appellant as unjustified as according to him the appellant could claim the benefit of the same while filing its return of income tax. Being aggrieved with this order both the appellant and the respondent have filed these two cross High Court Appeals wherein the appellant has stated that the learned Single Judge was not justified in declining the claim of enhanced income tax amounting to Rs.6,888,260/-, which may be allowed, whereas the respondent is aggrieved on the ground that the learned Single Judge was not justified in directing them to pay the sales tax with mark-up at the rate of 6% per annum.

4. Mr. Ali Asad Gondal Advocate has appeared on behalf of the appellant (in HCA No.109 of 2019) and stated that the order of the learned Single Judge is not in accordance with law as the learned Single Judge has not considered various aspects going to the roots of the case. According to

him, the appellant demanded the payment of Rs.35,048,260/- from the respondent in terms of Section 64-A of the Act-1930. He stated that reading of the said Section would clearly reveal that a purchaser, in the event of any change in the duty or taxes, is entitled to increase or decrease, as the case may be, the said duty or tax which the seller is required to pay. He stated that this is exactly what the appellant has done as after the withdrawal of exemption on Sales Tax and imposition of enhanced income tax, the appellant was legally justified in demanding from the respondent the said sales tax and enhanced income tax. He stated that the learned Single Judge, while passing the order quite correctly required from the respondent to pay the sales tax but fell in error in not directing the respondent to pay the enhanced income tax, which was part and parcel of the contract and as per Section 64-A of the Act-1930, was legally obliged to pay the same. He also drew our attention to Section (3A) of the Sales Tax Act, 1990. He, therefore, partly supported the order of the learned Single Judge so far as demand of sales tax reimbursement is concerned; whereas agitate the said portion of the order which deals with recovery of the enhanced income tax. In support of his above contentions, the learned counsel has placed reliance on the following decisions:

1) *Pakistan Agricultural Storage Vs. Crescent Jute Products (2004 CLD 849)*

2) *Army Welfare Sugar Mills. Vs. Federation of Pakistan (1992 SCMR 1652)*

3) *M/s. Telecard Ltd., Karachi Vs. Collector Sales Tax and Central Excise and another (PTCL 2010 CL 1014)*

4) *M/s. Mayfair Spinning Mills Ltd. Vs. Custom, Excise and Sales Tax Appellate Tribunal and two others (PTCL 2002 CL 115)*

5) *S.S.A. Moeed and another Vs. Messrs Ebrahim Alibhai Charitable Trust (1987 MLD 308)*

6) *M/s. Fecto Belarus Vs. Government of Pakistan Tractor Ltd. (PTCL 2005 CL. 754)*

7) *M/s. Chaudhry Brothers Vs. Province of the Punjab through Secretary/Chief Purchase Officer, Industries and Mineral Development Department, Lahore and 2 others (1993 MLD 2437)*

5. Mr. Meeran Muhammad Shah, Additional Advocate General Sindh (AAG) has appeared on behalf of the respondent (appellant in HCA No.139 of 2019) and stated that the Government of Sindh is not required to pay the Sales tax amount. He invited our attention to the contract entered between the parties dated 10.03.2011 and stated that its clauses No.22 and 26 may be read. He stated that as per clause 22 the learned Single Judge was firstly required to send the matter for Arbitration and when the case was not sent for arbitration then as per clause 26, it was the appellant's duty to pay the duty and taxes. He, however, admitted that when the contract was signed between the parties there was neither any sales tax nor income tax on the tractors. He further stated that the appellant should have made a reference to the Federal Board of Revenue for withdrawal of sales tax and income tax hence shifting the burden of these taxes upon the respondent is not only illegal but also uncalled for. He, therefore, stated that the learned Single Judge has erred in not considering the agreement /contract between the parties and has also misinterpreted Section 64-A of the Act-1930. He also stated that as per the said Section the appellant cannot shift their burden on the Province of Sindh and the same has to be borne by the appellant. In support of his above contentions the learned counsel has placed reliance on the decisions reported as (Army Welfare Sugar Mills Ltd Vs. Federation of Pakistan and others)1992 SCMR 1652 (Interestingly also relied upon by the counsel for the appellant) and (Land Acquisition Collector & 6 others Vs. Muhammad Nawaz & 6 others) PLD 2010 SC 745. He, therefore, in the end, submitted that the judgment of the learned Single Judge may be set aside since grave illegalities and irregularities appear in the same and the

appellant may be directed to bear the sales tax imposed upon them. Since the issue of income tax has been decided in the favour of the Province of Sindh by the learned Single Judge, he supported the order of the learned Single Judge so far as this aspect is concerned.

6. The counsel for the appellant in his rebuttal has reiterated his stance, however it is noted that the main thrust of his arguments is on the application of provisions of Section 64-A of the Act-1930.

7. We have heard all the learned counsel at considerable length and have also perused the record and the various decisions relied upon by them.

8. The learned Single Judge while deciding the matter framed four issues, which are reproduced herein below :

> *"i. Whether the suit is not maintainable against defendant?*
>
> *ii. Whether the Plaintiff is not entitled to recover an amount of Rs.35,048,260.00 with future markup at the rate of 6 month KIBOR (Ask Side) plus 4% per annum from the date of payment of additional taxes till receipt of payment from the defendant?*
>
> *iii. Whether the Plaintiff is not liable to pay taxes as per the contract dated 10.03.2011 and amended contract dated 04.05.2011?*
>
> *iv. What should the decree be?"*

9. So far as the issue of maintainability is concerned, the suit was found to be maintainable. So far as the issues Nos. 2, 3 and 4 are concerned, they were partly decided in favour of the present appellant and partly in favour of the respondent. In so far as the matter with regard to payment of sales tax is concerned, it was held by the learned Single Judge that the same was to be borne by the Province of Sindh (the respondent). However, in so far as the liability of income tax is concerned, the learned Single Judge observed that the same was to be borne by the appellant.

10. Before proceeding any further, we deem it appropriate to reproduce herein below the provision of Section 64-A of the Sales of Goods Act, 1930, upon which much emphasis has been laid by the counsel for the appellant as well as the respondent.

**<u>Section 64-A of the Sale of Goods Act</u>**

**“64-A. In contracts of sale amount of increased or decreased duty or tax to be added or deducted”** In the event of any duty of customs or excise or tax on any goods being imposed, increased, decreased or remitted after the making of any contract for the sale of such goods without stipulation as to the payment of duty or tax where the duty or tax was not chargeable at the time of the making of the contract, or for the sale of such goods duty-paid or tax paid where duty or tax was chargeable at that time,

(a) If such imposition or increase so takes affect that the duty or tax or increased duty or tax, as the case may be, or any part thereof, is paid, the seller may add so much to the contract price as will be equivalent to the amount paid in respect of such duty or tax or increased of duty or tax, and he shall be entitled to be paid and to sue for and recover such addition, and

(b) If such decrease or remission so takes effect that the decreased duty or tax only or no duty or tax, as the case may be, is paid, the buyer may deduct so much from the contract price as will be equivalent to the decrease of duty or tax or remitted duty or tax, and he shall not be liable to pay, or be sued for or in respect of, such deduction.

**Explanation :-**

The word “tax” in this section means the tax payable under the Sales Tax Act, 1951.”

11. The main emphasis of the learned counsel for the appellant as well as respondent is upon the interpretation of Section 64-A of the Act-1930, hence as per their own pleadings the aspect germaning from the said Section alone are dealt with in detail in the ensuing paragraphs of this judgment. Learned counsel for the appellant submits that since the

appellant were only the provider of the goods i.e. the tractors to the respondent, hence the burden of tax liability, if any, has to be borne by the respondent.

12. Perusal of Section 64-A of the Act, reproduced above, clearly stipulates that the purpose of introducing the said law was to safeguard the interest of the parties in case of any increase or decrease in the rates, which takes place subsequent to the contract entered between the parties save as otherwise provided under the contract. However, one aspect is quite clear from the said Section that the seller is permitted under the law to add so much amount equivalent to the amount paid in respect of any increase in the duties or taxes. However, option was also given to the buyer that he may also deduct any amount equivalent to the decrease in duties or taxes, as the case may. Meaning thereby that a facility is provided to both the seller and the buyer that in case of any change either in case of increase or decrease in the duties or taxes, the same could be taken care of, as the case may be.

13. Now if the facts of the instant case are examined, it is an admitted position that at the time when the parties entered into the contract there were neither any sales tax nor any income tax on the tractors, which were introduced subsequently vide SRO 477(1)/2011 dated 03.06.2011. It may be noted that it was agreed between the parties that the bid would be submitted and accepted on the basis of the structure of taxes and duties prevailing on the date of the submission of the bid and the contract would also be signed on that basis. It is also an admitted position that on the date of signing of the agreement between the parties, there was neither any sales tax nor income tax on the goods, which were to be supplied by the appellant to the respondent. However, the position subsequently changed

on 03.06.2011 vide above referred SRO. It is evident from the record that the moment the sales tax and the enhanced income tax was introduced, the appellant duly informed the respondent about the withdrawal of the exemption of sales tax and enhanced income tax and that due to the legislative changes, now the respondent has to bear the brunt of the taxes in terms of Section 64-A of the Act.

14. The spirit of the Section 64-A of the Act-1930 from its language appears quite clear that the same provides a mechanism for adjustment of any increase/decrease in the duties and taxes so that neither a seller could be burdened with the additional duty nor a buyer would come under a disadvantageous position in case of reduction of duties and taxes. However, it is noted that the matter in hand is not a case where the increase in the duties and taxes took place before the signing of the agreement rather this is a case where the duties and taxes have been enhanced after signing of the agreement between the parties, hence as per Section 64-A of the Act, a seller (who in the present case is the "Multiline Enterprises) is entitled to recover the excess amount paid on account of such increase in the duties and taxes and the buyer (the Province of Sindh) is liable to reimburse the same to the seller, since the goods admittedly were imported for the purpose of fulfilling the terms of agreement made between the parties.

15. The main thrust of the argument of the learned AAG being that the learned Single Judge, while disposing of the case, has not considered the clauses 22 and 26 of the contract dated 10.03.2011. Perusal of the clause 22 of the contract, which is available at page 57 of HCA No.109 of 2019, clearly stipulates that the same relates with "Disputes and Arbitration". It is an admitted fact that neither the appellant nor the respondent department has ever applied and moved any application to the learned Single Judge for

referring the matter for arbitration. Had this be the case that an application for arbitration was moved/filed which was not considered by the learned Single Judge, then the position would have been somewhat different. As per the record neither the appellant nor the respondent has moved before the learned Single Judge any application for referring the matter to the arbitrator for settlement of dispute between the parties. Hence, the respondent department cannot, at this juncture, take refuge of the said clause of the agreement, since the same was neither adhered to by the appellant nor the respondent. So far as the non-consideration of clause 26 is concerned, the same is reproduced herein below:

> ***26. TAXES AND DUTIES***
>
> *26.1 All taxes and duties levied for delivery on 'DDP' i.e., Delivery Duty Paid basis shall be to the account of the Supplied.*
>
> *26.2 In case the Supplier, under this Contract, is illegible for exemption from any taxes and duties such exemptions shall be obtained by the Supplier at his own expenses. The Purchaser shall not be liable to pay to the Supplier amounts that may be paid by him towards any taxes and duties, under which he is exemptible.*

16. In our view, above clause also does not help the respondent department as this is what exactly the appellant has done. The appellant has paid the sales tax and income tax but due to the changed circumstances after the levy of the sales tax and income tax has approached the respondent in terms of Section 64-A of the Act-1930. As stated above, the spirit of Section 64-A was to provide a mechanism for adjustment of any increase or decrease in the duties /taxes so that neither the seller nor a buyer would come to a disadvantageous situation. It is an admitted position that the appellant only approached the respondent department after the levy of the sales tax and income tax to bear the burden of these taxes as per Section 64-A of the Act-1930, which provision of law, in our view, is quite clear so

far as placing the responsibility upon a seller or a buyer, in case of any increase /decrease in the duties /taxes.

17. The decisions in the cases of Pakistan Agricultural Storage, S.S.A. Moeed and another and M/s. Chaudhry Brothers (quoted supra) though are of Single Judges of the High Courts but all these judgments, which are cited for reference only and are not binding upon us, clearly stipulate that supplier is entitled to receive sales tax on the goods supplied by him. The same principle was also endorsed in a decision given by the Single Judge of this Court reported as Messrs Shahnawaz Engineering (Pvt.) Ltd., Karachi through Chairman Vs. Messrs National Insurance Corporation through Executive Director (2005 CLD 678) [not cited before us]. The decisions in the cases of Land Acquisition Collector (mentioned above), as relied upon by the learned AAG, and Mayfair Spinning Mills Ltd., as relied upon the learned counsel for the appellant, are found to be distinguishable from the facts obtaining in the instant matter. In the case of Fecto Belarus (quoted above) it was held by the Hon'ble Apex Court that the burden of customs duty has to be borne by the purchaser and reference was made to the case of Army Welfare Sugar Mills (referred above). In the case of Telecard Ltd. (mentioned above) a Division Bench of this Court observed that in the case of indirect tax (sales tax is an indirect tax) the burden is upon the end consumer and reliance was placed on Fecto Belarus case. Hence, by applying the principle laid down by the Division Bench of this Court it is clear that the burden of sales tax being an indirect tax, for all practical purposes, has to be borne by the Purchaser. In the case of Army Welfare Sugar Mills (cited above) the Hon'ble Supreme Court while dealing with the matter observed as under:

> *54. It may also be observed that section 64-A of the Sales of Goods Act, 1930, entitles a vendor to recover from a purchaser any*

*duty or custom or excise or tax on any goods being imposed or increased after the conclusion of any contract for sale of such goods, if the contract does not contain any provision contrary to it.*

The above judgments of the Hon'ble Supreme Court and a D.B of this Court leaves no room for a vendor to recover from a purchaser any duty or custom or excise or tax on any goods being imposed or increased after the conclusion of the contract, if the contract does not contain any provision contrary to it. In the instant case the appellant being the vendor has required from the respondent to pay the increased amount of sales tax, which surely was claimed after the introduction of sales tax vide above referred SRO which, in our view, squarely falls within the ambit of Section 64-A of the Act-1930. Hence, we endorse the view of the learned Single Judge that after the imposition of sales tax the burden to pay the same squarely lies with the respondent department. We further would like to add that the law framers of Section 64-A in order to avoid any misinterpretation or ambiguity added an explanation in the said Section that the word "tax" in this section means the tax payable under the Sales Tax Act, 1951, which now is Sales Tax Act, 1990. We, therefore, find absolutely no merit in the appeal filed by the Province of Sindh bearing HCA No.139 of 2019 and uphold the order of the learned Single Judge so far as the recovery of sales tax in terms of Section 64-A of the Act-1930 by the appellant from the respondent department.

18. Apropos the claim of enhanced income tax, which is stated to have enhanced from 1% to 5%, is concerned, here again we tend to agree with the observations made by the learned Single Judge, as firstly income tax is a direct tax and the GD clearly shows that the tractors were imported in the name of the appellant company and as per Section 148 of the Income Tax Ordinance, 2001. Income tax being direct tax is the liability of the importer

and the credit of which easily be claimed by the appellant while filing its income tax return. The request of the appellant that similar treatment be given to the income tax as that of sales tax does not carry force since, as stated above, sales tax is an indirect tax, whereas income tax is a direct tax and these two taxes being falling on different pedestals of the fiscal statues have to be considered and dealt with separately. In the case of Telecard Ltd. it has categorically been observed that income tax is a direct tax which is to be borne by the person himself, whereas the indirect tax is the liability of the end user being passed on to him. Hence a separate treatment has to be accorded to both these levies one being direct and the other being indirect. The learned Single Judge has, in our view, quite rightly opined that income tax does not fall under the purview of Section 64-A of the Act-1930 and has to be borne by the appellant itself, the credit of income tax, in our view, could be claimed by the appellant in accordance with the Income Tax Ordinance, 2001. Hence, we do not find any merit in the appeal filed by Multiline Enterprises bearing HCA No.109 of 2019 and dismiss the same also and uphold the order passed by the learned Single Judge in his behalf.

19. With the above observations both these High Court Appeals stand dismissed alongwith the pending application(s), if any, with no order as to cost.

JUDGE

JUDGE

Karachi:
Dated: .04.2019.