

IN THE HIGH COURT OF SINDH AT KARACHI

HCA No. 357 of 2017

Deputy Commissioner Inland Revenue Services (AEC) & others

.....V.....

M/s. Clariant Pakistan Limited

Dates of Hearing : 05.10.2022 & 20.10.2022
Appellants through : Mr. Kafeel Ahmed Abbasi, Advocate.
Mr. M. Ishaque Pirzada, Advocate.
Respondent through : Mr. Aijaz Ahmed Zahid, Advocate.

ORDER

Zulfiqar Ahmad Khan, J:-This appeal challenges the Judgment and Decree passed in Suit No. 1663 of 2009 where the core issue as to whether the colouring compounds commercially known as “Masterbatches” locally manufactured, imported or locally supplied by the Plaintiff are zero-rated under entry No.66 of SRO 509(I)/2007 dated June 9, 2007 as amended by SRO 163(I)/2011 dated March 2, 2011 was decided in affirmative and suit was decreed.

2. Per learned counsel the suit itself had question of maintainability under Section 51 of the Sales Tax Act, 1990 in particular in the presence of the judgment penned down in the case of HCA No. 263/2016 (Collector of Model Customs Collectorate v. Naveena Industries Ltd) (2017 PTD 2123) where it was held that *“When there is no mala fide on the part of Customs Authorities nor there is any jurisdictional defect in decision/orders passed under S.80 of Customs Act, 1969, there is no justification to abandon and by-pass statutory forums and no suit can be filed before High Court while exercising jurisdiction and powers of a civil Court”*.

3. Brief background of the controversy at hand is that the plaintiff claimed to be engaged in the business of manufacturing and import of chemicals including colouring and preparation of textile leather, paper and plastic industry, so also dealing in pigment used in Masterbatches preparation, which is a highly concentrated pigment. Masterbatches classified in HS Code as 3206.4910 were usually imported by the plaintiff having been declared at zero-rated for the purpose of levy of sales tax, however, in due course the plaintiff was confronted with two notices available at page 243 & 287 dated 06.11.2009 and 10.11.2009 respectively wherein allegations were levelled that the plaintiff have been misdeclaring its goods under HS Code 3206.4900 (instead of 3206.4910) which classification was removed from zero-rated vide SRO 1059(I)/2007 dated 25.10.2007 "SRO 1509", therefore, it has caused loss to the national exchequer. The plaintiff filed the abovementioned suit and vide detailed judgment the learned Single Judge not only decreed the suit in favour of the plaintiff rather defendants were directed to consider the refund claim of the plaintiff within the parameter of law.

4. Learned counsel for the appellant submits that the complexity posed through various SROs has not been suitably adjudicated and the issue No.1 which did not pertain to SRO 504(I)/2013, has been decided on the basis of the said SRO, whereas, the issue framed only pertained to SRO 509(I)/2007 and SRO 163(I) of 2011 and with regard to issue No.2, learned counsel alleged that the judgment has travelled beyond the scope of the prayers, and order with regard to refund of the earlier claims were not even part of the prayers, therefore, the judgment and decree be set aside. Mr. Abbasi further

articulated that the suit of the respondent company was not maintainable and could only have been entertained on the condition that a minimum of 50% of the tax calculated by the tax authorities/appellant was deposited with the appellant as directed by the Hon'ble Supreme Court, so that on conclusion of the suit, according to the correct determination of the tax due or exempt (as the case may be) the same could have been refunded or the remaining balance was to be paid. In this respect he placed reliance on 2018 SCMR 1444 (Searle IV Solution Pvt. Ltd. v. Federation of Pakistan & others). Mr. Abbasi reiterated that since the said judgment of the Hon'ble Supreme Court is in field and the same is binding in nature, therefore, the suit filed by the respondent company ought to have been dismissed or the respondent was to be directed to deposit 50% of the tax calculated by the appellant in view of the above judgment. He further contended that respondent/plaintiff failed to show which of his rights have been infringed by the appellant/defendant, which it failed. The action taken by the appellant/defendant, per learned counsel was fit and proper, and in accordance with the provisions of the Sales Tax Act, 1990. It was not denied that a letter dated 23.07.2008 was issued to the respondent/plaintiff indicating therein that the Masterbatches fall under PCT heading No.3206.4910 which was not zero rated in terms of SRO 621(I)/2005 dated 17.06.2005 & SRO 525(I)/2006 dated 05.06.2006.

5. He further contended that respondent/plaintiff vide letter dated 28.08.2008 had wrongly clarified that the material supplied fell within the description of "colouring matter and other preparation"

and wrongly classified the said materials to be falling under PCT heading No.3206.4900 and covered by SRO621(I)/2005 dated 17.06.2005 and SRO525(I)/2006 dated 05.06.2006, while the product “Masterbatches” supplied by the respondent/plaintiff has been separately classified under PCT heading No.3206.4910 and not covered under SRO.621(I)/2005 and SRO 525(I)/2006. He further contended that letters dated 06.11.2009 and 10.11.2009 issued by the appellant/defendant are according to the provisions of law and SRO 509(1)/2007 by virtue of SRO 1059(I)/2007 having changed the description of the goods covered by the zero rated entry 66, and accordingly the legal position relating to Masterbatches changed and these goods no longer remained zero rated. He further contended that the learned Single Judge travelled beyond the scope of the issues and pleadings by relying upon the SRO 504(I)2013 whereby the amendments were made in SRO 1125(I)/2011 which had no nexus and relevancy with the issues. With regards issue No.2, he contended that the respondent/plaintiff never made any prayer with regards the alleged refund of sales tax in the pleadings, nor made any prayer for the refund, therefore, allowing the prayer beyond the pleadings/prayers was not legally sustainable, hence, the impugned Judgment and Decree is liable to be set aside on this sole score too. He further contended that vide SRO 1059(I)2007 issued by the Federal Government that made amendments in SRO 509(I) 2007, on account of which the main PCT heading 3206.4910 was substituted by 3206.4990 which excluded registered persons’ goods from the zero rated regime, however, thereafter, another SRO 163(I) 2011 dated 02.03.2011 was issued, whereby, amendment was made in SRO

509(I)2007 by substituting heading 3206.4900 with 3206.4990. He submitted that the main PCT heading i.e. 3206.4910 was never reinserted or resubstituted by the Federal Government. If the intention was to provide zero rated facility to registered persons.

6. Learned counsel for the respondent on the other hand stated that the judgment has been rendered after comprehensive appreciation of facts and the complexity of various SROs have been fully described therein, particularly through the case cited in the judgment where this court at various instances alongside the Custom Tribunal have already decided such a controversy, a request was made to dismiss the instant appeal. Learned counsel for the respondent placed reliance on unreported Judgments passed in C.P. No.D-91 of 2013 (Gul Ayaz Khan & another v. Federation of Pakistan & others), C.P. No.D-6067 of 2016, (Thal Limited & another v. The Federation of Pakistan & others) and Custom Appeal No. K-119/2010 (Sindh International Industries Pvt. Ltd v. The Deputy Collector of Customs Model Custom Collectorate). Mr. Zahid further contended that Masterbatch comprises highly concentrated pigment, mixed with a carrier plastic, in a granule/pellet, powder or liquid form, that allows the processor to colour raw polymer during a manufacturing process. A pigment used in Masterbatch preparation can be organic, inorganic, or both and is added in the range of 20 to 70% based on its chemical class, per learned counsel.

7. He further contended that classification of such materials is based on the pigments used in the corresponding masterbatches. He explained that organic pigment based masterbatches are classified

under PCT 3204.1700, whereas inorganic pigment based masterbatches are classified under PCT 3206.4900 and states that the present case pertains to the masterbatches falling in PCT heading 3206.4900. He further contended that the masterbatches, imported and supplied by the respondent/plaintiff have been zero rated under various notifications issued by Federal Government for the purpose of levy of sales tax through SRO 621(I)/2005, SRO 525(I)/2006 and SRO 509(I)/2007. He also contended that the present case pertains to the period during which SRO 509 of 2007 was in operation and, therefore, no sales tax was to be levied at the import stage or the local supplies made by the respondent/plaintiff, and that the respondent's/plaintiff's masterbatches were admittedly entitled to zero rating even under PCT heading 3206.4910. While concluding his submissions, learned counsel submitted that the masterbatches imported and locally supplied by the respondent/plaintiff have remained zero rated throughout the period mentioned in the Impugned Letters and the learned Single Judge rightly, as well as legally and reasonably passed the Judgment and Decree, therefore, the appeal be dismissed accordingly.

8. Heard the learned counsel and perused the record. It appears that historically goods manufactured by the respondent were classified under SRO 621(I)/2005 dated 17.06.2005 and treated under HS Code 3206.4900. The said SRO was however later on superseded by SRO 525(I) 2006 dated 05.06.2006 where a number of goods falling under various PCT Headings were chosen to be charged sales tax at the rate of zero percent and in the said SRO, entry 73 described as "other colouring mater and other preparations" were given zero

rated treatment and were held to be falling under HS Code 3206.4900. The said concession remained in the field (as entry No.66) with the identical description, however, its HS Code was changed from 3206.4900 to 3026.4910 i.e. through instant SRO goods falling under HS Code 3206.4900 were removed from the ambit of concessional regime. Whilst according to the said change, as evident from various annexures, it appears that respondent started importing the same goods thereafter under HS Code 3206.4910 to take benefit of the concession, notwithstanding that the same goods were earlier imported under HS Code 3206.4900. During scrutiny of the sales tax record this discrepancy was noted which resulted into a clarification issued on 23.07.2008 by the department to the effect that the masterbatches bearing PCT heading No.3206.4910 were to remain zero-rated till 30.06.2007 and chargeable to sales tax at the rate of 15% thereafter and the respondent was directed to justify as to how it was continuously enjoying the zero-rated status on such masterbatches. The said clarification was answered by the respondent through its letter dated 28.08.2008 stating that it continued to treat masterbatches as “other colouring mater and other preparations” which were treated under SRO 621 of 2005 and 525 of 2006 bearing PCT heading 3206.4900. With this background, notices which were impugned in the suit, were issued by the appellant. The complexity of the matter does not stop here, in fact a number of SROs were issued thereafter and through SRO 1509(I)/2007 dated 27.10.2007 HS Code for the goods described as “other colouring mater and other preparations” was substituted with HS Code 3206.4990 and the said SRO also held that the amendment was

deemed to have always been so made i.e. retrospectively. Seems like that upon the respondent having continuously making representations before the department, these requests eventually resulted into the issuance of SRO 163(I)/2011 wherein HS Code for the goods described as “other colouring mater and other preparations” at serial number 66 were substituted from 3206.4990 back to 3206.4900. But what about the intervening period? It appears that with this understanding the impugned notice of 10.11.2009 was issued by the respondent under Section 11(2) of the Sales Tax Act, 1990 with the following operating part:-

“2. The Federal government vide SRO 1059(I)/2017 dated 25th October, 2007 made an amendment in SRO 509(I)/2007 dated 09.06.2007, whereby the PCT heading of the said item falling at serial No 66 of the said SRO was replaced by the item having PCT heading 3206.4990 (other coloring material and other Preparations). The Master Batches falling at serial No. 66 of the SRO 509(I)/20074 by virtue of the above mentioned amendment has become chargeable to standard rate of tax with effect from 09.06.2007 (as the said amendment was made effective from 09.06.2007 vide SRO 1059(I)/2007). The chargeability of sales Tax at standard rate of tax on supplies of Master Batches with effect from 09.06.2007 has also been confirmed by the Federal Board of Revenue vide C. No.3(15)ST-L&P/99 (pt-1) dated 02.05.2009 (Copy enclosed).

3. It has been reported that M/s. Clariant Pakistan Ltd. had not observed the above said amendment in SRO 509(I)/2007 and continuously supplied “Master Batches” having specific PCT code 3206.4910 at zero rate of Sales Tax instead of Standard rate of tax duly chargeable thereon. The Registered Person was therefore asked to produce the Sales Value of Master Batches which were supplied to their customers on payment of Sales Tax @ zero%.”

9. The assertion of the learned counsel for the respondent that having rectified an error and bringing back the masterbatches which

arguably were falling within “other colouring matter” and “other preparations” back to HS Code 3206.4900 has eventually rectified the earlier mistake, however, learned counsel failed to answer that during the intervening period when goods falling under HS Code 4900 were removed from the concessional regime through SRO 1509 of 2007 would not those goods be changed sales tax, the answer that rule of interpretation of HS Code 3206.4910 would remain exempted as to main heading of 3206.4900 at the concessional treatment is not plausible, and it seems that on account of such explanation, the learned Single Judge through his paragraph 18 has chosen to decide the case in favour of the plaintiff. But to our understanding, to avail the concessional treatment under any law, it is an established principle and incumbent upon the claimant to satisfy that its case fully fell in the ambit of concessional regime. The very purpose that HS Code i.e “other colouring mater and other preparations” was changed from 3206.4900 to 3206.4910 aimed to isolate masterbatches from the concessional regime which clarification was issued through the communication attached with this memo of appeal at page 321 where masterbatches classifiable under PCT Heading 3206.4910 were held to be excluded from the purview of zero-rating from the date of issuance of the SRO 509(I)/2007 i.e. 09.06.2007 and where the said clarification has never been challenged before any court or forum thus having attained finality, therefore, the claim of the appellant communicated through the impugned notice dated 10.11.2009 appears to be tenable.

10. Last but not least, in our humble view the suit having no triable issues was not inherently maintainable, coupled with the

fact that such a plaint does not find mention in the types of suits which the Code of Civil Procedure, 1908, through Appendix A(3) titled “Plaints” envisages amongst 49 types of suits specifically detailed in the Code.

11. Resultantly, we allow this appeal and set aside the judgment and decree and direct the respondent to respond to the impugned notices in accordance with law and the department to consider the submissions made, and decide the same through a speaking order after giving opportunity of hearing to the respondent.

Karachi
Dated:30.12.2022

JUDGE

JUDGE