IN THE HIGH COURT OF SINDH, KARACHI

Special Sales Tax Reference Application ("Spl. STRA") No. 399 of 2007

Date	Order with signature of Judge

Present: ***Mr. Justice Muhammad Junaid Ghaffar***
Mr. Justice Agha Faisal

Applicant:	**Messrs Reckitt & Colman Pakistan Limited Through Mr. Khawaja Aizaz Ahsan, Advocate along with Mr. Sami-ur-Rehman, Advocate.**
Respondent(s):	**The Collector, Collectorate of Sales Tax (West) & others Through Mr. Irfan Mir Holepota, Advocate.**
Date of hearing:	**15.02.2023**
Date of Judgment:	**10.03.2023**

J U D G M E N T

Muhammad Junaid Ghaffar, J: Through this Sales Tax Reference Application, the Applicant has impugned Order dated 04.06.2003 passed by the then Customs Excise & Sales Tax Appellate Tribunal, Karachi; whereby, the said Tribunal by a majority of 2 to 1 has been pleased to dismiss the Appeal. This Reference Application was admitted for regular hearing vide Order dated 05.03.2008 on the following two questions of law:-

i. Whether Dettol was exempt from payment of sales tax in term of notifications SRO 598(I)/90 dated 7.6.1990 and SRO 553(I)/94 dated 9.6.1994?

ii. Whether the show cause notice dated 23.10.1998 was time-barred under sub-section (2) of section 36 of the Sales Tax Act, 1990?

2. Learned Counsel for the Applicant has contended that in terms of SRO 598(I)/90 dated 7.6.1990 vide Serial No.15 all medicinal preparations if registered as a Drug under Section 7 of the Drugs Act, 1976, are exempt from the levy of sales tax; that the SRO was then superseded by another SRO 553(I)/94 dated 09.06.1994 and a similar exemption was available at Serial No.11 and in both these SROs, there was no condition as to under what Heading the product is to be classified; that the Applicant, as an abundant caution, had been approaching the concerned authorities including CBR and vide their Letter dated 08.09.1990, it was informed that benefit of SRO was available, if the product in question was registered as a Drug under Section 7 of the Drugs Act, 1976; and therefore, a subsequent Show Cause Notice for demanding the sales tax was without lawful authority and jurisdiction; that the Tribunal has seriously erred in placing reliance on some

Classification Ruling issued by the World Customs Organization (WCO) inasmuch as that was later in time and per settled law[1] is always prospective in nature; hence not applicable in the facts and circumstances of this case; that even otherwise the Show Cause Notice is dated 23.10.1998 requiring payment of sales tax for the period pertaining to 1993-94; 1994-95 and 1995-96, and is time barred under Section 36(2) of the Sales Tax Act, 1990, for transactions up to October 1995. In view of these submissions he has prayed for answering the questions in favour of the Applicant.

3. On the other hand, Respondent's Counsel has supported the order passed by the Tribunal with a further submission that the product in question is not a medicinal preparation; hence not entitled for any exemption, and therefore, no case is made out.

4. We have heard both the learned Counsel and perused the record. We would first like to deal with question No.2, that *"Whether the show cause notice dated 23.10.1998 was time-barred under sub-section (2) of section 36 of the Sales Tax Act, 1990?"*. Insofar as the Applicant's case is concerned, they have placed reliance on reply to their Letter dated 15.08.1990 by CBR vide its Letter dated 08.09.1990, and it is their case that they have acted upon such advice of CBR since long and never had any intention to evade payment of sales tax. It would be advantageous to reproduce the contents of CBR's Letter, which reads as under:-

"GOVERNMENT OF PAKSITAN
CENTRLA BOARD OF REVENUE
++++

C.No. 16(53)ST/87 Islamabad, the 8th Sep., 1990.

From: Muhammad Yehya
Second Secretary
To : M/s Reckitt & Colman
Of Pakistan Ltd.
F-18, Sind Industrial Trading
Estate, KARACHI.

SUB : DETTOL ANTICEPTIC SOLUTION – SALES TAX EXEMPTION.

I am directed to refer to your letter No. 14-A, dated the 15th August, 1990 on the subject noted above and to say that Dettol is an item of heading 38.08 as it is primarily a disinfectant. However, the benefit of SRO 598(I)/90 dated 7th June, 1990 will be available to it if it is registered as a Drug under section 7 of the Drugs Act, 1976 from the day of issuance of the said notification.

2. You must be aware of the decision about the Dettols classification issued some time back.

Sd/=
MUHAMMAD YAHYA
SECOND SECRETARY

[1] 1989 SCMR 353, 1985 SCMR 1753, PLD 1970 SC 453, 2002 PTD 955 PLD 1994 Karachi 480, 2008 PTD 1475 & 2004 PTD 2516

5. From perusal of the above letter addressed to the Applicant, it appears that though CBR held that the product in question is an item of Heading 38.08 as it is primarily a *disinfectant*; however, further stated that benefit of SRO 598 (subsequently superseded by SRO 553) will be available to the Applicant if its' product is registered as a Drug under Section 7 of the Drugs Act, 1976. It was further informed that a decision regarding classification of the product had already been issued; but still it was observed and agreed that they are entitled for benefit of SRO in question. In view of such position insofar as the question of limitation, as above is concerned, it has to be looked into by keeping in mind that at least the Applicant had no deliberate intention to skip payment of sales tax on the product in question. It solely acted on the advice of CBR. It would be advantageous to refer to the relevant portion of Section 36(1) & (2) of the Sales Tax Act, 1990, under which the recovery proceedings were initiated as prevalent during the issue in hand:-

> "**[36. Recovery of tax not levied or short-levied or erroneously refunded**.-(1) Where by reason of some collusion or a deliberate act any tax or charge has not been levied or made or has been short-levied or has been erroneously refunded, the person liable to pay any amount of tax or charge or the amount of refund erroneously made shall be served with a notice, within five years of the relevant date, requiring him to show cause for payment of the amount specified in the notice.
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> (2) Where, by reason of any inadvertence, error or misconstruction, any tax or charge has not been levied or made or has been short-levied or has been erroneously refunded, the person liable to pay the amount of tax or charge or the amount of refund erroneously made shall be served with a notice within three years of the relevant date, requiring him to show cause for payment of the amount specified in the notice:

6. From perusal of the above provision, it reflects that under sub-section (1) of Section 36 ibid a notice can be issued where, by reason of some ***collusion*** or a ***deliberate act*** any tax or charge has not been levied or made or has been short-levied or has been erroneously refunded; whereas, under Sub-Section (2) a notice can be issued where, by reason of any ***inadvertence***, ***error*** or ***misconstruction***, any tax or charge has not been levied or made or has been short-levied or has been erroneously refunded. These two sub-sections provide for different situations and accordingly have a different period of limitation. Under Sub-section (1) it is 5 years and under Sub-section (2) it is 3 years, both from the relevant date as provided under sub-section (4) thereof. Though, the Show Cause Notice in question is silent as to applicability of any of the sub-sections of section 36 ibid and apparently an attempt was made to enlarge the period of limitation against the Applicant, however, in our considered view, and on the basis of the facts and circumstances of this case, it appears that the case of the Applicant would be covered by sub-section (2) of Section 36 of the Sales Tax Act, 1990. Per

settled law, it is the narration of facts in the Show Cause Notice along with supporting evidence which determines the offence attracted in a particular case[2]. The jurisdictional threshold required for issuing Show Cause Notice under Section 36 of the Act attains importance because of the disparate and contrasting character of the mischief envisaged in the two subsections of section 36[3]. On the whole, unless there is a deliberate design or an agreement between persons to defraud the tax department and the same is clearly and perspicuously laid out in the Show Cause Notice, mere mentioning of section 36(1) or mentioning the words 'deliberate act' or "collusion" in the Show Cause Notice will not vest the tax department with the jurisdiction to invoke section 36(1) of the Act[4]. Therefore, the applicability of the period of limitation is dependent on the facts and circumstances of the case that under which sub-section a case would fall when show cause notice is read into with the narration of the facts so stated therein. We may observe that law as to limitation is settled and the cardinal principle of law is that all are equal before law, whether a citizen or State, and if a law prescribes period of time for recovery of money, after its lapse recovery is not enforceable through Courts[5]. For the present purposes, our understanding is, that since the Applicant had acted on the advice of CBR; and therefore, at best the case of the Applicant could be of ***inadvertence***, ***error*** or ***mis-construction*** and for recovery of such sales tax, would fall within the contemplation of sub-section (2) of section 36 of the Act, for which the limitation period is (3) three years from the relevant date; and therefore, we have no hesitation in answering the question regarding limitation in favour of the Applicant by holding that the Show Cause Notice in question was time barred for transactions up to October, 1995; hence the question is answered accordingly.

7. Now we take up question No.2 that "*Whether Dettol was exempt from payment of sales tax in term of notifications SRO 598(I)/90 dated 7.6.1990 and SRO 553(I)/94 dated 9.6.1994".* It would be advantageous to refer to the relevant Entry in SRO 598 as well as 553 (supra), which reads as under:

SRO 598(I)/90 dated 7th June, 1990.—

15.	Medicinal preparations.	Respective Headings.	If registered as a Drug under section 7 of the Drugs Act, 1976.

SRO 553(I)/94, dated 9th June, 1994.—

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2 PLD 2013 Lahore 634 (Caretex v Collector Sales Tax)
3 PLD 2013 Lahore 634 (Caretex v Collector Sales Tax)
4 PLD 2013 Lahore 634 (Caretex v Collector Sales Tax)
5 Federation of Pakistan v Ibrahim Textile Mills Limited (1992 SCMR 1898)

11.	Medicinal preparations.	Respective Headings.	If registered as a Drug under section 7 of the Drugs Act, 1976 (XXXI of 1976)

8. From the perusal of the above, it appears that the exemption is on *medicinal preparation*, falling under respective heading of the Customs Tariff and registered as a Drug under Section 7 of the Drugs Act, 1976. It is not in dispute that CBR by its letter dated 08.9.1990, categorically advised the Applicant that the product in question (notwithstanding that it is still entitled for exemption under said SRO) is to be classified under Heading 38.08 as a *disinfectant*. The learned Tribunal while dismissing the appeal has been pleased to hold that since the product is a *disinfectant*; has been so classified by WCO, and therefore, is not a *medicinal preparation*. This was brought to the knowledge of the Applicant from day one when the letter dated 08.09.1990 was issued by CBR. The said classification appears to have been accepted insofar as the product being a *disinfectant* and falling under heading 38.08 is concerned. Therefore, the stance now taken that the product is a *medicinal preparation* does not have any force of law. If the Applicant relies upon the letter of CBR for the purposes of claiming exemption under the SRO as advised, then the same has to accepted as well in respect of classification of the product as a *disinfectant* of heading 38.08. The other argument that since the product has been registered as a drug under the Drugs Act, 1976, and therefore, becomes a *medicinal preparation* is also misconceived inasmuch as the requirement of its registration under the Drug Act, has its own implication and merely for this reason it cannot become entitled for exemption from sales tax solely on this ground. This is, in fact, one of the requirements for claiming exemption from sales tax under the two SRO's as above, but the primary condition required to be met is that of it being a medicinal preparation. This is lacking in the case of the Applicant, whereas, repeatedly the product has been classified under heading 38.08 as a *disinfectant* and to that there is no rebuttable argument or material on record. The issue of this product as to whether it is a *disinfectant* or a *medicinal preparation* has been settled by the classification ruling issued by WCO; and therefore, in the present proceedings no exception can be drawn to such classification. We may also add that such classification is a matter of record since 1990; hence, the same is not being applied retrospectively as argued and the case law relied upon is of no help in the present facts. Therefore, question No.1 is answered accordingly, in ***negative***; against the Applicant and in favour of the Respondent.

9. In view of the above facts and circumstances of this case, this Reference Application is ***partly allowed*** to the extent of question No.2 regarding limitation as above; whereas, it stands ***dismissed*** to the remaining extent.

10. Let copy of this order be sent to Appellate Tribunal in terms of sub-section (5) of Section 47 of the Sales Tax Act, 1990. Reference is disposed of in the above terms.

Dated: 10.03.2023

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