

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

C. P. No. D-1472 of 2016 alw
C. P. No. D-5160 / 2013
C. P. No. D-1078, 1201, 1202, 3642, 4279 & 766/2014
C. P. No. D-3394, 7965, 7966 / 2015
C. P. No. D-1888, 3629, 4087, 4627, 5095, 5630, 6850 & 6851/ 2016
C. P. No. D-196, 3087, 596 & 6295/2017
C. P. No. D-2485 & 6455 / 2018
C. P. No. D-915, 916, 2544, & 6884 / 2019
C. P. No. D-3379, 3380, 5909 & 5956 & 5957 / 2020,
C. P. No. D-2499, 2500, 4241 & 4346 / 2021
Spl. Sales Tax Reference Application Nos. 119, 95, 96 / 2016
S.T.R.A Nos. 175 & 889 of 2017
Spl. S.T.R.A No.71 of 2019

Date

Order with signature of Judge

PRIORITY

- 1) For hearing of CMA No. 6630/2016.
- 2) For hearing of main case.

16.02.2023.

For the Petitioners.

M/s. Khalid Javed Khan, Hyder Ali Khan, Arshad Hussain Shahzad Samiur Rehman Khan, Omer Akhund, Umaimah Anwar Khan, Abid H. Shaban, Imtiaz Ali, Naveeda Basharat, Lunba Pervez, Shafqat Zaman, Abdul Sattar Silat, Abdul Rahim Lakhani, Asim Iqbal, Farmanullah Khan, Syeda Marium, Abdul Jabbar Mallah, Abdul Ahad, Naeem Suleman, Taqueer Randhawa, Kashan Ahmed, Atif Hafeez, Zeeshan Khan, Khalid Mehmood Siddiqui, Khurram Ashfaq, Muhammad Adeel Awan, Atta Muhammad Qureshi, Asadullah Shaikh, Muhammad Yahya Advocates.

For the Respondents.

M/s. Shahid Ali Qureshi, Kashif Nazeer, Shamshad Ahmed Narejo, Ameer Bakhsh Metlo, Irfan Mir Halepota, Ayaz Sarwar Jamali, Dr. Huma Sodhar, Muhammad Zubair Hashmi, Fahim Ali, S. Ahsan Ali Shah, Ali Tahir Soomro, Dr. Shah Nawaz Memon, Fozia M. Murad, S. Shafqat Ali Shah Masoomi, S. Mohsin Imam Wasti, Muhammad Aqeel Qureshi, Advocates.

Mr. Zeeshan Adhi, Additional Advocate General Sindh.
Mr. Kafeel Ahmed Abbasi, Additional Advocate General Sindh.
Mr. Qazi Ayazuddin Qureshi, Assistant Attorney General.

Ms. Manzooran Gopan, Law Officer, Law Department,
Government of Sindh.
Mr. Sikandar Hassan, Law Officer, Law Department,
Government of Sindh.

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On 26.01.2023 we had passed the following order: -

“It appears that these matters pertaining to levy of sales tax on Toll Manufacturing are pending since 2016. Apparently, there exists a dispute between the Federation and the Province of Sindh as to collection of said sale tax and insofar as Petitioners are concerned, they do not dispute that sales tax has to be paid; but either to the Federation or the Province as the case may be, whereas, continuously they are paying such sales tax to the Federal Government. It is their

further case that Toll Manufacturing does not fall within service in any manner. It appears that during pendency of these Petitions, meeting of National Tax Council (NTC) was held on 09.06.2022 wherein, all Provinces as well as Federation were present and as per Para-8(ii) of the minutes of the said meeting it has been agreed that sales tax on Toll Manufacturing will rest with the FBR. It further appears that thereafter, on 28.06.2022 Province of Sindh has issued a Notification through which, according to them, with effect from 01.07.2022 sales tax on services of Toll Manufacturing stands exempted. Today, learned Additional Advocate General Sindh submits that it is the stance of Province of Sindh that such exemption is only applicable from 01.07.2022, whereas, prior to that, it is their right to claim and charge Sales Tax on Toll Manufacturing which according to them is a Service under the Sindh Sales Tax on Services Act, 2011.

However, we are of the view that once it has been agreed by the Province that such collection of sales tax on Toll Manufacturing will rest with FBR, then admittedly, it is no more a service. It can't be argued or justified that Toll Manufacturing was though a service up to 30.6.2022, and from 1.7.2022 onwards it is not, and rests with the FBR. It is either a service or not, whereas, under the Sales Tax Act, 1990, read with entry 49 of the Fourth Schedule to the Constitution, Federation cannot levy or even collect sales tax on services. We may observe that since an exemption has been issued by the Province, it can't be their case that by some mechanism they have authorized FBR to collect sales tax on Toll Manufacturing. In view of such position, while confronted, Learned Additional Advocate General Sindh needs time to seek proper instructions from Province of Sindh. At his request, as a last and final chance, time allowed.

To come up on **16.02.2023 at 11:00** a.m. Interim order passed earlier to continue till next date of hearing. Office to place copy in connected Petitions.”

As noted, the dispute is between the Province of Sindh and the Federation as to levy and collection of sales tax on Toll Manufacturing, post 18th amendment, whereby, entry 49 of the Fourth Schedule¹ to the Constitution stands amended in respect of levy and collection of sales tax. Today, Mr. Zeeshan Adhi, Additional Advocate General Sindh submits that insofar as any consent recorded in the meeting of the National Tax Council is concerned, that is not binding on the Province of Sindh, whereas, the very Constitution and formation of the National Tax Council is without any support of law; hence, the minutes of the said meeting are not an impediment against the stance of the Province as already reiterated earlier, including in the comments, that sales tax is to be paid on toll manufacturing to the Province, being a service.

However, we are compelled to observe that such response on the part of the officers of the Province of Sindh, including the one who had attended the meeting of National Tax Council as noted in the above order i.e. Finance Secretary, Chairman SRB and its advisors, is not only without any justification; but reflects badly on the part of the Province as to their

¹ Federal Legislative List

conduct before the Court. There is no denial of the fact that such meeting was attended by these gentlemen on behalf of the Province of Sindh, whereas, not even the contents of the minutes of the said meeting have been denied. In fact, despite passing of the above order, no response has been filed in writing on their behalf. A mere oral statement by learned AAG on their behalf, to this effect or contrary to what has been agreed upon in the said meeting does not suffice.

We had noted in our above order that once it has been agreed by the Province that such collection of sales tax on Toll Manufacturing will rest with FBR, then admittedly, it is no more a service. It was further observed that there is no legal ground to justify that Toll Manufacturing was though a service from the date of promulgation of the Sindh Sales Tax on Services Act, 2011 up to 30.6.2022, and from 1.7.2022 onwards it is not. In our considered view, it is either a service or not, whereas, under the Sales Tax Act, 1990, read with entry 49 of the Fourth Schedule to the Constitution, Federation cannot levy or even collect sales tax on services.

We may further observe that prior to the 18th amendment and since inception of the Sales Tax Act, 1990, the definition of manufacture has always been such or has been interpreted in a manner, that toll manufacturing is in essence manufacturing of goods, under the Sales Tax Act, 1990. The definitions under the said Act, including that of manufacture [section 2(16)]; supply [Section 2(33)], have though gone through several changes; however, the findings of the Courts in the case of **Amie**² that “*the processing of goods by the Appellant surely is a manufacturing process*”, and **ORI TECH**³, that “*the delivery of the subject goods to the vendor as above, cannot by any stretch of imagination be termed as a taxable supply*” and “*that the manufacturing/blending of the subject imported material into lubricants is carried out under the orders of, for and on behalf of the respondent company, and in their name*” enunciate the principle that toll manufacturing is a process of “manufacture”. In fact, in **Amie** (Supra) it was held that no sales tax is even payable on conversion charges for doing such process; and it is only thereafter, that section 2(33) was amended to include levy of sales tax on toll manufacturing process. (see section 2(33) (d) *ibid*). It is clear from these judgments that processing of goods (whether owned or otherwise) is basically a manufacturing activity through which an article is reshaped or transformed into another different article or goods, whereas, the argument that it a service, is basically an

² 2006 PTD 1459

³ 2019 SCMR 875

issue of misunderstanding and misinterpretation of the manufacturing processes involved and as already defined under the Sales Tax Act, 1990.

We had also observed that merely for the reason that an exemption has been issued by the Province, it does not in and of itself mean that by some mechanism they have authorized FBR to collect sales tax on Toll Manufacturing. In fact, if it had been strictly a case that toll manufacturing is a service, then the Province would not have agreed that FBR may collect sales tax on toll manufacturing. The argument that it is still a service under the Sindh Sales Tax on Services Act, 2011 and has only been exempted from 1.7.2022, whereas, since promulgation of 2011 Act and up to 30.6.2022 the tax in question has to be paid to the Province instead of FBR; is not only misconceived but practically not enforceable. We may further observe that post 18th Amendment in a number of cases of like nature, it is the taxpayer who is being dragged into unnecessary and protracted litigation and is being subjected to double taxation by the Federation as well as the Province in addition to a very heavy burden on the Courts by way of Constitutional Petitions, which perhaps, would have been better resolved amicably and with consultation between the Federation and the Province. In fact, in this matter it has been resolved; but now the Province of Sindh wants that tax collected earlier by FBR on behalf of the Federation on toll manufacturing has to be paid to them. It seems that perhaps it is their understanding that this Court is a forum to recover the tax from Federation and then pay it to the Province. We are afraid this conduct, as well as the stance taken before us today, cannot be appreciated; rather must be deprecated. In our considered view, it is high time we start imposing costs upon such conduct of the Province and its officers in their personal capacity, as such conduct, instead of resolving the issue, is to linger on with this litigation, and make an attempt to get the said amount in their kitty. At best, they ought to have approached the same forum or any other forum as may be available to resolve such disputes and claim their lien on such tax, which now onwards, has been exempted by them with further agreement that if at all sales tax is to be collected on toll manufacturing, it will be done by FBR.

In view of hereinabove facts and circumstances of this case read with our order passed on 26.01.2023, all these Petitions are disposed of with the observations that during the period under dispute before us, the tax which has already been paid by the Petitioners to the Federation through FBR, in respect of toll manufacturing, is their final discharge of liability in respect of sales tax, (either under the Sales Tax Act, 1990 or under the Sindh Sales Tax on Service Act, 2011 Act), and they will not be

obliged to pay any further sales tax on such activity. As a consequence, thereof, any proceedings initiated by the Province of Sindh under the 2011 Act to this extent, stands abated / dispose of in these terms, whereas, if at all the Province intends to get any share out of the sales tax already collected by FBR under this head, it may approach the Federation for its amicable settlement, as may be advised.

All these Petitions and Reference Applications stand disposed of in these terms. Office to place copy in connected matters.

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