

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Suit No.1014 of 2012

DATE ORDER WITH SIGNATURE OF JUDGE

**Plaintiff: Multiline Enterprises through
Mr. Ijaz Ahmed Zahid, Advocate.**

**Defendant: Province of Sindh
Through M/s. Suneel Kumar Talreja &
Naheed Akhtar, State Counsel.**

For Final Arguments.

Date of Hearing: 15.11.2018

Date of Judgment: 24.12.2018

J U D G M E N T

Muhammad Junaid Ghaffar J. This This is a Suit for Recovery of money and the Plaintiff seeks judgment and decree for the following Relief(s):-

- (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.

2. The precise facts are that on invitation of bids by the Defendant for procurement of 16 Crawler Tractors ("Bulldozers") along with spare parts, a Tender dated 23.09.2010 was advertised, wherein, the Plaintiff's bid was accepted being lowest and award was made on 29.01.2011, at the rate of Rs.11.50 Million per Bulldozer, which was accepted by the Plaintiff vide Letter dated 23.02.2011. After the Award, a Constitutional Petition bearing

No.D-445/2011 was filed before this Court by an unsuccessful bidder, and initially interim orders were passed; but thereafter vide Order dated 09.03.2011, the Defendant was allowed to proceed with the signing of the contract and such contract was entered into on 10.03.2011. Thereafter once again in the said Petition, another application was filed, whereby, Plaintiff was also impleaded and Court ordered that no further steps were to be taken; however, on 27.04.2011 while dismissing the Petition, the rate per Bulldozer was reduced from Rs.11.5 Million to Rs.11 Million. The Plaintiff reluctantly accepted such order, and thereafter an amended contract was signed on 04.05.2011 and advance payment was released in the first week of June, 2011. At the relevant time when the Contract was signed there was an exemption of Sales Tax and Income Tax on the import of the goods in question but through SRO 477(I)/2011 dated 03.06.2011 an amendment was carried out, and the exemption of Sales Tax was withdrawn; whereas, the rate of Income Tax payable at import stage was enhanced and the Plaintiff immediately notified the same to the Defendant vide Letter dated 13.06.2011; whereas, the Plaintiff also approached Federal Board of Revenue for a clarification but was informed that Sale Tax will now be payable at the rate of 17% on the import of Bulldozers. It is the case of the Plaintiff when goods arrived at Karachi Port, the Plaintiff paid sum of Rs.28,160,000/- on account of Sales Tax and Rs.6,888,260/- on account of enhanced rate of Income Tax. Subsequently, Plaintiff demanded an additional amount of Rs.35,048,260/- from the Defendant vide its Letter dated 22.09.2011. It is further stated that despite making hectic efforts though the contractual amount was paid; however, this claim was not entertained, hence instant Suit.

3. Learned Counsel for the Plaintiff has contended that when the Contract was signed there was an exemption in respect of Sales Tax and reduction in the rate of Income Tax; however, subsequently through SRO 477(I)/2011, the exemption of Sales Tax was withdrawn and despite approaching FBR, no such exemption was granted in respect of the Tender, and therefore, Plaintiff is entitled for the relief claimed through this Suit in terms of Section 64-A of the Sales of Goods Act, 1930. Learned Counsel has read out the said provision and has contended that the law is clear on this issue; whereas, the amount of Sales Tax and Income

Tax paid in excess due to withdrawal of exemption squarely falls within the ambit of Section 64-A (ibid); hence Plaintiff is entitled for relief claimed herein. He has further contended that as to the award of Contract, supply of goods and payment as per Contract is not in dispute and it is merely now a legal question and it is the case of the Plaintiff that by virtue of Section 64-A (ibid), the Buyer is responsible for the payment of enhanced rate of Sales Tax and Income Tax; therefore, the objection of Defendant is misconceived. Learned Counsel has referred to the documents exhibited in evidence and has contended that all such documents have been exhibited and admitted including exhibits "P-8" to "P-15" onwards, which are in respect of the proof of the payment of this enhanced Sales Tax and Income Tax to FBR. Per learned Counsel there was no delay on the part of the Plaintiff; whereas, the Award of the Tender was stayed in the Constitutional Petition by this Court and such period, if any, could not be counted for against the Plaintiff. According to him, the Plaintiff acted promptly and immediately opened Letter of Credit and imported the goods; however, when the goods arrived, the amending Notification was issued and on this account extra amount of Sales Tax and Income Tax had to be paid to honour the Contract. Lastly, he has contended that the Defendant has not claimed any liquidated damages, as per the Contract, and therefore, even otherwise no case for any delay against the Plaintiff can be made out. In support he has relied upon the cases reported as ***M/s. Chaudry Brothers Vs. Province of the Punjab through Secretary/Chief Purchase Officer, Industries and Mineral Development Department, Lahore and 2 others (1993 MLD 2437)*** and ***Messrs National Gas Ltd. Through Company Secretary V. Ministry of Railway through Federal Secretary Railways and 2 others (2015 PTD 2552)***.

4. On the other hand, learned Advocate General's Office has not made any verbal arguments but has chosen to file written arguments, wherein, it has been contended that Invitation of Bids, participation of the Plaintiff, and Award thereof is not disputed; whereas, after Order dated 27.04.2011, passed in C.P No.445/2011, the rate was reduced and was acted accordingly. It is further contended that after completion of the Contract, the Invoice amount has been paid as per the Contract; whereas, in

terms of Clause-26 of the Agreement, all taxes were to be borne by the Plaintiff in respect of payment of taxes etc. and the Defendant is not liable for any such payment, and therefore, claim was rightly refused. It is further contended on behalf of the Defendant that in the cross-examination, the Plaintiff has admitted that it was their duty and responsibility to pay all taxes and duties, which were applicable. In support thereof reliance has been placed on Clauses 22 & 26 of the Agreement and it is further contended that the dispute, if any, was to be referred to the Arbitration, therefore, instant Suit is incompetent. It has been prayed that Suit be dismissed and if there is any grievance, they may approach for Arbitration.

5. On 10.03.2014, the following Issues were settled by the Court:-

- 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?

6. I have heard the learned Counsel for the Plaintiff and perused the written arguments of the Defendant. Since all the above issues are interlinked except Issue No. (i), as they all are legal issues, they are being dealt with jointly and together in this judgment.

7. Insofar as Issue No. (i) regarding maintainability of the Suit is concerned it may be appreciated that no evidence has been led by the defendant in this regard. What I presume and gather is that perhaps for existence of an Arbitration Clause in the Contract, this issue was raised, whereas, even in the written arguments no plausible defence has been taken in this regard. Moreover, it is to be appreciated that the dispute which is before the Court is post contract, and it has got nothing to do with the Arbitration Clause

of the Contract. It is precisely a legal issue which is to be decided by this Court in terms of Section 64-A of the Sale of Goods Act, 1930. In view of such position Issue No.(i) is answered by holding that the Suit is maintainable against the Defendant(s).

8. Adverting to Issue Nos. (ii), (iii) & (iv), it may be noted that insofar as facts, as noted hereinabove are concerned they do not appear to be in dispute as Plaintiff after participation was awarded the Tender and supplies were made accordingly. It is the case of the Plaintiff that after signing of the revised Contract on 04.05.2011, the first advance payment was released in June, 2011; whereas, the Letter of Credit was immediately opened, however, on 03.06.2011, a Notification was issued, whereby, the exemption of Sales Tax was withdrawn. Though it has been contended that through this very Notification the rate of Income Tax was also increased; but on perusal of the same it does not reflect so. It would be advantageous to reproduce the said Notification as well as the Clarification dated 28.6.2011 issued by FBR, which reads as under:-

Amending Notification

Notification No. S.R.O. 477(I)/2011, dated 3rd June, 2011--- In exercise of the powers conferred by section 19 of the Customs Act, 1969 (IV of 1969), and clause (a) of sub-section (2) of section 13 of the Sales Tax Act, 1990, the Federal Government is pleased to direct that the following further amendments shall be made in its Notification No. S.R.O.575(I)/2006, dated the 5th June, 2006, namely:-

In the foresaid Notification,--

- (a) In the preamble, for the figures and words "21, and 23" the figures, commas and word "1, 5, 21, 22, 23, 28, 28A, 29 and 36" shall be substituted;
 - (b) In the Table, in S. No. 8, in column (5), for the words "Ministry of Tourism", wherever occurring, the commas and words, "Tourism Departments of Provincial Governments, Gilgit-Baltistan, FATA and Department of Tourist Services of the Capital Administration and Development Division" shall be substituted and shall be deemed to have been so substituted with effect from the 20th April, 2011.
2. This Notification shall take effect from the 4th June, 2011."

 "GOVERNMENT OF PAKISTAN
 (REVENUE DIVISION)
 FEDERAL BOARD OF REVENUE
 (INLAND REVENUE WING)

C. NO. 3(15)ST-L&P/2010

Islamabad, the 28th June, 2011

Mr. Nasir A. Malik,
 Multiline Enterprises,
 64-Ahmad Block New Garden Town,
Lahore.

Subject: CLEARANCE REQUIRED REGARDING CUSTOM CLEARANCE OF SIXTEEN UNITS OF BULLDOZERS AGAINST THE GOVERNMENT CONTRACT NO. DAE/STORES 934/560/11 DATED 10.03.2011.

I am directed to refer to your letter No. nil dated 22.06.2011 on the above noted subject.

2. The issue has been examined in the Board and it is stated that the benefit of zero-rating of sales tax on serial No. 1 of SRO.575(i)/2006 dated 05.06.2006 was withdrawn vide SRO. 477(I)/2011 dated 03.06.2011, hence, Bulldozers are chargeable to sales tax at standard rate @ 17% with effect from 04.06.2011 on import stage.

(Fahad Ali Choudhry)
Second Secretary (ST-L&P)”

9. It would also be advantageous to reproduce Section 64-A of the Sales of Goods Act, 1930, which reads as under:-

“ 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 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 the time.

- (a) If such imposition or increase so takes effect 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 increase 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.”

10. Insofar as the Notification of FBR dated 3.6.2011 and its Clarification is concerned, there appears to be no dispute that an amendment was carried out in the main SRO 575(I)/2006 dated 5.6.2006, whereby, at least (so clearly reflected) the exemption of Sales Tax was withdrawn. Before this amendment, in terms of the original SRO 575(I)/2006 dated 5.6.2006, in exercise of powers conferred by clause (a) of sub-section (2) of Section 13 of the Sales Tax Act, 1990, whole of the Sales Tax leviable under the Sales Tax Act, 1990 was exempted, whereas, through the

aforesaid amendment, goods specified in various Serial Nos. of the Table to the said SRO were excluded from such exemption. The goods in question i.e. Bulldozers have been specified at Serial No.1 of the Table against HS Code No.8429.1100 & 8429.1900. This happened during pendency of the Contract and when the goods were imported and reached at Karachi Port, the rate of Sales Tax was enhanced to 17% after withdrawal of the exemption. Though a claim regarding enhanced rate of Income Tax has also been made but to that effect, however, there is no Notification or a Clarification placed on record on behalf of the Plaintiff. Insofar as the provisions of Section 64-A of the Sales of Goods Act, 1930, is concerned this provides a mechanism that as to how in contracts of Sale, amount of increased or decreased duty or tax is to be added or deducted, and who is responsible to pay the same. It provides that *“if such imposition or increase so takes effect 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 increase of duty or tax, and he shall be entitled to be paid and to sue for and recover such addition”*. At the same time this provision also caters for a situation, wherein, the duty or tax has been decreased during such period. Explanation appended to this Section states that word **“tax”** in this section means the tax payable under the **Sales Tax Act, 1990**. Therefore, at the very outset, I may observe that insofar as the claim regarding enhanced Income Tax is concerned, the same does not fall within the purview and ambit of Section 64-A (ibid), and therefore cannot be considered by this Court. Moreover, advance tax is always subject to final adjustment against liability of Income Tax at the time of filing of a Tax Return, barring certain exception, and Plaintiff has not been able to prove any such exception. Hence, such being an advance tax paid on account of and by the Importer / Assesee, even otherwise cannot be demanded in terms of Section 64-A of the Sale of Goods Act, 1930. Insofar as the claim of Sales Tax is concerned, it appears that such claim would fall within the contemplation of Section 64-A ibid, as the imposition and/or enhancement in the rate of Sales Tax has taken place, after execution of the Contract and the Plaintiff is entitled to add so much of the amount to the Contract price, which is to be paid

and he can sue for its recovery as well. The Plaintiff in support of its claim has relied upon the Goods Declaration as Exh.-P/10 and Sales Return as Exh. P/15. Perusal of the Goods Declaration reflects that an amount of Rs. 22,959,536/- was paid at the import stage, whereas, the claim of the Plaintiff in respect of Sales Tax is for Rs. 28,160,000/-, which is perhaps based on the amount finally paid at the time of local Sales. To support this amount further, reliance has been placed on a separate receipt and a Statement of such payment; however, it is to be borne in mind that any Sales Tax paid at local Sales stage at the time of filing of Sales Tax Return is based on total Sales made during the month on the basis of Sales Tax Value, whereas, in this case the return reflects that there are other sales of the Plaintiff as well. Moreover, no proper evidence has been led in this regard as to the excess and higher amount of sales tax being claimed as against the amount paid at the import stage. In the circumstances, I am of the view that Plaintiff could only claim the amount covered in terms of S.64-A of the Sale of Goods Act, 1930, and that could only be the amount payable due to withdrawal of an exemption earlier in field. The said amount is what the plaintiff paid at import stage as reflected from the Goods Declaration i.e. Exh-P/10.

11. In view of hereinabove facts and circumstances of the case and the legal position which emerges therefrom, the Plaintiff has made out a case for recovery of the amount of Sales Tax in terms of Section 64-A of the Sale of Goods Act, 1930, as above. Accordingly, Issue Nos. (ii), (iii) and (iv) are answered by holding that Plaintiff was only liable to pay Sales Tax as per the contract dated 10.3.2011 duly amended on 4.5.2011, and is therefore entitled for recovery of Rs.22,959,536/- with mark-up at the rate of 6% per anum (note-simple mark-up and not on compound basis) from the date of filing of this Suit till its realization.

12. Suit stand decreed in these terms and office is directed to prepare decree accordingly.

Dated: 24.12.2018

J U D G E