

IN THE HIGH COURT OF SINDH AT KARACHI

**Present**

*Muhammad Shafi Siddiqui, J*

*Mahmood A. Khan, J*

**HCA No.47 of 2020**

*[Wahid Hussain v. Federation of Pakistan & Others]*

For Appellant: Mr. Abdul Rehman, Advocate  
For Respondent No.1: Mr. Kafil Ahmed Abbasi, DAG a/w  
Mr. Hussain Bohra,  
Asstt. Attorney General &  
Mr. M. Aqeel Qureshi, Advocate  
For Respondent No.2: Mr. Muhammad Bilal Bhatti,  
Advocate  
For Respondent No.3: Mr. Farmanullah Khan,  
Advocate  
Date of hearing: 09.12.2021

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**JUDGMENT**

**Muhammad Shafi Siddiqui J.**- The appellant being one of the plaintiffs in Suit No.825 of 2014 amongst others, has challenged the order of the learned Single Judge dated 20.1.2020 [reasons dated 22.1.2020], dismissing the application of the appellant for releasing the profit accrued on the amount deposited with the Nazir of this court in relation to the disputed sales tax amount.

2. Brief facts are that the appellant filed a suit for declaration of some of the provisions of Section 38 of the Sales Tax Act, 1990 as added by Sales Tax Amendment Ordinance, 2014 as being *ultra vires* to the provision of Section 3 of the Sales Tax Act, 1990. The disputed amount being recovered on the basis of such amendment was secured by the appellant with the Nazir of this court in compliance of order dated 30.05.2014 which was in pursuance of order passed in CP No.3266 of 2014 though the petition was dismissed on 20.10.2015 followed by dismissal of the suit on 30.3.2016. The principal amount available with the Nazir as being secured by the appellant was released to the respondent. The appellant thus claimed the amount of profit accrued on such investment since the

default surcharge has also been acknowledged by the department as contemplated under Section 34 of the Sales Tax Act, 1990.

3. It is the case of the appellant that under the regime of Sales Tax Act, 1990, only claim which could be legitimized is a claim of default surcharge apart from the principal amount of tax, which in fact was paid alongwith default surcharge, hence, the department could not have a lien on the subject amount being interest accrued while the amount remained with the Nazir under the orders of the court.

4. Learned DAG supports the contentions of the department and submits; had it [principal amount] been paid at the relevant time, the department would have enjoyed this investment and hence they are entitled for the entire amount including profit accrued alongwith the default surcharge.

5. Learned counsel for Respondent No.3/SSGC on the other hand stated that they are only a withholding agent of respondent No.1 whereas the judgment rendered by Division Bench of this court was approved by Hon`ble Supreme Court of Pakistan and the order may be passed as deemed fit and proper in accordance with law. SSGC however claimed to have deposited default surcharge over the sales tax deposited with the Nazir. This is the reason that no proceeding for recovery of default surcharge was initiated as stated before learned Single Judge. Mr. Muhammad Aqeel Qureshi, only marked his appearance and gave no logical reason to retain profit amount in addition to default surcharge already received as stated above by SSGC`s counsel.

6. It may be noted that neither any counter affidavit to the application filed before the learned Single Judge nor any response to the clear statement made by SSGC receiving principal and default surcharge as deposited by SSGC being withholding agent is made. Default surcharge was recovered and deposited by SSGC in lieu of recovery notice dated 26.12.2018 attached with CMA No.641 of 2020.

7. Heard counsel and perused the impugned order and record. It appears that learned Single Judge vide para 5 of the judgment has structured his reasoning that the appellant cannot justify the claim over the profit on the count that no proceedings were ever initiated by the department for levy and recovery of default surcharge under Section 34 of Sales Tax Act, 1990 and has agreed to the suggestion of learned DAG to such an extent.

8. The claim of Federal Board of Revenue is structured in terms of Sales Tax Act, 1990. Section 3 thereof is a charging section and in consequence of its denial, Section 11 of the Act would come into play on any of the event as disclosed therein. The entire machineries of Section 11 *ibid* is silent as far as the “interest” amount over the unpaid amount is concerned. Section 34, however, provides, notwithstanding the provisions of Section 11, when a registered person does not pay the tax due or any part thereof whether wilfully or otherwise in time in the manner specified in this Act, rules or notification issued thereunder or claims a tax created, refunds or makes an adjustment which is not admissible to him or incorrectly applied the rate of zero percent or supplies made to him, he shall in addition to the tax due, pay default surcharge at the rate prescribed. Even this mode of recovering default surcharge on the amount due is silent as far as interest [in addition to default surcharge] is concerned.

9. Learned Single Judge relied upon 6 Indian judgments and one of *Dilshad Hussain reported in 2005 SCMR 530*. All of them are distinguishable as under :

[i]. The case of *GTC Industries*<sup>1</sup> is misplaced in the sense that in terms of 11AA of the Central Excise and Salt Act, 1944 as added by the Finance Act, 1995, it provides interest on delayed payment of duty which was payable in addition to the duty at such rate as

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<sup>1</sup> GTC Industries Ltd v. Union of India (1998 ) 3 SCC 376

prescribed which is not the case here. Sales Tax Act, 1990 is based on default surcharge not interest.

[ii]. Similarly, in the case of *Jaipur Municipal Corporation*<sup>2</sup> no benefit of any interim order is being claimed by the appellant rather the principal amount alongwith default surcharge stood paid by virtue of an acknowledgement which is conceded by Mr. Aqeel Qureshi.

[iii]. In the case of *Ram Krishna Verma*<sup>3</sup> on the proposition that no one could suffer from the act of the court and that in case any interim order is obtained and advantage is assumed which was ultimately found to be without merit, the interest of justice requires that any undeserved or unfair advantage gained by the party invoking jurisdiction of the court must be neutralized. Perhaps the compensation as default surcharge in terms of such delayed or non-payment is recognized by the statute itself in terms of Section 34 of the Sales Tax Act, 1990 and this is the concept of neutralizing the situation. When the claim of the department was satisfied to the extent of default surcharge no further claim is recognized by Sales Tax Act, 1990. Here the appellant came to the court for declaration of amendment carried out in law, but considering a situation when the appellant defaulted on its own without resorting to the litigation in court, the department could have earned default surcharge only, as mandated by law.

[iv]. Similarly, the cases of *Mahadeo Savlaram Shelke*<sup>4</sup>, *Amarjeet Singh*<sup>5</sup> and *Karnataka Rare Earth*<sup>6</sup> are distinguishable on the same strength.

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<sup>2</sup> Jaipur Municipal Corporation v. C.L. Mishra (2005) 8 SCC 423

<sup>3</sup> Ram Krishna Verma v. State of U.P. (1992) 2 SCC 620

<sup>4</sup> Mahadeo Savlaram Shelke v. Pune Municipal Corporation (1995) 3 SCC 33

<sup>5</sup> Amarjeet Singh v. Devi Ratan and Ors. (2010) 1 SCC 417

<sup>6</sup> Karnataka Rare Earth and Anr. v. Senior Geologist, Department of Mines & Geology and Anr: (2004) 2 SCC 783.

10. In the case of *Dilshad Hussain*<sup>7</sup>, the employees/workers of the company were justified to have received the interest as there was no parallel mechanism of claiming default surcharge or interest /compensation on such payment as withheld, as in the case of Sales Tax Act, 1990.

11. The respondent cannot be allowed to have a cake and eat it at the same time. After first successful attempt of biting a cherry, the department had made a second attempt over it. If this mechanism is allowed to be justified, it would result in an unjust enrichment and benefitting the department. This is being treated as unjust enrichment in the sense that though the department has received the principal amount alongwith default surcharge as recognized under the law which has not been denied to have been deposited by the agent/SSGC, in terms of letter dated 15.02.2019, yet they opposed orally, the release of profit to appellant. The entities which are creation of statute must remain within the frame and perform within the frame of their law creating them, nothing more or nothing less is expected from such entities.

12. The upshot of the above discussion is that the appeal is allowed in the above terms and since the department has received principal amount and default surcharge as not denied throughout, the profit lying with the Nazir be released to the appellant.

**JUDGE**

**JUDGE**

Karachi;

Dated: 14.12.2021

Approved for reporting

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<sup>7</sup> Dilshad Hussain v. Islamic Republic of Pakistan (2005 SCMR 530)