IN THE HIGH COURT OF SINDH, KARACHI

PRESENT:

MR. JUSTICE MUHAMMAD JUNAID GHAFFAR
MR. JUSTICE AGHA FAISAL

1.	C.P.No.D-1916/2016	M/s Continental Biscuit	Petitioner
2.	C.P.No.D-3523/2018	M/s. J.B Ind.	Petitioner
3.	C.P.No.D-3524/2018	M/s International Textile Mills	Petitioner
4.	C.P.No.D-4334/2018	M/s Krystopac Energy (Pvt) Ltd.	Petitioner
5.	C.P.No.D-4868/2018	M/s M.N Textile	Petitioner
6.	C.P.No.D-4928/2018	M/s Omega Ind.	Petitioner
7.	C.P.No.D-356/2019	M/s. Diamond Ind. Corp. Ltd.	Petitioner
8.	C.P.No.D-635/2019	M/s. Chamber Sugar Mills (Pvt) Ltd	Petitioner
9.	C.P.No.D-691/2019	N.P Cotton Mills Ltd	Petitioner
10.	C.P.No.D-1181/2019	M/s Equity Textile Ltd	Petitioner
11.	C.P.No.D-1728/2019	M/s Dewan Sugar Mills (Pvt) Ltd	Petitioner
12.	C.P.No.D-1870/2019	M/s Baba Farid Sugar Mills (Pvt) Ltd.	Petitioner
13.	C.P.No.D-1871/2019	M/s. Chamber Sugar Mills (Pvt) Ltd	Petitioner
14.	C.P.No.D-1926/2019	M/s Zeal Pak Cement Factory Ltd	Petitioner
15.	C.P.No.D-1984/2019	M/s Equity Textile Ltd	Petitioner
16.	C.P.No.D-3368/2019	M/s MATCO Foods Ltd.	Petitioner
17.	C.P.No.D-6051/2019	M/s Deewan Sugar Mills (Pvt) Ltd	Petitioner
18.	C.P.No.D-6882/2019	Din Textile Mills Ltd	Petitioner
19.	C.P.No.D-7531/2019	M/s Gatrco Power Pvt Ltd	Petitioner
20.	C.P.No.D-7539/2019	M/s Pakistan Synthetic	Petitioner
21.	C.P.No.D-8330/2019	Union Fabrics Pvt Ltd.	Petitioner

Vs.

Federation of Pakistan & others ....*Respondents*

FOR THE PETITIONERS: M/s. Pervez Iqbal Kasi, Muhammad Faheem Bhayo alongwith Mr. Muhammad Din Qazi, Arshad Hussain Shahzad, Rana Sakhawat Ali, Haroon Shah for Ameen M. Bandukda, Advocates.

FOR THE RESPONDENTS M/s. Ameer Bakhsh Metlo, Pervaiz Ahmed Memon, Javed Hussain for Masooda Siraj, Muhammad Aqeel Qureshi, Shahid Ali Qrueshi, Advocates.

FEDERATION: Through Mr. Kafeel Ahmed Abbasi, DAG.

Dates of Hearing: 04.11.2020 & 24.11.2020.

Date of Judgment: 24.11.2020

JUDGMENT

Muhammad Junaid Ghaffar J.- Through these petitions, the Petitioners have impugned respective Show Cause Notices issued by the Respondent-Department and so also vires of S.R.O. 450(I)/2013 dated 27.05.2013 **(SRO-450)** and Section 8(1)(h) & (i) of the Sales Tax Act, 1990 **(Act).** Through these Show Cause Notices, the Petitioners were confronted as to why the Input Tax adjustment claimed in violation of SRO 450 and Section 8(1)(h) & (i) of the Act shall not be disallowed.

2. Petitioners Counsel have made their submissions; however, without any disrespect to all learned Counsel, their arguments have been noted and recorded in this judgment collectively for ease, convenience and to avoid overlapping, if any. They have argued that the disallowance / restriction of input tax through impugned SRO and 8(1)(h) & (i) of the Act is unreasonable, confiscatory in nature and against Section-7 of the Act; that the products and material on which Input Tax is being denied are used directly in improving the manufacturing of the end product, hence Input tax adjustment cannot be denied; that Section-7 allows Input tax adjustment and is a substantive provision, whereas, through impugned SRO and 8(1)(h) & (i) of the Act, such Input is being denied, and therefore, cannot be sustained; that without these materials on which Input Tax is being denied, no manufacturing of the end product can be done; that all these materials are directly relatable to taxable supplies and before such determination no final conclusion can be inferred so as to deny the input tax adjustment; that these provisions are within itself contradictory, and therefore, should be interpreted in favor of the taxpayers; that no reasonable justification has been provided for denying the Input Tax adjustment in question; that such restriction is unreasonable, and is therefore, liable to be declared as ultra vires and show cause notices be vacated. In support they have relied upon various cases[1].

3. Similarly contention of Respondents Counsel and learned DAG have been recorded collectively and they have argued that Section-7 is subject to Section 8

[1] PTCL 2017 CL. 217 (M/s. Chiltan Ghee Mills, Quetta and others vs. Deputy Collector of Sales Tax (Refund), Customs House, Quetta and another), PTCL 2001 CL. 509 (Attock Cement Pakistan Ltd. vs. Collector of Customs, Collectorate of Customs and Central Excise, Quetta and 4 others), PTCL 2006 CL. 673 (Ghandhara Nissan Diesel Ltd. vs. Collector, Large Tax Payers Unit and 2 others), PTCL 2018 CL. 348 (Coca-Cola Beverages Pakistan Ltd. vs. The Customs, Excise and Sales Tax Appellate Tribunal and others), PTCL 2013 CL. 534 (DG Khan Cement Vs. The Federation of Pakistan etc.).

(ibid) as it has a non-obstante clause, and therefore, Input Tax claim is not absolute; that even otherwise, the Petitions are not maintainable as Show Cause Notices have been directly challenged; that these material and equipment are not direct constituent of the end product; hence not entitled for any Input Tax; that the burden and consequence of denying and or restricting any Input Tax adjustment is even otherwise on the consumer of the end product and not on the Petitioners, hence, they have no case. In support reliance has been placed on various cases[2].

4. We have heard all the learned Counsel and perused the record. It appears that the Petitioners are manufacturers engaged in the manufacturing of various products and have come before this Court on issuance of Show Cause Notices issued to them by the Respondent-Department after examination of their respective Sales Tax Returns. It is case of the department that the Petitioners have availed various Input Tax Credits, which were impermissible in terms of Section 490(I)/2004 dated 12.06.2004 issued in terms of section 8(1)(b) of the Act duly amended by SRO 450[3]. It appears that such Notification being in field, the Legislature also amended S. 8(1), whereby, through clause (h) & (i) most of the products / materials so notified in SRO-450 have now been included in Section 8(ibid), which disallows tax credit. In essence after incorporating these items in Section 8(ibid), the SRO had become redundant; but was not withdrawn, and therefore, the Petitioners have challenged the vires of this SRO 450 in

[2] 2006 PTD 2821 (Messrs AMZ Spinning and Weaving Mills (Pvt.) Ltd. through Manager vs. Appellate Tribunal, Customs Sales Tax and Federal Excise, Karachi), PTCL 2011 CL 213 (M/s. Dewan Cement v. Pakistan through Secretary Ministry of Finance), 2005 PTD 2067 (Ittehad Chemicals Limited Lahore vs. Customs, Excise and Sales Tax Appellate Tribunal, Lahore), 2007 PTD 47 (Messrs Tauqir Ashraf & Co., Lahore through managing Partner vs. Customs Central Excise and Sales Tax Appellate Tribunal, Lahore and 2 others), 2020 PTD 101 (Nishat Mills Ltd. vs. Federation of Pakistan), 2006 PTD 2066 (Ghandhara Nissan Diesel Ltd. through Sr. General Manager Finance, Karachi vs. Collector, Large Tax Payers Unit, Government of Pakistan, Karachi), 2000 PTD 254 (Commissioner of Income Tax v. National Agriculture Ltd. Karachi), AND PLD 1990 S.C 68 (Government of Pakistan v. Hashmani Hotel Limited)

[3] **S.R.O 450/(I)/2013 dated 27.5.2013.---** In exercise of the powers conferred by clause (b) of sub-section (1) of section 8 of the Sales Tax Act, 1990, the Federal Government is pleased to direct that the following further amendment shall be made in its Notification No. S.R.O. 490(I)/2004, dated the 12th June, 2004, namely:-

In the aforesaid Notification,

(i) In clause (c), the word "and" shall be omitted, and

(ii) In clause (d), for the full stop at the end, and semicolon and word "; and" shall be substituted and thereafter the following shall be added, namely:-

"(e) building material including cement, bricks, paints, varnishes, distempers etc.;

(f) office equipment and machines (excluding electronic fiscal cash registers), furniture, structure, fixture and furnishings excluding those directly used in taxable activity;

(g) electrical and gas appliances, pipes, fitting excluding those directly used in taxable activity;

(h) wires, cables, ordinary electrical fitting and sanitary fittings, excluding those directly used in taxable activity, and

(i) crockery, cutlery, utensils etc., excluding those directly used in taxable activity."

addition to S. 8(1)(h) & (i) [4] of the Act. The Act in question provides a mechanism of input tax as against output tax and the refund, if so accrued. The said mechanism in governed by the provisions of s.7(determination of tax liability)[5] and s.8 (Tax Credit not allowed) and perusal thereof reflects that in terms of S. 7 (***subject to Section 8 and Section 8B)*** a taxpayer is entitled to deduct input tax paid or payable for the purposes of taxable supplies made or to be made by him from output tax due from him in respect of a particular tax period. There are other restrictions and mechanisms under Section 7 of the Act, which for the present purposes are not relevant; however, one may make note of the fact that such admissibility of input tax adjustment or refund is qualified by and through s.8 ibid. Lastly, S. 8 of the Act puts an embargo and restriction, providing inter alia that a tax credit shall not be allowed and a registered person shall not be entitled to reclaim or deduct input tax paid for any purpose other than for the taxable supply made or to be made by him; and again on any other goods, which are notified by the Federal Government and so on and so forth. Here the goods were first notified in terms of s.8(1)(b) vide SRO 450, and thereafter now form part of the Act in s.8(1)(h) & (i). The Petitioners' precise

[4] **"[8. Tax credit not allowed.—**(1) Notwithstanding anything contained in this Act, a registered person shall not be entitled to reclaim or deduct input tax paid on—

(h) Goods used in, or permanently attached to, immoveable property, such as building and construction materials, paints, electrical and sanitary fitting, pipes, wires and cables, but excluding [pre-fabricated buildings and] such goods acquired for sale or re-sale or for direct use in the production or manufacture of taxable goods; [21][***]

(i) Vehicles falling in Chapter 87 of the First Schedule to the Customs Act, 1969 (IV of 1969), parts of such vehicles, electrical and gas appliances, furniture, furnishings, office equipment (excluding electronic cash registers), but excluding such goods acquired for sale or re-sale [22][:]]

[5] **7. Determination of tax liability.**–(1) [Subject to the provisions of [section 8 and] 8B, for] the purpose of determining his tax liability in respect of taxable supplies made during a tax period, a registered person shall [, subject to the provisions of section 73,] be entitled to deduct input tax paid or payable during the tax period for the purpose of taxable supplies made, or to be made, by him from the output tax [excluding the amount of further tax under sub-section (1A) of section 3.] that is due from him in respect of that tax period and to make such other adjustments as are specified in Section 9

[Provided that where a registered person did not deduct input tax within the relevant period, he may claim such tax in the return for any of the six succeeding tax periods.]

(2)A registered person shall not be entitled to deduct input tax from output tax unless,-

(i) in case of a claim for input tax in respect of a taxable supply made, he holds a tax invoice [in his name and bearing his registration number] in respect of such supply for which a return is furnished [:]

Provided that from the date to be notified by the Board in this respect, in addition to above, if the supplier has not declared such supply in his return or he has not paid amount of tax due as indicated in his return;

(ii) in case of goods imported into Pakistan, he holds bill of entry or goods declaration in his name and showing his sales tax registration number, duly cleared by the customs under section 79 [, section 81] or section 104 of the Customs Act, 1969 (IV of 1969);]

(iii) in case of goods purchased in auction, he holds a treasury challan, [in his name and bearing his registration number,] showing payment of sales tax;]

[(iv) ***]

[(3) Notwithstanding anything in sub-sections (1) and (2), the Federal Government may, by a special order, subject to such conditions, limitations or restrictions as may be specified therein allow a registered person to deduct input tax paid by him from the output tax determined or to be determined as due from him under this Act.]

[(4) Notwithstanding anything contained in this Act or rules made there under, the Federal Government may, by notification in the official Gazette, subject to such conditions, limitations or restrictions as may be specified therein, allow a registered person or class of persons to deduct such amount of input tax from the output tax as may be specified in the said notification.]

case is that the items in question are directly used in facilitating and improving the manufacture of the end product; as a consequence, are direct constituent of the taxable supply, and therefore, covered when s.7 read with s.8 are read harmoniously; hence, there was no occasion to deny input tax adjustment or refund through impugned Notification and the provisions of 8(1)(h) & (i) of the Act. However, we are not inclined to agree with this contention as this issue is already settled by a learned Division Bench Judgment of this Court in the case of ***AMZ Spinning***[6] by holding[7] that on account of a non obstante clause in s.8, it shall override and prevail over the provisions of s.7 and that the disentitlement to seek adjustment is based upon provision of s.8(1)(b) itself and the very purpose of enacting s.8(1)(b) was to deny adjustment of input tax also on such items which though are used in the manufacture and production of taxable goods or supplies; but the Federal Government in its discretion denies to extend such benefit to the taxpayer. The ratio of the aforesaid judgment in pith and substance also applies to 8(1)(h) & (i) of the Act inasmuch as previously the goods, on which Input Tax Adjustment was denied, were notified through Notification under 8(1)(b) of the Act, whereas, presently not only a Notification to that effect has been issued i.e. S.R.O. 450; but so also now the goods on which Input Tax Adjustment or refund is inadmissible have been incorporated in s.8(1)(h) & (i) of the Act. Nothing has been argued before us so as to how in view of this finding the present case can be distinguished and as to how the impugned SRO and the provisions of 8(1)(h) & (i) of the Act are ultra vires. Though an attempt was made by placing reliance on various judgments cited by them; however, in the facts and circumstances of this case, all these judgments are irrelevant and in our view the issue in hand is appropriately covered by the judgment in the case of ***AMZ Spinning*** of a learned Division Bench of this Court. We are of the view that it is the prerogative of the Legislature to allow and / or to deny Input Tax Adjustment, whereas, in the present matter, the Petitioners have directly come before us on

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[6] (2006 PTD 2821) judgment authored by *Faisal Arab,J.* as his lordship then was.

[7] Section 8(1)(b) on the other hand is clear deviation from the above referred criteria provided in section 7(1)and section 8(1)(a) as section 8(l)(b) disentitles a taxpayer to claim adjustment of input tax even on such goods which though otherwise were entitled for adjustment, but on account of being specified by the Federal Government in the official Gazette, are denied the benefit of adjustment. Thus under section 8(1)(b), the legislature has specifically empowered the Federal Government to deny adjustment of input tax on any item which may have been used by a taxpayer for the manufacture or production of taxable goods or supplies.

The argument of learned counsel for the applicant that benefit of adjustment of input tax could not be denied to applicant through a subordinate legislation as this amounts to nullifying the intent of the legislature as envisaged in sections 7(1) and 8(1)(a) of the Act is therefore misconceived. In our view the disentitlement to seek adjustment is based upon provision of section 8(1)(b) itself. The very purpose of enacting section 8(1)(b) was to deny adjustment of input tax also on such items which though are used in the manufacture and production of taxable goods or supplies but the Federal Government in its discretion denies to extend such benefit to the taxpayer. We don't see any other purpose of section 8(1)(b) other than this. If the intention of legislature was to deny adjustment of input tax only on such items which were not used for making taxable goods and supplies, then the provisions of section 8(1)(a) were sufficient to cover such a situation and there was no need to incorporate section 8(1)(b). Thus it is under the provisions of section 8(1)(b) itself that the Federal Government derives power to notify items against which adjustment cannot be claimed though used in the making of taxable goods and supplies. Where the notification itself derives its legitimacy on the basis of the provisions of the main enactment i.e. section 8(1)(b), then how such notification can be termed as violative of the provisions of the Sale Tax Act.

It is the prerogative of the legislature to impose any tax which it is legally competent to impose under the Constitution. It can choose the duration during which it is to be imposed and can also withdraw any tax at any time. Subsequent withdrawal of a tax does not create any justification to avoid the tax for the period during which it was chargeable. The Federal Government was within its right to include any item listed in S.R.O. 578(I)/98, dated 12-6-1998 on which adjustment of input tax could not be claimed and was equally competent to subsequently delete any items from such list. For the entire period during which an item was part of the notification issued under section 8(1)(b) of the Sales Tax Act, no adjustment of input tax could be claimed by a taxpayer.

issuance of Show Cause Notices and it is yet to be determined that whether all these goods and / or materials on which Input Tax is being claimed or has been claimed by the Petitioners, were used in the manufacturing of the taxable supplies made by them. Such determination is otherwise dependent on the factual plane, and therefore, even otherwise, we are not in a position to determine and adjudicate the same in our Constitutional Jurisdiction. The intent and purpose of 8(1)(h) & (i) of the Act and so also SRO-450 reflects that the Legislature has decided that these materials, which have been so notified, are not a direct constituent of a taxable supply, whereas, even otherwise it is settled in the case of ***AMZ Spinning*** that Input Tax Adjustment can even be denied on materials, which are a direct constituent of a taxable supply.

5. Respondent's Counsel had placed reliance on[8] which is a single bench judgment of the learned Lahore High Court wherein a similar challenge to vires of s.8(1)(h) & (i) had failed and in response the petitioner's Counsel argued that it has been set-aside in appeal[9]. However, on perusal of Appellate Courts judgment it transpires that it has not been set-aside; but modified in that the petitioners were required to respond to the show cause notices with directions to the adjudicating officer to interpret s.8(1)(h) & (i) on case to case basis after determining facts of each case without prejudice to the findings in this regard. We, respectfully do not agree with this part of the judgment of the Appellate Court inasmuch as the Appellate Court had already arrived at a contrary conclusion[10] after relying upon a judgment of the Hon'ble Supreme Court in the case of Attock Cement[11] and therefore, in such circumstances in our considered view adjudicating authority cannot take a contrary view once the Supreme Court and the High Court had already arrived at a conclusion that any input tax adjustment under s.7 of the Act is subject to s.8 ibid. Therefore, the opinion of learned single judge of the Lahore High Court in ***Nishat Mills***[12] is correct and applicable to the present facts before us.

6. Adding to this we (this Division Bench) have already decided this issue in case of Input Tax Adjustment on packing materials consumed by the zero rated industries under SRO 1125(I)/2011 vide Judgment dated 24.12.2020[13] and held

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[8] 2020 P T D 101 NISHAT MILLS LIMITED V. FEDERATION OF PAKISTAN
[9] 2020 P T D 1641 NISHAT MILLS LIMITED V. FEDERATION OF PAKISTAN
[10] 6. To reclaim (refund) and deduct (adjustment) input tax is a right subject to the provision of the Section 8, which disallow it, as a general rule, against goods which are not used for the purpose of taxable supplies. This right, as created by the Section 7, can be refused or denied even against goods used for the purpose of supply, if so specified in the official Gazatte.
[11] *1999 PTD 1892*. "9.......However, as already discussed above, such deduction is not permissible under section 8 if the Federal Government under a notification includes the accessories and spare parts in the goods within the meaning of section 8(1)(b) of the Act."
[12] 2020 PTD 101
[13] C.P No.D-6211/2016 & others (M/s. Liberty Mills Ltd. & others vs. Federation of Pakistan & others)

that notwithstanding the fact that packing material is a direct constituent of a taxable supply, in view of a non-obstante clause as well as in absence of any infirmity and or defect in the powers of the legislature to enact s.8(1)(b) of the Act, input tax adjustment or refund can be validly denied to a tax-payer in respect of such direct constituent. The same ratio applies herein in respect of s.8(1)(h) & (i)of the Act, and therefore, finding no substance in these Petitions, which otherwise are not maintainable as merely Show Cause Notices have been issued, we in the given facts and circumstances of these cases, on 24.11.2020, by means of a short order had dismissed these Petitions; and these are the reasons thereof.

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