

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Muhammad Shafi Siddiqui, J.
Agha Faisal, J.

HCA 259 of 2019 : *Getz Pharma (Pvt.) Limited vs. Fed of Pak & Others*
HCA 272 of 2019 : *Wilshire Laboratories (Pvt) Ltd. vs. Fed of Pak & Others*
HCA 277 of 2019 : *The Searle Company Limited vs. Federation of Pak & Others*
HCA 278 of 2019 : *Martin Dow Limited vs. Federation of Pakistan & Others*
HCA 279 of 2019 : *OBS Pakistan (Pvt) Limited & another vs. Fed of Pak & Others*
HCA 280 of 2019 : *Sami Pharmaceuticals (Pvt) Ltd& Others vs. Pak & Others*
HCA 281 of 2019 : *Searle (Pvt) Ltd. vs. Federation of Pakistan & Others*
HCA 282 of 2019 : *Barrett Hodgson (Pvt) Ltd. vs. Federation of Pakistan & Others*
HCA 284 of 2019 : *Macter International Limited vs. Fed of Pakistan & Others*
HCA 298 of 2019 : *Elko Organization (Pvt) Ltd. vs. Fed of Pakistan & Others*
HCA 320 of 2019 : *Frontier Dextose (Pvt) Ltd. vs. Fed of Pakistan & Others*
HCA 338 of 2019 : *Danas Pharmaceutical (Pvt) Ltd. vs. Fed of Pak. & Others*
HCA 04 of 2020 : *Genix Pharma (Pvt) Ltd. vs. Federation of Pak & Others*
CP D 6072 of 2017 : *MediFlow Pharmaceutical (Pvt) Ltd vs. Pak and Others*
CP D 7920 of 2017 : *MediFlow Pharmaceutical (Pvt) Ltd vs. Pak & Others*
CP D 2436 of 2018 : *MediFlow Pharmaceutical (Pvt) Ltd vs. Pak & Others*
CP D 2691 of 2018 : *Mediflow Pharmaceuticals Pvt Ltd vs. Pak & Others*
CP D 4429 of 2018 : *Mediflow Pharmaceuticals (Pvt) Ltd vs. Pak & Others*
CP D 2133 of 2019 : *Mediflow Pharmaceuticals (Pvt) Ltd vs. Pak & Others*
CP D 3229 of 2019 : *Mediflow Pharmaceuticals (Pvt) Ltd vs. Pakistan &Others*

For the Appellants /
Petitioners :

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Mr. Salman J. Mirza, Avocate
Mr. Hussain Idris, Advocate
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For the Respondents:

Mr. Kafeel Ahmed Abbasi, Deputy Attorney General
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Mr. Shahid Ali Qureshi, Advocate
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Mr. Zafar Imam, Advocate
Mr. Shakeel Ahmed, Advocate
Ms. Masooda Siraj, Advocate
Mr. Ali Qambar Askari, Advocate

Date/s of hearing : 06.10.2021 & 06.12.2021

Date of
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JUDGMENT

Agha Faisal, J. The crux of this determination is whether the import of packing material, used to store, market and distribute pharmaceutical products / drugs, is entitled to exemption from sales tax, as a “raw material”, in terms of Entry 105 to the 6th Schedule to the Sales Tax Act 1990 (“Act”).

This issue was determined in the negative in several suits¹ and high court appeals assailing the Impugned Judgment are before us. In addition thereto, several petitions were also preferred to agitate the said issue and the same are also before us. Per request of the learned counsel, the appeals and the petitions were heard and reserved conjunctively, hence, shall be determined vide this common judgment.

Pertinent facts

2. The controversy pertains to interpretation of Entry 105 to the 6th Schedule of the Act (“Entry 105”) and it is considered illustrative to initiate this discussion by reproducing the relevant provision herein below:

“Raw materials for the basic manufacture of pharmaceutical active ingredients and for manufacture of pharmaceutical products, provided that in case of import, only such raw materials shall be entitled to exemption which are liable to customs duty not exceeding ten per cent ad valorem, either under the First Schedule 1 [or Fifth Schedule] to the Customs Act, 1969 (IV of 1969) or under a notification issued under section 19 thereof.”

3. It was the case of the appellants (and also the petitioners herein) that packaging / packing material employed to contain pharmaceutical products, including without limitation cardboard, glass bottles, clear plastic and aluminum foil, ought to be extended the benefit of Entry 105 as *inter alia* without the same the relevant pharmaceutical products could not be distributed or sold.

Respective arguments

4. Per appellant’s / petitioners’ counsel², the decision arrived at vide the Impugned Judgment was erroneous and it was imperative that packaging be treated as raw material for the purposes of Entry 105 of the Act. This assertion was rested primarily on the arguments that the packaging ought to be considered as raw material used in the manufacture of pharmaceutical products; the said correlation is maintained and

¹ Vide Judgment dated 02.08.2019 (“Impugned Judgment”).

² Spearheaded by Mr. Muhammad Vawda, Advocate and followed by Mr. Salman J Mirza, Advocate.

the benefit of exemption is available under the Customs Act 1969; the definition of raw material ought to be given its wider dictionary meaning; the word “and” mentioned in Entry 105 may be read as “or”; and unless an item is expressly taxed the same cannot be subjected to levy via a denial of exemption.

5. The respondents’ case was articulated by Mr. Shahid Ali Qureshi and it was submitted that the Impugned Judgment merited no interference in appeal and that the petitions were devoid of merit. Learned counsel took us through the record to demonstrate that the points raised by the appellants / petitioners had been conclusively addressed by the learned Single Judge and that no exception to the reasoning has been identified by the appellants’ / petitioners’ counsel. In terms of assistance with regard to the law governing fiscal exemptions, it was argued that in Pakistan, as well as in India, there have been recent developments whereby the preference of the exchequer, in interpretation of exemption provisions, has been reiterated.

Scope of determination

6. Heard and perused. Since the arguments were primarily addressed in the context of the appeals, therefore, it is considered appropriate to render our findings therein and apply the same *mutatis mutandis* to the petitions under scrutiny. The respective learned counsel sought to argue the present matters at the *kutchha peshi* stage, with the assistance of the record and proceedings of the suits wherein the Impugned Judgment was delivered, hence, the matters were heard to length to adjudicate the solitary point for determination, framed in pursuance of *Order XLI Rule 31 of the Code of Civil Procedure 1908*, being:

“Whether the import of packing material, used in the manufacture of pharmaceutical products / drugs, is entitled to exemption from sales tax, as a “raw material”, in terms of Entry 105 to the 6th Schedule to the Sales Tax Act 1990.”

Exemption

7. The exemption per Entry 105 is worded to be applicable to raw materials for the basic manufacture of pharmaceutical active ingredients and for manufacture of pharmaceutical products. Pharmaceutical active ingredients are substances or combination of substances used in a finished pharmaceutical product, intended to furnish pharmacological activity or to otherwise have direct effect in the diagnosis, cure, mitigation, treatment or prevention of disease, or to have direct effect in

restoring, correcting or modifying physiological functions in human beings³. It is recorded that it was never the appellants' / petitioners' case that their items fell in the category of raw materials for the basic manufacture of pharmaceutical active ingredients, therefore, no deliberation is merited in such regard.

8. The next question is the core issue herein, being whether packaging / packing material falls within the definition of raw material for the manufacture of pharmaceutical products. The learned Single Judge has dwelled extensively on this issue and decided in the negative. It is our view that the appellants' / petitioners' counsel have remained unable to identify any infirmity with the rationale employed and the conclusion drawn by the learned Single Judge. However, it is considered imperative to independently test this issue upon the anvil illumined by the august Supreme Court in *Mahboob Industries*⁴.

9. The august Court was seized of a matter wherein exemption was being claimed in respect of packaging on the premise that the item to be ensconced therein was exempt from certain levies. The Supreme Court maintained that such exemption could not be allowed since the manufacturing activity of the packaging was distinct from that of the exempt product and further that the said activity could not be considered to be an inseparable part of the manufacture of the exempt product. It was also reiterated that an intermediary product by itself could not avoid chargeability if the same was not covered in an exemption provision⁵.

10. The packaging / packing material, exemption in respect whereof was sought, was physically demonstrated before us by the appellants' / petitioners' counsel and the items shown comprised of cardboard, glass bottles, clear plastic and aluminum foil. Applying the law illumined by the august Court in *Mahboob Industries* to the present facts and circumstances, we may safely conclude that no case could be set forth before us to consider the packaging / packing material as an inseparable part of manufacture of pharmaceutical products / drugs.

Correlation with Customs Act 1969

11. The learned Single Judge duly considered the argument of whether Entry 105 had an analogous correlation with the Customs Act 1969; and dismissed it while observing as follows:

³ Per definition employed by the World Health Organization; https://www.who.int/medicines/areas/quality_safety/quality_assurance/DefinitionAPI-QAS11-426Rev1-08082011.pdf.

⁴ Per *Faqir Muhammad Khokhar J* in *Collector of Customs vs. Mahboob Industries* reported as 2006 PTD 730.

⁵ *Adil Propylene Products Limited vs. Pakistan* reported as 2000 SCMR 1708.

“The argument which has been pressed upon vehemently on behalf of the Plaintiffs is that this Court must read the word “raw material” mentioned in Entry No.105 *ibid* so as to include the packing material which has been imported by the Plaintiffs. It is a settled principle of interpretation that while interpreting a specific provision of a statute, the intent of the legislature and the language employed is determinative of the legislative intent and the Courts have to interpret the same while keeping such intention in mind. It has been noted hereinabove that 5th Schedule to the Customs Act clearly provides for exemption/reduction in respect of packing material as well as raw materials for packing of pharmaceutical products, whereas, Entry No.105 of the 6th Schedule is silent to this effect. Therefore, this Court is not permitted to add anything in the said provision. The principle of “*Casus Omissus*” is squarely applicable here, that a matter which should have been, but has not been provided for in a statute cannot be supplied by Courts, as to do so will be legislation and not construction, [*Hansraj Gupta v. Dehra Dun Mussoorie Electric Tramway Co. Ltd.*, AIR 1933 PC 63]. A *Casus Omissus* can, in no case, be supplied by the Court of law as that would amount to altering the provision, [*Nadeem Ahmed Advocate v. Federation of Pakistan 2013 SCMR 1062*]. Moreover, in interpreting a penal or taxing statute the Courts must look to the words of the statute and interpret them in the light of what is clearly expressed. It cannot imply anything which is not expressed; it cannot import provisions in the statute so as to support assumed deficiency, [*Collector of Customs (Appraisement) v. Abdul Majeed Khan & Others 1977 SCMR 371*]. A statute is an edict of the Legislature and the conventional way of interpreting or construing a statute is to seek the “intention” of its maker. Once, the word “packing material” has been specifically left out against Entry 105 *ibid*, whereas, the same has been consciously inserted or provided in the 5th Schedule to the Customs Act, then, it makes it clear that the intention is not to grant any exemption of Sales Tax on the packing material; and at the same time it is granted for the purposes of Customs Duty. If a statutory provision is open to more than one interpretation the Court has to choose that interpretation which represents the true intention of the Legislature. It is settled law that the function of the Courts is only to expound and not to legislate.”

12. There is no cavil to the principle that while interpreting a specific provision of a statute, the intent of the legislature and the language employed is determinative of the legislative intent and the same may primarily be gleaned from the pertinent statute itself. It is apparent that the exemption permissive *vide* the Customs Act 1969 is not *pari materia* to that within the Act, *inter alia* since packing material / constituents thereof is expressly mentioned in the Customs Act 1969 while being conspicuously omitted in the Act. Learned counsel for the appellants / petitioners have remained unable to identify any infirmity with the findings of the learned Single Judge in this respect as well.

Dictionary definition

13. The appellants' / petitioners' counsel sought to widen the scope of the exemption, conferred *vide* Entry 105, by relying upon generic dictionary meanings to define the phrase “raw materials”. This aspect was considered and refused in the Impugned Judgment by concluding as follows:

“... the precise arguments of the learned Counsel for the Plaintiffs are to the effect that packing material, which is specifically imported for packing of pharmaceutical products falls within the term “raw material” as used in Entry No.105 of the 6th Schedule. On the other hand, the Defendants’ argument is that these packing materials do not qualify and it is only basic raw materials, which are entitled for exemption. One of the learned Counsel appearing on behalf of the Plaintiff in Suit No. 2067/2016 has placed reliance on the definition of “manufacture”, as provided in Section 2(16) of the Act, and has submitted that the process and operation of assembling, mixing, cutting, dilating, bottling, packaging, repacking or preparation of goods in any other manner falls within the term “manufacture” as defined in the Act itself, and therefore, the packaging process of pharmaceutical products is entitled for the above exemption. To this argument, it may be observed that the same has no relevance for the present purposes, whereas, even otherwise, this contention does not appear to be correct and in fact it is the inverse, as apparently, the definition of “manufacture” has been given in the Act to include the activity of packaging as a taxable activity and for such purposes, a broad definition of any sort of packaging has been defined as “manufacture”, which resultantly makes such activity as taxable under the Act. In fact, it caters to the activity (packaging) independently, being carried out by packaging companies, which by itself, do not manufacture any products; but render their services as packaging companies to third parties. In view of such position, this argument is hereby repelled.”

14. It may be pertinent to consider at the very onset and insistence upon consideration of generic dictionary definitions could denote that the proposed definition is alien to the pertinent statute itself. The relevant definition provisions, inclusive of Sections 2 (d), (q) and (af), duly cater for the exigencies pertinent to the Act and no case stood made out to disregard the statutory explanations, apparently in harmony with the scheme of the law for the present purposes, and adopt some generic definition foreign to the statute itself.

Read “and” as “or”

15. It is well settled law that where a statute has provided for a particular thing to be done in a specific manner then it is to be done in that manner and that the role of courts is not designed to legislate but interpret statutes according to their ordinary and plain meaning and not import and or supply words or provisions⁶, no matter how laudable and desirable it may appear to be⁷. A court of law is not ordinarily entitled to read words into an act of Parliament⁸ and it must be appreciated that a court cannot put into an Act words which are not expressed and which cannot be reasonably implied on any recognized principle of construction⁹.

⁶ *AKD Investment Management Limited & Others vs. JS Investment Limited & Others* reported as 2020 CLD 596.

⁷ *Zahid Iqbal vs. Hafiz Muhammad Adnan & Others* reported as 2016 SCMR 430.

⁸ *Nadeem Ahmed Advocate vs. Federation of Pakistan* reported as 2013 SCMR 1062.

⁹ *Amanullah Khan vs. Chief Secretary NWFP & Others* reported as 1995 SCMR 1856.

16. The learned Single Judge had considered the import of *Shazeb*¹⁰ and maintained that even if the exemption is considered to be available to both categories of manufacture, i.e. disjunctively, it did not merit any favor to the appellants' case. We find ourselves to be in concurrence in such regard.

17. Respectfully, it is our considered view that even if we were to read *and* as *or*, as suggested by the appellants' / petitioners' counsel, no benefit would accrue in favor of the appellants / petitioners as we have already observed supra that no case has been set forth before us to befall packaging / packing material within the ambit of raw material for manufacture of pharmaceutical products.

Interpretation of fiscal statutes

18. It is trite law that interpretation of a fiscal statute has to be made strictly and any doubts arising from the interpretation of a fiscal provision must be resolved in favor of the taxpayer¹¹. A Division Bench of this Court had observed in *Citibank*¹² that it is a fundamental principle of interpreting fiscal statutes that there is no intendment or equity with regard to the charging provision, which must be applied as they stand. Appellants' / petitioners' counsel relied upon the *PTV* case to substantiate that even in so far as exemption provisions were concerned, credence had to be given to the tax payer.

19. The *PTV* case considered the interpretation of exemption provisions and illumined that when a tax is clearly imposed by a statutory provision any exemption from it must be clearly expressed in the statute or clearly implied from it; where the taxpayer claims the benefit of such express or implied exemption, the burden is on him to establish that his case is covered by the exemption; the terms of the exemption ought to be reasonably construed; and if a taxpayer is entitled to an exemption on a reasonable construction of the law it ought not to be denied to him by a strained, strict or convoluted interpretation of the law.

20. Applying the aforementioned enunciation of law to the present circumstances we find that there is no exemption in respect of packaging expressed / implied in Entry 105; the appellants / petitioners have remained unable to discharge the burden to establish their claim for exemption within the verbiage of Entry 105; there is no cavil to the Impugned Judgment having construed the exemption conferred vide Entry 105 correctly; and no case has been set forth before us to consider the appellants /

¹⁰ *Shazeb Pharmaceutical Industries Limited vs. Pakistan* reported as 2015 PTD 1532.

¹¹ *Pakistan Television v. CIR*, reported as 2019 SCMR 282 ("PTV"); reiterating *Pakistan Television v. CIR* reported as 2017 SCMR 1136.

¹² Per *Munib Akhtar J* in *Citibank NA vs. Commissioner Inland Revenue* reported as 2014 PTD 284; cited with approval by the honorable Supreme Court in *Pakistan Television*.

petitioners being entitled to exemption pursuant to Entry 105, upon reasonable construction thereof.

21. Notwithstanding our observation supra, it is pertinent to observe that in an apparent, subsequent in time, departure from the appellants' / petitioners' interpretation of the *PTV* case, the august Court has held in *Fitter Pakistan*¹³ that even if an exemption provision was susceptible to two interpretations, the one in favor of the exchequer was to be preferred.

Our attention was also solicited to a contemporary edict¹⁴ of the Indian Supreme Court wherein the pertinent law was revisited and it was held that while the benefit of any ambiguity in a fiscal statute, in so far as chargeability is concerned, may inure to the benefit of the assessee, however, an ambiguity with respect of an exemption clause must be resolved in favor of revenue. The august five member bench, while overruling the earlier view conferring primacy upon the assesses even in exemption matters as enunciated *inter alia* by a three member bench in *Sun Exports*¹⁵, held that an exemption may only be allowed to an entity that has demonstrated that its case fell squarely within the parameters enumerated in the relevant instrument itself and that all conditions precedent had been duly satiated.

22. Suffice to state that no case was set forth before us in any event to consider Entry 105 susceptible to two interpretations, therefore, even on the anvil of the earlier *PTV* case no case was made out before us to consider the case for an exemption, conspicuously absent from the Act itself.

Conclusion

23. Entry 105 extends a benefit in respect of raw materials for the basic manufacture of pharmaceutical active ingredients and for manufacture of pharmaceutical products. The claim of the appellants / petitioners admittedly does not fall into the prior category and no case has been set forth before us to interfere in the findings of the learned Single Judge, whereby it has been determined that the said claim did not fall within the latter category either. It is observed that while there appears to be no cavil to consider packaging / packing material chargeable to tax per the Act, no case has been made out to consider exemption for the same within the parlance of Entry 105. Therefore, the question framed for determination supra is answered accordingly and in the negative.

¹³ Per Umar Atta Bandial J in *Collector of Customs FBR vs. Fitter Pakistan (Pvt.) Ltd.* reported as 2020 SCMR 1157.

¹⁴ *Commissioner of Customs (Imports) vs. Dilip Kumar and Company* reported as TS-421-SC-2018.

¹⁵ *Sun Export Corporations vs. Collector of Customs* reported as (1997) 6 SCC 564.

24. In view of the reasoning and rationale herein, we are of the considered view that no interference is merited in the Impugned Judgment, which is hereby maintained and upheld. The present High Court appeals are found to be devoid of merit, hence, dismissed along with all pending applications. As a corollary hereof, the listed petitions, along with pending applications, are also dismissed.

JUDGE

JUDGE