THE HIGH COURT OF SINDH KARACHI

Suit No. 03 of 2019

[Amsons Textile Mills (Pvt.) Ltd. versus Federation of Pakistan & others]

Plaintiff	:	Amsons Textile Mills (Pvt.) Limited through Mr. Mushtaque Hussain Qazi, Advocate.
Defendant 1	:	Nemo.
Defendant 2	:	The Chief Commissioner Inland Revenue through Dr. Shahnawaz Memon Advocate.
Defendant 3	:	The Commissioner Inland Revenue through Mr. Muhammad Aqeel Qurashi, Advocate.
Defendant 4	:	Sui Southern Gas Company Ltd., through Mr. Haider Naqi, Advocate.
Defendant 5	:	Nemo.
Dates of hearing	:	15-01-2021 & 26-01-2021
Date of decision	:	05-05-2021

JUDGMENT

Adnan Iqbal Chaudhry J. - Aggrieved of the withdrawal of its zero-rated facility by the Federal Board of Revenue, the Plaintiff prays as follows:

> *"i) declare that the plaintiff is a textile industry engaged in the business of manufacturing textile products and duly registered as textile manufacturer with the Ministry of Textile Industry, Government of Pakistan, APTPMA and S.I.T.E., Karachi;*
>
> *ii) declare that the plaintiff falls within the category of textiles and qualifies for zero-rating in terms of SRO 509 (1)/ 2007 dated 09.07.2007 read with SRO 1125 (1)/ 2011 dated 31.12.2011;*
>
> *iii) direct the Defendant no. 1 to restore the zero-rating status of the Plaintiff and the Defendant no.4 and 5 to charge sales tax from the Plaintiff at zero rate;*
>
> *iv) direct the Defendant no.4 to charge the sale price of gas from the Plaintiff, being textile manufacturer, at the rate as is applicable to registered textile manufacturers;*

v) declare and direct that the Defendants that they do not have any lawful authority to withdraw the facility of zero-rating of sales tax of the plaintiff without issuance of any show cause notice;

vi) set aside and quash STGO No.10 of 2015 dated 22.01.2015 and impugned STGO No. 11 of 2015 dated 22.01.2015 issued by the Defendant No.1;

vii) Grant any other relief …….. ; and

viii) Grant costs of the suit."

2. Pursuant to Sales Tax General Order [STGO] No. 07/2007 and STGO No. 16/2007 issued by the FBR (Defendant No.1) under the erstwhile clause (d) of section 4 of the Sales Tax Act, 1990, the Plaintiff was enjoying a zero rate of sales tax on electricity and gas supplied by the K-Electric Ltd. and SSGC (Defendants 5 & 4) to the Plaintiff's textile for the purposes of manufacturing goods. On 15-01-2015, the Incharge, Intelligence Investigation and Prosecution Branch issued notice to the Plaintiff under section 11-A of the Sales Tax Act, 1990 asserting that on a physical verification it was found that the Plaintiff had been misusing the zero-rated facility and is thus liable to pay the evaded sales tax of Rs. 157,611,187/-. Resultantly, on the recommendation of the RTO, the FBR issued STGO No. 10/2015 and STGO No. 11/2015, both dated 22-01-2015, to withdraw the zero-rated facility of the Plaintiff (the impugned STGOs).

3. The aforesaid notice dated 15-01-2015 issued by the Incharge, Intelligence Investigation and Prosecution Branch under section 11-A of the Sales Tax Act, and the impugned STGOs issued by the FBR were challenged by the Plaintiff before a Division Bench of this Court by way of C.P. No. D-713/2015 on grounds *inter alia* that section 11-A of the Sales Tax Act was not attracted; that the notice dated 15-01-2015 did not specify the alleged misuse; and that the impugned STGOs were without providing the Plaintiff an opportunity of a hearing.

4. On 11-02-2015, the following interim order was passed in C.P. No. D-713/2015:

> "In the meanwhile the operation of the impugned STGO No. 10/2015 and STGO No. 11/2015, both dated 22.01.2015, shall remain suspended till the next date of hearing in respect of petitioner. The petitioner may submit response to the impugned show cause notice issued under Section 11-A of the Sales Tax Act, however, no final order shall be passed in this regard till the next date of hearing."

C.P. No. D-713/2015 was eventually disposed of by the learned Division Bench on 12-10-2015 with the following order:

> "After arguing the matter at length, counsel for the petitioner has pointed out that though the Show Cause Notice dated 15.1.2015 did not reason out the alleged misuse of the facility of zero rating of Sales Tax entitling the respondents from withdrawing the benefit of the SRO 1125 (1)/ 2011) dated 31.12.2011 through issuance of STGO dated 22.1.2015, however, after filing the instant petition and after receiving the comments of the respondents, a detailed response to the show Cause Notice dated 15.1.2015 has been submitted by the petitioner on 17.02.2015, however, since an interim order is operating, therefore, final order could not be passed.
>
> By consent while we disposing of this petition direct the respondents, after providing an opportunity of hearing to the petitioner, to pass final order pursuant to Show Cause Notice dated 15.01.2015 strictly in accordance with law within 30 days hereof.
>
> Petition stands disposed of in the above terms alongwith the listed applications."

5. Pursuant to the above mentioned final order dated 12-10-2015 passed in C.P. No. D-713/2015, the Incharge, Intelligence Investigation and Prosecution Branch, who was also Audit Officer Inland Revenue, passed Order-in-Original No. 03/2016 dated 21.01.2016 to hold that the Plaintiff had misused the zero rate on the supply of electricity and gas by using such supply for its canteen, which was not the purpose of the zero-rated facility, and hence violated the provisions of the Sales Tax Act, 1990. The sales tax on electricity and gas consumed in the Plaintiff's canteen was worked out as Rs. 617,443/- plus default surcharge under section 34(1) and penalty under section 33(5) of the Sales Tax Act, 1990. The Order-in-Original recited that it was appealable under section 45-B of the Sales Tax Act, 1990 before the Commissioner Appeals. During the hearing of the instant suit it was disclosed by learned counsel for the Plaintiff

that an appeal had been preferred by the Plaintiff; that the matter was presently in appeal before the Appellate Tribunal Inland Revenue; and that the liability determined under the Order-in-Original had been paid/adjusted by the Plaintiff.

6. It was on 01-01-2019 that the Plaintiff filed the instant suit. Apart from challenging the impugned STGOs dated 22.01.2015, whereby the Plaintiff's zero-rated facility was withdrawn by the FBR, the plaint also averred that from October 2018 onwards the SSGC (Defendant No.4) had billed the Plaintiff for natural gas in excess of the tariff applicable to the Plaintiff. It is to be noted that pending suit, clause (d) of section 4 of the Sales Tax Act,1990, which empowered the FBR to specify a zero rate of sales tax on certain goods by way of an STGO, was omitted by the Finance Act, 2019 effective 01-07-2019.

7. Only the SSGC (Defendant No.4) filed written statement. The other Defendants were eventually debarred by order dated 10-11-2020, where after the suit came up for settlement of issues. On a perusal of the pleadings, the following issues arise for determination of the suit :

(i) Whether the suit is maintainable to challenge STGOs No. 10/2015 and 11/2015 issued by the FBR to withdraw the zero-rated facility granted to the Plaintiff ? If so, whether the impugned STGOs are unlawful ?

(ii) Whether the suit is maintainable to challenge consumer classification under the gas tariff notification ? If so, whether the Plaintiff qualifies to be classified amongst consumers described as *"Registered manufacturers or exporters of five zero-rated sectors and their captive power namely: Textile ……."* ?

(iii) To what relief, if any, is the Plaintiff entitled to ?

Learned counsel agreed that the above issues can be decided on the basis of the record without the need to record further evidence.

Therefore, in view of Order XV Rule 3 CPC, the suit was heard for final judgment.

Issue No.(i):

8. The impugned STGOs (No. 10/2015 and 11/2015 dated 22-01-2015) to withdraw the zero-rated facility from the Plaintiff were issued by the FBR on being communicated by the RTO that the zero-rated facility had been misused, and that notice dated 15.01.2015 under section 11-A of the Sales Tax Act had been issued by the department to the Plaintiff. By order dated 12-10-2015 passed in C.P. No.D-713/2015, the High Court treated the notice dated 15-01-2015 as a show-cause notice, and required the department to decide the same. Pursuant thereto, the Incharge, Intelligence Investigation and Prosecution Branch passed Order-in-Original No. 03/2016 dated 21.01.2016 and maintained that the Plaintiff was liable for misusing the zero-rated facility granted to it by the FBR.

9. The plaint of the suit did not disclose the Order-in-Original No. 03/2016, nor that such order is subject matter of an appeal pending before the Appellate Tribunal Inland Revenue. To answer that, Mr. Mushtaque Qazi, learned counsel for the Plaintiff submitted the suit does not impugn the Order-in-Original, rather it impugns STGOs No. 10/2015 and 11/2015 whereby the FBR had withdrawn the zero-rated facility; that the matter of the Order-in-Original passed by the Incharge, Intelligence Investigation and Prosecution Branch, and the matter of the impugned STGOs issued by the FBR were separate; that while the Plaintiff availed the remedy of an appeal against the Order-in-Original as prescribed by the Sales Tax Act, an appeal against the impugned STGOs is not available under the Sales Tax Act, 1990, hence the suit. However, learned counsel submitted that since gas was/is the primary source of energy for the Plaintiff's textile, it does not agitate any further STGO No.10/2015 which was for the withdrawal of the zero-rated facility on supply of electricity. Learned counsel pointed out that after the Plaintiff had adjusted/paid the

liability of sales tax determined by the Order-in-Original, the Chief Commissioner Inland Revenue had recommend to the FBR by letter dated 03.04.2019 that the Plaintiff's zero-rated facility should be restored. Learned counsel submitted that the challenge to the impugned STGO is without prejudice to the submission before the Appellate Tribunal that the very notice dated 15-01-2015 on which the Order-in-Original was passed, was without lawful authority and void. When confronted with the omission of clause (d) of section 4 of the Sales Tax Act, 1990 by the Finance Act, 2019, learned counsel submitted that in view of section 6 of the General Clauses Act, 1897 a direction can still issue to the FBR to give effect to the zero-rated facility uptill the omission of clause (d) of section 4 of the Sales Tax Act, 1990.

10. Mr. Aqeel Qureshi, learned counsel for the Defendant No.3 (Commissioner Inland Revenue) submitted that the FBR had withdrawn the Plaintiff's zero-rated facility because the Plaintiff had misused the same, and that such withdrawal was within the domain of the FBR. Dr. Shahnawaz Memon, learned counsel for the Defendant No.2 (Chief Commissioner Inland Revenue) submitted that even if the Chief Commissioner Inland Revenue had recommended the restoration of the Plaintiff's zero-rated facility, such recommendation was not binding on the FBR; that along with the Order-in-Original No. 03/2016, the remedy against the impugned STGOs was also before the Appellate Tribunal Inland Revenue, and thus the suit was not maintainable; and that in any case, after the omission of clause (d) of section 4 of the Sales Tax Act, 1990, the suit had become infructuous.

11. Heard the learned counsel and perused the record.

12. It cannot be argued by the Plaintiff that the FBR was devoid of the power to withdraw the zero-rated facility by issuing the impugned STGOs. The erstwhile clause (d) of section 4 of the Sales Tax Act, 1990 which empowered the FBR to issue STGO to specify a

zero rate of sales tax on supply of specific goods, also implied the concomitant power to withdraw such zero-rated facility. That much follows by virtue of the doctrine of *locus poenitentiae* embodied in section 21 of the General Clauses Act, 1897 as under:

> "**21. Power to make to include power to add, to amend, vary or rescind orders, rules or bye-laws.—** Where by any Central Act or Regulation a power to issue notifications, orders, rules, or bye-laws is conferred, then that power includes a power exercisable in the like manner and subject to the like sanction and conditions (if any) to add, to amend, vary or rescind any notifications, orders, rules or bye-laws so issued."

13. STGOs No. 07/2007 and 16/2007 by which the zero-rated facility was granted to the Plaintiff in the first place, were on the condition that the zero-rated electricity and gas is consumed only in the manufacture of specified goods. Admittedly, the impugned STGOs were issued by the FBR on receiving information from the RTO that the zero-rated facility was being mis-used by the Plaintiff. Therefore, it also cannot be argued by the Plaintiff that the impugned STGOs were unwarranted.

14. As noted above, the Plaintiff had earlier preferred C.P. No.D-713/2015 before a Division Bench of this Court to challenge not only the notice dated 15-01-2015 issued under section 11-A of the Sales Tax Act, but also to challenge the same STGOs that are now impugned in this suit. The prayer made in C.P. No. D-713/2015 included the following:

> *"i) …….*
> *ii) …….*
> *iii) …….*
> *iv) Declare that the use of the electricity and gas in the premises of the mills for office, canteen and other places is not the misuse of electricity and gas;*
>
> *v) Declare that the impugned show cause notice dated 15.01.2015 issued by the Respondent No.5 and impugned STGO No.10 and 11 of 2015 both dated 22.01.2015 are arbitrary, capricious, illegal, mala fide, unlawful and nullity in the eye of law and of no legal effect;*

vi) Direct the Respondent No.1 to restore the zero-rating of the Petitioner by rescinding the impugned show cause notice and the impugned STGOs';
vii) …….
viii) …….

ix) Prohibit and restrain the Respondents, their officers/ subordinates or any other person including Respondent No.3 from taking any adverse action against the Petitioner including the recovery of sales tax on the basis of impugned show cause notice and the STGOs;

x) Declare that the Respondents have no lawful authority to withdraw the facility of zero-rating of sales tax of the Petitioner on the basis unfounded ground;

xi) Set aside and quash impugned show cause notice dated 15.01.2015 and impugned STGO No.10 of 2015 dated 22.01.2015 and impugned STGO No.11 of 2015 dated 22.01.2015 issued by the Respondent 5 and 1;
xii) ……..
xiii) …….."

None of the above prayers were granted by the Division Bench. The order dated 12-10-2015 disposing of C.P. No. D-713/2015 manifests that the Division Bench was of the view that the impugned STGOs could not be challenged as long as there was an allegation of misuse of the zero-rated facility; and that is why the learned Division Bench directed the department to determine such allegation by treating the notice dated 15-01-2015 issued under section 11-A of the Sales Tax Act as a show-cause notice. Notably, the Plaintiff had consented to the passing of said order by the High Court, in other words conceding that a challenge to the impugned STGOs did not lie until it was finally determined in the tax hierarchy that the Plaintiff had not misused the zero-rated facility. The Order-in-Original No.03/2016 that followed maintained that the Plaintiff was liable for mis-using the zero-rated facility. Though the Plaintiff may have deposited the liability of sales tax so determined, the finding of mis-use of the zero-rated facility is still intact *albeit* in appeal before the Appellate Tribunal Inland Revenue as admitted by learned counsel for the Plaintiff. In other words, the order dated 12-10-2015 passed in C.P. No. D-713/2015 still holds the field and nothing has changed

thus far to give the Plaintiff a fresh cause of action against the impugned STGOs.

15. Though it is correct that the Sales Tax Act, 1990 did not provide a special remedy to the Plaintiff against the FBR for issuing the impugned STGOs (withdrawal of the zero-rated facility), the Plaintiff did avail a remedy by filing C.P. No.D-713/2015 wherein the challenge to the impugned STGOs remained unsuccessful, in that, when none of the prayers against the impugned STGOs were granted, those would be deemed to have been refused[1]. Thus, the instant suit for the same relief would be barred by constructive *res-judicata* and the doctrine of election. That the general principles of *res-judicata* debar a party from re-agitating a matter by way of a civil suit when the same has been dealt with by the High Court in writ jurisdiction, is law that had been settled by the Supreme Court as far back as the case of *Muhammad Chiragh-ud-Din Bhatti v. The Province of West Pakistan* (1971 SCMR 447) as follows:

> "Even if section 11 of the Civil Procedure Code may not, in terms, apply in support of the plea of *res judicata*, it can hardly be disputed that the general principles of *res judicata* are clearly attracted to debar a party from re-agitating the matter afresh by a civil suit, which had been put at rest by a judgment of the High Court passed in writ jurisdiction. The civil court could not have by-passed or over-ridden the order of the High Court competently made in another jurisdiction on the same subject between the same parties."[2]

The doctrine of election also emerges from the principles of *res-judicata* as dilated by the Supreme Court in *Trading Corporation of Pakistan v. Devan Sugar Mills Ltd.* (PLD 2018 SC 828) as follows:

> "The moment suitor intends to commence any legal action to enforce any right and or invoke a remedy to set right a wrong or to vindicate an injury, he has to elect and or choose from amongst host of actions or remedies available under the law. The choice to initiate and pursue one out of host of available concurrent or co-existent proceeding/ actions or remedy from a forum of competent

[1] This principle is also embodied in Explanation V of section 11 CPC.
[2] That principle was reiterated in *Abdul Majid v. Abdul Ghafoor Khan* (PLD 1982 SC 146) and *Zainab v. Muni* (2004 SCMR 1786).

jurisdiction vest with the suitor. Once choice is exercised and election is made then a suitor is prohibited from launching another proceeding to seek a relief or remedy contrary to what could be claimed and or achieved by adopting other proceeding/action and or remedy, which in legal parlance is recognized as doctrine of election, which doctrine is culled by the courts of law from the well-recognized principles of waiver and or abandonment of a known right, claim, privilege or relief as contained in Order II, rule (2) C.P.C., principles of estoppel as embodied in Article 114 of the Qanun-e-Shahadat Order 1984 and principles of res-judicata as articulated in section 11, C.P.C. and its explanations."

16. To conclude: by prayer clauses (i), (ii), (iii), (v) and (vi) of the suit the Plaintiff seeks essentially the same relief as earlier sought in C.P. No. D-713/2015 against the same STGOs, which relief was not granted by the High Court. Resultantly, said prayers of the suit are barred by constructive *res-judicata* and the doctrine of election. Having concluded so, I need not advert to the effect on the suit by the omission of clause (d) of section 4 of the Sales Tax Act, 1990 by the Finance Act, 2019. Issue No. (i) is answered accordingly.

Issue No. ii:

17. This issue emanates from the second leg of the suit and prayer clause (iv). It is the Plaintiff's case that under the gas tariff notification dated 04-10-2018 as amended by notification dated 18-10-2018, the Plaintiff falls under the category of consumers described as "*Registered manufacturers or exporters of five zero-rated sectors and their captive power namely: Textile …….*" where the tariff is Rs. 600 per MMBTU; whereas from October 2018 the SSGC billed the Plaintiff @ Rs. 780 per MMBTU as applicable to consumers described as '*General Industrial*'.

18. It appears that the Plaintiff's classification by the SSGC as a '*General Industrial*' consumer instead of a '*Registered manufacturer or exporter of five zero-rated sectors…….*' for the purposes raising gas bills, is a consequence of the withdrawal of the zero-rated facility from the Plaintiff pursuant to the impugned STGOs. Therefore, the relief sought in prayer clause (iv) is only consequential to the main relief

sought against the impugned STGOs. Since the suit is not maintainable for the main relief, it cannot be considered independently for the consequential relief. If the Plaintiff is of the view that the withdrawal of the zero-rated facility has no bearing on its eligibility as a *'Registered manufacturer or exporter of five zero-rated sectors …….'*, then the issue raised by it is in the nature of a billing dispute. For that a special remedy before a special forum is provided under the 'Complaint Resolution Procedure for Natural Gas, Liquefied Petroleum Gas (LPG), Compressed Natural Gas (CNG) and refined oil products Regulations, 2003' as framed under the Oil and Gas Regulatory Authority Ordinance, 2002. Therefore, the suit is also not maintainable for prayer clause (iv). Issue No. (ii) is answered accordingly.

Issue No. iii:

19. Having concluded above that the suit is not maintainable for any of the relief sought, the same is dismissed along with pending applications.

JUDGE

KARACHI:
DATED: 05-05-2021