

# IN THE HIGH COURT OF SINDH, KARACHI

Suit No.1663 of 2009

[Clariant Pakistan Limited v. Deputy Commissioner Inland Revenue Service & others]

- Dates of hearing : 09.05.2017 and 23.05.2017
- Date of Decision : 19.06.2017
- Plaintiff : Clariant Pakistan Limited, through M/s. Ijaz Ahmed and Waqar Ahmed, Advocate.
- Defendants No.1-3 : Deputy Commissioner Inland Revenue Service (AEC) and others, through Mr. Kafeel Ahmed Abbasi, Advocate.
- Defendants No.4, 5 : Federal Board of Revenue and Federation of Pakistan, through Mr. Masood Hussain Khan, Assistant Attorney General.
- Law under discussion: (i) Sales Tax Act, 1990  
(ii) Civil Procedure Code, 1908.  
(iii) General Clauses Act, 1897.

## Case law relied upon by counsel for the plaintiff.

1. 1992 S C M R page-1652  
[*Army Welfare Sugar Mills Limited v. Federation of Pakistan and others*]
2. 2012 S C M R page-1698  
[*Collector of Customs, Lahore v. Shahida Anwar*]
3. P L D 1997 SC page-582  
[*Elahi Cotton Mills Limited and others v. Federation of Pakistan through Secretary M/O Finance, Islamabad and 6 others*]
4. P L D 2001 SC page-340  
[*Anoud Power Generation Limited and others v. Federation of Pakistan & others*]
5. 2014 PTD page-1057  
[*Asif Traders and another v. Collector of Customs through Assistant Collector and others*]
6. 2011 PTD page-1558  
[*Shahnawaz (Private) Limited through Director Finance v. Pakistan through the Secretary Ministry of Finance Government of Pakistan, Islamabad & another*]

7. 2010 PTD page 1717  
[*Dewan Cement Limited through Authorized Representative v. Pakistan through the Secretary Ministry of Finance, Revenue Division and Ex-officio Chairman, F.B.R., Islamabad & 2 others*]
8. 2010 PTD page-287  
[*Messrs Huffaz Seamless Pipe Ind. Ltd. v. Collector of Sales Tax, Hyderabad*]
9. Unreported Judgment of learned Division Bench of this Court passed in Constitutional Petition Nos.D-6067, 6615, 6068 and 6069 of 2016.  
[*Thal Limited and another v. The Federation of Pakistan & others*]
10. Unreported Judgment of the Customs Appellate Tribunal, at Karachi, dated 26.09.2011 passed in Customs Appeal No.K-1198 of 2010  
[*M/s Sindh International Industries (Pvt) Ltd. v. The Deputy Collector of Customs Model Customs Collectorate (Appraisalment)-II, Karachi*]

#### **Case law relied upon by counsel for defendants No.1 to 3**

1. 1996 S C M R page-83  
[*The Collector, Customs and Central Excise, Peshawar and others v. M/s. Rais Khan Limited through Muhammad Hashim*]
2. (2008) 98 Tax page-69 (S.C. Pak.)  
[*Commissioner of Income Tax/Wealth Tax, Companies Zones, Peshawar v. River Side Chemicals (Pvt.) Ltd., Gadoon*]
3. 2010 P T D page-287  
[*Messrs Huffaz Seamless Pipe Ind. Ltd. v. Collector of Sales Tax, Hyderabad*]
4. PTCL 1988 page-596  
[*M/s. Bisvil Spinners Ltd. v. Superintendent, Central Excise and Land Customs Circle, Sheikhpura and another*]

#### **Other research material submitted by the counsel for defendants No.1 to 3**

1. Pakistan Customs Tariff 2008-2009
2. Pakistan Customs Tariff 2012-2013
3. Federal Board of Revenue Clarification C.No.3(15)ST-L&P/99(Pt-1) dated 2<sup>nd</sup> May, 2009.

### **J U D G M E N T**

**Muhammad Faisal Kamal Alam, J:** Instant suit has been filed by the plaintiff against the defendants, primarily, *inter alia*, impugning the recovery notices dated 06.11.2009 and 10.11.2009 issued by defendant Nos.1 and 2 respectively. Following relief is sought:

**“PRAYER**

- a) *Declaring the Impugned Letters to be illegal and of no legal effect.*
- b) *Declaring that the colouring compounds commercially known as masterbatches locally manufactured, imported or locally supplied by the Plaintiff are zero-rated under entry No.66 of SRO 509(I)/2007 dated June 9, 2007.*
- c) *Declaring that the retrospective application of notification SRO 1059(I)/2007 dated October 25, 2007 to the colouring compounds commercially known as masterbatches locally manufactured, imported or locally supplied by the Plaintiff is illegal.*
- d) *Granting a permanent injunction restraining Defendants from demanding sales tax at the rate of 15% on the colouring compounds commercially known as masterbatches locally manufactured, imported or locally supplied by the Plaintiff or taking any other coercive action against the Plaintiff.*
- e) *Any other relief which this Hon’ble Court deems appropriate in the circumstances of case may also kindly be granted to the Plaintiff.*
- f) *Costs of the Suit may also be granted.”*

2. After receiving notice of present proceedings, defendants No.1 to 4 contested the claim of plaintiff by filing Written Statement as well as Counter Affidavits to the interlocutory applications.

3. It is also necessary to point out that earlier the question of maintainability was raised by the learned counsel for the defendants by invoking section 51 of the Sales Tax Act, 1990 and vide an order dated 04.05.2015, this Court did not agree with the plea of defendants and consequently their application under Order 7, Rule 11 C.P.C. (C.M.A.No.5986 of 2015) for rejection of plaint was dismissed.

4. On 30.11.2015, the following issue was framed as the entire controversy can be decided on the basis of said issue:

***1. Whether the colouring compounds commercially known as masterbatches locally manufactured, imported or locally supplied by the Plaintiff are zero-rated under entry No.66 of SRO 509(I)/2007 dated June 9, 2007 as amended by SRO 163(I)/2011 dated March 2, 2011?***

5. While writing Judgment, it is deemed appropriate that though a formal but a necessary issue should also be framed to the effect that:

***2. What should the decree be?***

6. Succinctly, the plaintiff has been importing, manufacturing and supplying colouring chemicals to textile, leather, paper and plastic industry. It is averred that an economic way of colouring various products like polyester fiber, polypropylene fiber and plastic articles is to add colour through colouring concentrates, which generally also termed as masterbatches.

7. Mr. Ijaz Ahmed, learned counsel representing the plaintiff, has strenuously argued that since in all the notifications, the sales tax exemption is given to PCT Heading 3206.4900 pertaining to ‘colouring matter and other preparations’ thus HS Code / PCT Heading of masterbatches, which is 3206.4910, is also exempted and basis of this interpretation is that when the main heading, that is, 3406.4900, is exempted from levy of sales tax then the subheading 3206.4910 is *ipso facto* exempted. Essentially, this is the main issue, which will lead to the deciding the Issue framed by this Court on 30.11.2015.

8. The above line of arguments has been seriously disputed by Mr. Kafeel Ahmed Abbasi, learned counsel representing defendants No.1 to 3,

who was supported in his stance by Mr. Masood Hussain Khan, learned Assistant Attorney General, appearing on behalf of defendant Nos. 4 and 5. The crux of the arguments of defendants' side is that the products 'masterbatches' and the material falling under 'colouring matter and other preparations' have distinct PCT Heading and, therefore, the product of plaintiff, that is, masterbatches is subjected to payment of 15% sales tax.

9. The submissions of learned counsel representing the parties hereto have been thoughtfully considered and with their able assistance, record of the case has been examined.

10. Mr. Kafeel Ahmed Abbasi, has referred to various goods declaration / bills of entries submitted by plaintiff, which are the part of the record, to advance his arguments that in the left column under the description of goods, masterbatches is mentioned and under the HS Code Heading, plaintiff surreptitiously mentioned 3206.4900 (PCT Heading) instead of 3206.4910 and, therefore, through deceptive tactics has cleared the goods / consignment of masterbatches without payment of applicable sales tax at that relevant time. Other goods declarations of different dates are also taken into the account, wherein the plaintiff has mentioned the PCT Heading as 3206.4910 for the masterbatches and when on this aspect, the counsel for defendants was queried, he replied that though in some cases the PCT Heading is correctly mentioned, but plaintiff took undue advantage of zero rated sales tax exemption and cleared the goods without paying of sales tax and for this reason the requisite demand notices dated 06.11.2009 and 10.11.2009 (Annexures 'J' and 'J-1') to the plaint; the **"Impugned Letters"** have been issued to plaintiff, *inter alia*, for recovery of amount due for non-payment of sales tax at the rate of Rs.15%, which comes to Rs.225,351,310/- (Rupees Twenty Two Crore Fifty Three Lacs Fifty One

Thousand Three Hundred and Ten only). Learned counsel for defendants prays for dismissal of instant suit.

11. Mr. Ijaz Ahmed, advocate, has strenuously argued that at no point in time, the plaintiff being a responsible and law abiding corporate entity has taken undue advantage of any of these exemptions. According to him, the confusion has arisen when SRO 509(I)/2007 dated 09.06.2007 was promulgated, wherein against Serial / Entry No.66, the PCT Heading of masterbatches was mentioned, that is, 3206.4910, but the description of the goods was mentioned as 'other colouring matter and other preparations'. On various representations preferred by the Industry to defendants, defendants No.4 and 5 (Federal Board of Revenue and Federation of Pakistan) eventually issued subsequent notification in the shape of SRO 1059(I)/2007 dated 25.10.2007; **the impugned SRO**, whereby a purported amendment was made in the Entry / Serial No.66 of earlier SRO 509(I)/2007, by replacing the said Entry with PCT Heading 3206.4990, that relates to the category of 'other'. This led to issuance of the aforementioned impugned letters by the defendants to plaintiff, which was throughout contested by plaintiff, as is evident from its replies submitted through different Chartered Accountant Firms.

12. As authority of officials (defendants No.1 to 3) for addressing such notices, besides vires of said impugned notification (SRO 1059(I)/2007), is also questioned and in the intervening period to forestall any recovery through coercive measures, the present proceeding was filed, wherein interim restraining order was granted on 04.12.2009. During pendency of present proceeding, defendants No.4 and 5 have promulgated another SRO 163(I)/2011 dated 02.03.2011, inter alia, whereunder wider PCT Heading 3206.4900 was restored in the above SRO 509(I)/2007 against its entry

mentioned at serial No.66. It would be advantageous to reproduce this notification of 02.03.2011 herein under:

**“GOVERNMENT OF PAKISTAN  
MINISTRY OF FINANCE, ECONOMIC AFFAIRS,  
STATISTICS AND REVENUE  
(REVENUE DIVISION)**

\*\*\*

Islamabad, the 2<sup>nd</sup> March, 2011

**NOTIFICATION  
(SALES TAX)**

**S.R.O. 163(I)/2011.** – In exercise of the powers conferred by clause (c) of section 4 of the Sales Tax Act, 1990, the Federal Government is pleased to direct that in its Notification No. S.R.O. 509(I)/2007, dated the 9<sup>th</sup> June, 2007, the following amendments shall be made and shall be deemed to have been so made, with effect from the 25<sup>th</sup> October, 2007, namely:-

In the said Notification, in the Table, in column (1), against serial number 66, in column (3), for the figure “3206.4990”, the figure “3206.4900” shall be substituted.

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[C. No.4/1-STB/2007 (Pt)]

**(Khawar Khurshid Butt)**  
Additional Secretary”

13. Learned counsel referred to various missives of plaintiffs addressed to the defendants after promulgation of above notification / SRO, which can be termed as **a curative SRO** for the sake of reference. However, defendant No.4-Federal Board of Revenue, vide its response date 19.10.2012 has regretted to accede to the pleas of plaintiff, primarily on the ground of pendency of instant cause. It is also one of the grounds, agitated by the plaintiff’s side, that in post curative SRO [163(I)/2011] scenario, the Collectorate of Lahore (functioning under defendant No.4-FBR) has processed and paid the sales tax refund claims of other entities which are engaged in the import and supply of same product-masterbatches. In

support of this arguments, three different sales tax refund payment orders have been placed on record with application (C.M.A.No.3416 of 2013), available at pages-45 to 49 (second part of the Court file).

14. Plaintiff has also contested the impugned SRO No.1059(I)/2007 on the ground that the said notification cannot operate retrospectively as intended by the said SRO (impugned) because it amounts to taking away the benefit of sales tax exemption from plaintiff retroactively by reopening past and closed transactions. To fortify this argument, the decisions of Army Welfare Trust and Ellahi Cotton Mills Limited (*supra*) have been relied upon. Later decision of Elahi Cotton Mills Limited is also invoked by the plaintiff's counsel in support of curative SRO No.163(I)/2011, which is remedial in nature and in fact makes the correction in the earlier notification-SRO 509(I)/2007 and has in fact restored the original zero-rated sales tax exemption benefit to the industry including plaintiff and which remedial action falls within the executive authority vested in the defendants No.4 and 5; Federal Board of Revenue and Federal Government. Crux of the dicta of the above referred reported decisions of the Hon'ble Apex Court is that an ***Executive Order / Notification***, which is detrimental or prejudicial to the interest of a person cannot operate retrospectively. However, a beneficial Executive Order / Notification issued by an Executive Functionary can be given retrospective effect.

15. This principle is reiterated and endorsed in recent Judgment handed down by a learned Division Bench of this Court in M/s. Asif Traders and another (*supra*). These submissions of plaintiff's counsel have substance. The defendants through the aforereferred impugned notification / SRO (1059(I)/2007) could not have made an amendment of the nature in the earlier SRO 509(I)/2007 (09.06.2007) and, therefore, the said impugned



notification is illegal being issued, *inter alia*, in excess of authority vested in defendants No.4 and 5. However, apparently realizing their mistake, said defendants No.4 and 5 consequently issued the curative notification-SRO No.163(I)/2011, whereby, PCT Heading 3206.4900 has been restored against Entry No.66 of SRO No.509(I)/2007, but the question still remains that how the plaintiff can claim benefit from it, as the product of plaintiff viz. Masterbatches, fall under the PCT Heading 3206.4910.

16. The two unreported decisions (mentioned in the title; *supra*) relied upon by the plaintiff's side are of significance. The first one is of learned Division Bench of this Court handed down in the case of Thal Limited and another v. The Federation of Pakistan and others, and the other one is of the Customs Appellate Tribunal in the case of Sindh International Industries (Pvt) Ltd. Though the second decision has a limited persuasive value, but given by a Tribunal of a competent having exclusive jurisdiction, involving identical issues and even the same product, can be considered.

17. Learned counsel representing the defendants attempted to draw a distinction between the above reported cases and the present case by referring to the case law relied upon by them, which have been mentioned in their (defendants') written synopsis as well. Gist of the principle laid down in the case law relied upon by the defendants' side is that onus is on the person (petitioner or plaintiff) who is claiming benefit of exemption under a SRO. Honourable Supreme Court in the case of Messrs Huffaz Seamless Pipe Ind. Ltd. (*supra*), has rejected the plea of exemption of the appellant, *inter alia*, on the ground that the applicant in that above case produced certain correspondences from its suppliers to support its claim instead of a notification extending the exemption sought for. I am afraid

that the reported Judgments relied upon by the defendants' side are not attracted to the facts and issues involved in the instant proceeding.

18. In addition to the above submissions, the learned counsel for the defendants further argued that the first decision passed by the learned Division Bench of this Court is not on merits but is based on a Clarification issued by the Ministry of Commerce (Federal Government), whereas, the decision of learned Customs Appellate Tribunal is not binding on this Court and the department / present defendants must have preferred a Reference against the same in this Court as provided under Section 47 of the Sales Tax Act, 1990. Despite giving him an opportunity to apprise this Court about pendency of any such Reference against the second decision of learned Customs Appellate Tribunal (*Sindh International Industries (Pvt) Ltd.*), no information or detail has been brought on record by the defendants' side till the writing of this Judgment; consequently, the said decision of the learned Customs and Sales Tax Appellate Tribunal has attained finality. In its paragraph-5, reasons are mentioned and the Tribunal has come to the conclusion after taking into the account aforementioned impugned SRO as well as the curative SRO together with Explanatory Notes and Rules of Interpretation of HS Code (Harmonized System Code), that when the main heading has been given exemption, that is, PCT 3206.4900, from payment of sales tax then, the subheading covering the masterbatches products; 3206.4910 is also exempted from payment of sales tax and petitioner (before the Tribunal) was held to be entitled to release the goods in accordance with rules but at zero-rated sales tax in terms of SRO 163(I)/2011 (the curative / remedial Notification). This decision is otherwise binding on the defendants if the same has attained finality. The defendants should have considered the requests of present plaintiff made

through various correspondences in accordance with law and by exercising discretion in a fair, just and reasonable manner as enjoined by Section 24-A of the General Clauses Act, 1897.

19. The unreported Judgment of learned Division Bench (ibid) is also carefully perused, where the controversy was the applicability of customs duty to the import of raw jute from Bangladesh. Earlier, the raw jute was exempted from payment of customs duty and was being imported under PCT Heading 5303.1000, which was subsequently subdivided into PCT Heading 5303.1010, 5303.1020 and 5303.1090 and consequently was chargeable to various percentage of customs duties. In the intervening period and vide another SRO 558(I)/2004 a blanket exemption was granted to PCT Heading 5303.1000. However, dispute arose between the importers and Customs Authorities with regard to levy of customs duty on the products imported under subheadings and finally this Court gave a decision that the above raw jute product was / is not subject to customs duties even if the importers are importing the product under the subheading, that is, PCT Heading 5303.1000, 5303.1020 and 5303.1090 from Bangladesh, as the main heading has been given exemption.

20. To a certain extent, the argument of defendants' counsel is correct. The Clarification of Federal Board of Revenue, present defendant No.4, as well as the Ministry of Commerce, of which the present defendant No.5 is a Controlling Authority, did weigh with the learned Division Bench in Thal Limited case, but at the same time the learned Bench in the above decision (of Thal Limited), has also laid down the rule of interpreting PCT Heading / H.S. Code, independently. Hence, the principle that has evolved from the above two decisions is that if a certain exemption is granted or extended to a main PCT Heading, usually having last three or two digits as 000 or 00,

then its subheadings also fall within the purview of that concession, unless excluded specifically through a legal instrument, *inter alia*, a notification (SRO). This last aspect is further fortified by a later notification issued by defendant No.4 being SRO 504(I)/2013 dated 12.06.2013, which has been placed on record by the plaintiff's counsel with his Folder of Synopsis of Submissions, at page-33. This notification is in fact an amendment of an earlier SRO 1124(I)/2011 dated 31.12.2011, wherein against Sr. No.56 again the sales tax exemption was extended to the PCT Heading 3206.4900. However, in the subsequent SRO 504(I)/2013, *inter alia*, the said entry / serial No.56 has been further amended to the extent that masterbatches (subject product) has been taken out of the ambit of zero-rated exemption. These documents lend further support to the arguments of plaintiff's side that if the main PCT Heading being 3206.4900 enjoyed the exemption throughout these years up to issuance of SRO 504(I)/2013 then the subheading relating to masterbatches, that is, PCT Heading 3206.4910 is entitled to the same treatment; zero-rated benefit of sales tax is also applicable to masterbatches falling under PCT heading 3206.4910.

21. The upshot of the above discussion is that I answer the Issue No.1 in the terms that till the issuance of SRO 504(I)/2013 dated 12.06.2013, the product masterbatches is entitled to zero-rated sales tax exemption, provided the last SRO 504(I)/2013 is still in the field and is not superseded by some other executive instrument or notification, in which case, the latest SRO / notification has to be interpreted in the light of above discussion.

**Issue No.2**

22. Considering what has been discussed herein above, the instant suit of plaintiff is decreed, by declaring that subject product viz. Masterbatches will be given the benefit of SRO 163(I)/2011 and the impugned letters and

demands of defendants contrary to the principle laid down hereinabove, are illegal and hence, all such impugned letters and demands are set aside and the defendants are directed to consider the refund claims of plaintiff within the parameters of law.

22. Parties are left to bear their own costs.

**JUDGE**

**Dated: 19.06.2017.**

*Riaz Ahmed / P. S.\**