IN THE HIGH COURT OF SINDH, KARACHI

Constitution Petition No. D- 8679 of 2018
Constitution Petition No. D- 1171 of 2019
Constitution Petition No. D- 1011 of 2019
Constitution Petition No. D- 3477 of 2019

Date	Order with signature of Judge

Present: ***Mr. Justice Muhammad Junaid Ghaffar***
Mr. Justice Agha Faisal

Petitioners:	**Nawab Brothers Steel Mills Pvt Ltd. (in C.P No. D-8679/2018) Naveena Steel Mills (Pvt) Ltd. (in C.P Nos.D-1171 & 3477 of 2019) Union Steel Industries (in C.P No. D-1011 of 2019) Through M/s. Haider Waheed & Abdul Moiz Jafferi Advocates.**
Respondent No. 1:	**The Federation of Pakistan Through Mr. Qazi Ayazuddin Qureshi, Assistant Attorney General**
Respondents:	**The Federal Board of Revenue & others through M/s. Muhammad Khalil Dogar, Zafar Hussain holding brief for Aamir Raza, Rashid Ali holding brief for Ghulam Murtaza and Ms. Afsheen Aman, Advocates**
Date of hearing:	**18.01.2023.**
Date of Judgment:	**18.01.2023.**

J U D G M E N T

Muhammad Junaid Ghaffar, J: The Petitioners before us are manufacturers of steel products and are aggrieved by imposition and collection of Sales Tax at the rate of 17% on import of their plant and machinery as it is their case that the Petitioners are governed by virtue of Section 7A of the Sales Act, 1990 ("**Act**") read with Rule 58H of the Sales Tax Special Procedure Rules 2007 ("**2007 Rules**") wherein, a substitute mechanism had been provided for payment of Sales Tax as final discharge of liability from all sorts of sales tax including sales tax at import stage.

2. Learned Counsel for the Petitioners[1] have contended that pursuant to Rule 58H of the 2007 Rules, the Petitioners' liability to pay the Sales Tax is a maximum of Rs.13 per unit of the electricity consumed being

[1] Led by Mr. Abdul Moiz Jafferi Advocate; (in C.P No. D-8679/2018; 3477 & 1011 of 2019) supplemented and adopted by Mr. Haider Waheed Advocate; (in C.P Nos.D-1171of 2019

collected by respective Electric Supply Companies, which is a final discharge of their liability, and therefore, levy and collection of Sales Tax on ad-val basis @17% on the import of plant and machinery is illegal; amounts to double taxation and is a burden upon the Petitioners. According to them since plant and machinery forms a necessary part of their manufacturing process being exclusively used for making taxable supplies; hence they could only be governed by Rule 58H ibid and not beyond that. Per learned Counsel, the Rules in question also provides for levy of fixed Sales Tax on certain items imported by the Petitioners; whereas, nothing has been stated as to levy of Sales Tax on the import of plant and machinery; hence impliedly it is exempt and no Sales Tax can be demanded or required to be paid on the import of plant and machinery. In support they have relied upon the cases reported as ***Attock Cement Pakistan Ltd. Vs. Collector of Customs Collectorate of Customs and Central Excise, Quetta and 4 others*** **(PTCL 2001 CL. 509),** ***M/s. Daewoo Pakistan Express Bus Services Limited Vs. Federation of Pakistan and 5 others*** **(PTCL 2016 CL. 490),** ***Collector of Customs, Sales Tax and Central Excise etc. Vs. M/s. Sanghar Sugar Mills Ltd., Karachi & others*** (**PTCL 2007 CL. 565),** and unreported judgment passed by the Honourable Supreme Court in **Civil Appeal No. 1422/2019** ***(The Commissioner, Inland Revenue, Karachi Vs. M/s. Attock Cement Pakistan Limited, Karachi).***

3. On the other hand, Respondents' Counsel[2] have argued that insofar as Rule 58H of the 2007 Rules is concerned, it has no nexus with the import of plant and machinery as Rule 58H only caters for payment of sales tax at the time of supply of goods, whereas, it further deals with a fixed amount of sales tax on import of certain input / raw materials. According to them it does not cover import of plant and machinery; nor there is any exemption notification in field; hence Sales Tax has to be paid on the import of plant and machinery. Lastly, they have argued that these petitions are premature as no sales tax has been paid, and therefore, it is not covered by Rule 58H as claimed.

4. We have heard learned Counsel for the Petitioners as well as Respondents and have also perused the record. It appears that petitioners before us are either manufacturing iron and steel products; or are in the process of setting up such manufacturing units / industry; and for this they have imported various plant, machinery and equipment to be used in such

[2] Led by Mr. Khalil Dogar Advocate and adopted by others

manufacture of steel products. The steel industry to which the Petitioners belong, for the purposes of payment of sales tax (at the time of import of respective machinery and equipment) on its production was governed by Rule 58H of the 2007 Rules (since omitted). It would be advantageous to refer to Rule 58H of the 2007 Rules notified vide S.R.O. 480(I)/2007 dated 9.6.2007, which reads as under: -

> "Notification No. S.R.O. 480(I)/2007, dated 9th June, 2007.--In exercise of the powers conferred by section 71 of the Sales Tax Act, 1990, read with clauses (9) and (46) of section 2, sections 3 and 4, sub-section (2) of section 6 [, sub-section (3)] [, section 7], section 7A, clause (b) of sub-section (1) of section 8, clause (a) of sub-section (2) of section 13, sub-sections (2A) and (3) of section 22, sections 23 and 60 thereof, the Federal Government is pleased to make the following rules, namely:--
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> **58H. Payment of tax.--**(1) Every steel-melter, steel re-roller ", composite unit of melting, re-rolling and MS cold drawing] and composite unit of steel melting and re-rolling (having a single electricity meter), "[excluding units operated by sugar mills or other persons using self-generated electricity] shall pay sales tax at the rate of [thirteen] rupees per unit of electricity consumed ***for the production of steel billets, ingots and mild steel (MS) products excluding stainless steel, which will be considered as their final discharge of sales tax liability [:]***
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> [Provided that the rates of sales tax on the basis of electricity consumption prescribed in sub-rules (1) and (2) shall only be applicable to units consuming electric power supplied by public sector electricity distribution companies [and M/s. K-Electric Limited].]
>
> (2) Payment of tax by steel melters, re-rollers [, composite unit of melting, re-rolling and MS cold drawing] and composite units of melting and re-rolling shall be made through electricity bills alongwith electricity charges:
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> Provided that in case the due amount of sales tax mentioned in sub-rule (1) is not mentioned in the electricity bill issued to any steel melter or re-roller ", composite unit of melting, re-rolling and MS cold drawing] or composite unit of melting and re-rolling, the said melter or re-roller, composite unit of melting, re-rolling and MS cold drawing] or composite unit shall deposit the due amount of tax for the relevant tax period at the rate of [thirteen] rupees per unit of electricity consumed excluding the amount of sales tax already paid on the electricity bill related to the said tax period through his monthly sales tax return
>
> Provided further that payment of sales tax at the rats of thirteen Rupees per unit of electricity shall be the final discharge of liability of steel re- rolling units and composite units of melting and re-rolling including their pre- beating sections operated through fuels other than electricity.]
>
> [* * *]]
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> [(2A) Adjustable sales tax at the rate of Rs. 5,600 per metric ton shall be levied and collected on import of re-meltable iron and steel scrap falling under PCT headings 7204.3000, 7204.4100 and 7204.4990, [from those discharging sales tax liability under sub-rule (1) of Rule 58H and Rupees [ten] thousand four hundred per metric tonne from other importers] whereas non- adjustable sales tax Rs. 5,600/- per metric ton shall be levied and collected on import of waste and scrap of compressors falling under PCT heading 7204.4940:
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> Provided that further local supplies of such imported waste and scrap of compressor shall not be subject to sales tax [:]
>
> [Provided further that the steel melters discharging their liability under sub-rules (1) and (2) shall submit paid electricity bills of last three months the time of filing of Goods Declarations.]
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> (2B) Local supplies of re-meltable iron and steel scrap shall be charged to sales tax at the rate of Rs. [10.400] per metric ton.
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> (2C) Steel melters may obtain adjustment of the sales tax paid on imported re-meltable iron and steel scrap, against the sales tax payable through their electricity bills, in the manner prescribed by the Board through a general order.]"

5. Perusal of the aforesaid Rule reflects that it falls under Special procedure for payment of Sales Tax, which now stands omitted[3] and in fact relates to payment of Sales Tax for the production of steel billets, ingots and mild steel (MS) products, excluding stainless steel and Sales Tax so paid at the rate of Rs.13 per unit of the electricity consumed was to be considered as final discharge of their Sales Tax liability on such production and sale of their finished products. It further provides in Rule 2A that an adjustable sales tax at the rate of Rs. 5,600 per metric ton shall be levied and collected on import of re-meltable iron and steel scrap falling under various HS Codes from those units who are governed by Sub Rule (1) of Rule 58H; whereas, Rs. 10,400/- per metric ton is to be paid by other importers. Finally, a non-adjustable sales tax at the rate of Rs. 5,600/- per metric ton shall be levied and collected on import of waste and scrap of compressors falling under respective HS Codes. It has been further provided that local supplies on import of such waste and scrap of compressor shall not be subject to sales tax. Rule 2B provides that local supplies of re-meltable iron and steel scrap shall be charged to sales tax at the rate of Rs. 10,400/- per metric ton and finally Rule 2C further provides that steel melters may obtain adjustment of the sales tax paid on import of re-meltable and steel scrap against the sales tax payable through their electricity bills, in the manner prescribed by the Board through a general order.

6. The precise case of the petitioners as set up in the petitions and the arguments so advanced before us is that for the purposes of import of such machinery as above, they are not required to, or liable to pay any sales tax in terms of section 3 of the Act, as in lieu of that they are paying or will be paying fixed amount of Sales Tax through their Electricity Bills as per consumption of units. Their further case is that in the alternative, if they are required to pay any such sales tax, they would not be entitled to any input tax adjustment as they are governed by the fixed sales tax regime; hence, are not at all liable to pay any sales tax at import stage insofar as import of plant and machinery is concerned. With respect we are unable to agree. One needs to appreciate that the charging section under the Act is section 3(1)[4] which provides that *there shall be charged,*

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[3] w.e.f 2019

[4] 3. Scope of tax.– (1) Subject to the provisions of this Act, there shall be charged, levied and paid a tax known as sales tax at the rate of [seventeen] per cent of the value of–

(a) taxable supplies made by a registered person in the course or furtherance of any [taxable activity] carried on by him; and

(b) goods imported into Pakistan, [irrespective of their final destination in territories of Pakistan].

levied and paid a tax known as sales tax at the rate of seventeen per cent of the value of ***(a) taxable supplies*** *made by a registered person in the course or furtherance of any taxable activity carried on by him; and* ***(b) on goods imported into Pakistan****, irrespective of their final destination in territories of Pakistan.* What the petitioners want this court is to accept that the procedure in vogue regarding payment of fixed amount of Sales Tax under Rule 58H ibid, also covers any liability arising out of import of goods into Pakistan more specifically the plant and machinery as covered by these petitions. This argument by itself is contradictory and far-fetched. As could be seen, the levy of sales tax on import of goods is in addition to and distinct from the liability of sales tax arising out of manufacture or supply of any finished products by the Petitioners. At least not in respect of import of any plant and machinery. If the intention would have been so, then an exemption notification in terms of section 13 of the Act would have been issued; or it would have been so included in the 6th Schedule to the Act. The intent and purpose of Rule 58H is only in respect of payment of sales tax on sale of finished products being sold by the Steel Industry / petitioners. They, in lieu of ad-valorem sales tax on the value of supply of their respective products have been facilitated and obliged to pay fixed sales tax through their electricity bills. This is as a matter of convenience; to bring uniformity within the Steel Industry in payment of fixed sales tax on units of electricity consumed; and may be to avoid any under payment of sales tax by an unscrupulous person. However, for the present purposes, it cannot, at all is to be equated with any exemption from sales tax on the import of plant and machinery. Their raw materials or input material has been given a special rate of sales tax as mentioned above, and in fact, this also is not exempt in any sense. If raw material is not exempt in terms of Rule 58H, then how could they claim exemption of sales tax on the import of plant and machinery under the garb of this Rule by contending that since they cannot claim any input tax adjustment; hence, are not liable to pay any sales tax at import stage. The argument that since the machinery in question would be used in the supply of finished product; hence, it is stock-in-trade, for the present purposes is not relevant; rather is an attempt to mislead and create confusion to avail exemption at import stage. It has no nexus with the chargeability of sales tax on the import of any plant and machinery. This, at best, could be an argument once sales tax has been paid and any claim of input tax or refund, as the case may be is denied. This also is further qualified in terms of section 7 and 8 of the Act.

7. It was also contended by the Petitioners Counsel that since no mechanism for adjustment of input tax has been provided under Rule 58H, therefore, asking the Petitioners to pay sales tax at the import stage is creating an additional liability, whereas, the right of input tax is also being denied. However, this argument is also misconceived. Admittedly within the Rule as above, it has been provided that if there is any excess payment of input tax, steel melters may obtain adjustment of sales tax paid on import of re-meltable iron and steel scrap against sales tax through their electricity bills in the manner prescribed by the Board through a general order. In fact, the arguments to this effect is contradictory inasmuch as even on the import of certain input / raw material, it appears that excess sales tax is being paid by the Petitioners; and therefore, some adjustment mechanism has been provided. If this had not been the case, then there was no need to incorporate Sub-Rule (2C) in the above Rules. Secondly, it is not within the scheme of the Act, that if no Sales Tax is adjustable on supply of such goods, then necessarily no sales tax can be charged at the import stage, be it import of plant and machinery or input / raw material. This is a misconception on the part of the Petitioners.

8. We may further observe that before us it is not that some Notification has been issued under Section 13 of the Act, or goods have been included in the 6th Schedule; and either the exemption is being denied; or for that matter, it is being interpreted in some other manner, detrimental to their interest. The Petitioners' case is merely presumptive, and conjectural based on an argument that since a mechanism has been provided for payment of fixed Sales Tax through electricity bills; then it is the entire discharge of liability in respect of all sorts of Sales Tax; including Sales Tax on import and supply stage. This argument is ill-founded and totally misconceived. The legal liability of a person in relation to supply of goods is clearly spelt out in section 3(3) (subject to subsection (3A)): the liability to pay sales tax is, in the case of a person making a supply on the person, and in the case of imported goods on the importer[5]. Merely, if both persons are same, it would not ipso fact result in an entitlement to exemption if any of the liability stands discharged; but would be a case of input tax minus the output tax. This stage is not yet reached in the present facts and circumstances. Insofar as the present stage of the petitioner's case (i.e. import of plant and machinery) is concerned, in fact, there was no occasion to approach the Court and seek any orders (including ad-interim

[5] Insaf Cotton Ginning v Federation of Pakistan (2016 PTD 2585)

orders) as neither any cause of action had accrued; nor a case to that effect was made out. Under the Act, sales tax on import is required to be paid in terms of section 3(1) (b) of the Act; which admittedly has no nexus with payment of any sales tax at supply stage for which at the relevant time Rule 58H was in field; and therefore, no case is made out by the Petitioners to exercise any discretion in the facts and circumstances of this case. Insofar as the precedents[6] cited by the Petitioners Counsel are concerned, they for the present purposes, have no relevance as they are in fact related to a situation, wherein after payment of sales tax at import stage, either input tax or refund was being denied on one pretext or the other. Moreover, these cases also pertain to a period when the Act and Rules in question were not *pari-materia* to the present Act and Rules. Lastly, insofar as the recent unreported judgment of the Honourable Supreme Court in *Commissioner, Inland Revenue Vs. M/s. Attock Cement Pakistan Limited,* is concerned, in that case the dispute between parties was regarding the time and manner of claiming the adjustment of 'input tax' and the Hon'ble Supreme Court dealt with two question of law[7], which for the present purposes do not help the case of the Petitioners; rather, in our view supports the case of the Respondents

9. At the most and notwithstanding the above, the right course available to the Petitioners was to approach Federal Board of Revenue prior to import of their goods to seek any exemption on the import of their plant and machinery. As stated this has been done and perhaps no response was received and the Petitioners rushed to this Court with their interpretation regarding Rule 58H as above and obtained ad-interim orders. Perhaps this was not warranted in the given facts and circumstances of these cases. Moreover, the Act in question provides a mechanism for refund of excess Input Tax under Section 10[8] ibid. Proviso to this Section deals with this and provides that that in case of excess

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6 Attock Cement; Daewoo Pakistan Express; Collector of Customs, Sales Tax and Central Excise (Supra)

7 (i) Whether the adjustment of 'input tax' from the 'output tax' provided under section 7(1) of the Sales Tax Act could be availed without any limitation of time.
(ii) Whether section 66 of the Sales Tax Act was applicable in the facts of present case, if so, whether the applications dated 11.06.1997 made by the respondent-company can be considered as refund applications under section 66 of the Sales Tax Act.

8 10. Refund of input tax.– (1) If the input tax paid by a registered person on taxable purchases made during a tax period exceeds the output tax on account of zero rated local supplies or export made during that tax period, the excess amount of input tax shall be refunded to the registered person not later than forty-five days of filing of refund claim in such manner and subject to such conditions as the Board may, by notification in the official Gazette specify: [Provided that in case of excess input tax against supplies other than zero-rated or exports, such excess input tax may be carried forward to the next tax period, along with the input tax as is not adjustable in terms of sub-section (1) of section 8B, and shall be treated as input tax for that period and the Board may, subject to such conditions and restrictions as it may impose, by notification in the official Gazette, prescribe the procedure for refund of such excess input tax.]

input tax against supplies other than zero-rated or exports, such excess input tax may be carried forward to the next tax period, along with the input tax as is not adjustable in terms of sub-section (1) of section 8B, and shall be treated as input tax for that period and the Board may, subject to such conditions and restrictions as it may impose, by notification in the official Gazette, prescribe the procedure for refund of such excess input tax. If any sales tax paid by the Petitioners at import stage, otherwise qualifies as their input tax within the ambit of the Act, including but not limited to restrictions per sections 7 and 8 ibid, then they may have a case to seek refund of any excess input tax in accordance with law.

10. In view of hereinabove facts and circumstances of the case, the Petitioners had failed to make out a case for any indulgence or to exercise any discretion in their favor under our Constitutional jurisdiction; hence, by means of a short order passed on 18.01.2023 we had dismissed all these petitions and these are the reasons thereof. Office shall place copy of this order in all connected petitions.

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