

THE HIGH COURT OF SINDH, KARACHI

Suit No. 1141 of 2018

[New Hampshire Insurance Company v. Province of Sindh & others]

Plaintiff : New Hampshire Insurance Company
through Mr. Shahbakhat, Advocate.

Defendants 1-3 : Province of Sindh and two [02] others
through Mr. Hisham Mahar, Assistant
Advocate General Sindh.

Date of hearing : 01-04-2024

Date of decision : 01-04-2024

JUDGMENT

Adnan Iqbal Chaudhry J. - The Plaintiff has challenged a show-cause notice dated 19-05-2018 issued under section 23(2) of the Sindh Sales Tax on Services Act, 2011 [SSTA], calling upon the Plaintiff to show-cause against assessment of short-paid sales tax under section 23(1), along with default surcharge under section 44 and penalty under section 43 of the SSTA. The show-cause notice was issued after an audit under section 28 of the SSTA.

2. The show-cause notice avers *inter alia* that the Plaintiff did not deposit sales tax on premium for reinsurance provided to other insurers, and that the Plaintiff itself received reinsurance from a foreign reinsurer but failed to deposit sales tax thereon as required under the SSTA. It is the case of the Plaintiff that the reinsurance taxable under the SSTA is that which is provided to a policy-holder as a value added product, and not which is provided to another insurer as a product with no value addition. Per the Plaintiff it provides reinsurance only to insurers and receives the same cover also from insurers and therefore it is not liable to sales tax under the SSTA. On that argument, the final order on the show-cause notice was stayed pending suit.

3. The fact of the matter is that even if an assessment order under section 23 of the SSTA is passed against the Plaintiff on the impugned show-cause notice, that is appealable before the Commissioner (Appeals) SRB under section 57 of the SSTA. Judgment of the latter is then appealable before the Appellate Tribunal under section 61 of the SSTA. Section 63 of the SSTA also envisages a Reference to the High Court from a question of law arising from the judgment of the Tribunal. Thus, the SSTA provides a hierarchy of remedies before special *fora*. In these circumstances learned counsel for the Plaintiff is confronted with the maintainability of a suit, which is the first of the issues settled by the Court on 30-05-2019.

4. Adverting to section 82(1) of the SSTA, which ousts the jurisdiction of a civil court, learned counsel for the Plaintiff relies on *Searle IV Solution (Pvt.) Ltd. v. Federation of Pakistan* (2018 SCMR 1444) to submit that the High Court of Sindh at Karachi while dealing with civil suits is nonetheless a High Court and not merely a 'civil court'. On the other hand, learned counsel for the Defendants invite attention to a number of orders passed by this Court rejecting plaints in similar fiscal suits brought to challenge show-cause notices.

5. Heard the learned counsel.

6. A similar argument as the one advanced by learned counsel for the Plaintiff here, has already been addressed by this Bench in *Zain ul Abideen v. Federal Board of Revenue* (PLD 2021 Sindh 130) and *Pakistan Petroleum Ltd. v. Pakistan* (2022 PTD 1742) as follows:

"9. Learned counsel for the Plaintiff had submitted that after *Searle IV Solution (Pvt.) Ltd. v. Federation of Pakistan* (2018 SCMR 1444) it is settled that the words 'civil court' in an ouster clause of a special statute do not apply to the High Court of Sindh at Karachi in dealing with civil suits. In the *Searle* case the question before the Supreme Court of Pakistan was to the exercise of jurisdiction by the single Judge of the High Court of Sindh at Karachi in civil suits brought to challenge orders passed by authorities under taxing statutes, which statutes expressly ousted the jurisdiction of civil courts. The Supreme Court first reiterated the well-established exceptions to the ouster of the plenary jurisdiction of a civil court, viz., that the jurisdiction of a civil court to examine orders/acts of an Authority or

Tribunal is not ousted (a) where the Authority or Tribunal was not validly constituted under the statute; (b) where the order/action of the Authority or Tribunal was *malafide*; (c) where the order/action passed/taken was such which could not have been passed/taken under the law that conferred exclusive jurisdiction on the Authority or Tribunal; and (d) where the order/action violated the principles of natural justice. On a related question, it was further held by the Supreme Court that even when the High Court of Sindh at Karachi exercises jurisdiction in civil suits, it was nonetheless a High Court and could not be equated with an ordinary civil court; and thus the words 'civil court' in section 217(2) of the Customs Act were not intended by the legislature to include the High Court of Sindh at Karachi when dealing with civil suits. However, that finding was not to say that the remedy of a civil suit before the High Court of Sindh at Karachi under section 9 CPC remains unrestricted notwithstanding the availability of a special forum under special law. That was made clear in *Searle*, and therefore in some of the appeals before it, which emanated from suits filed in the High Court of Sindh at Karachi, the Supreme Court held that the case did not fall within the ambit of established exceptions to the ouster of jurisdiction, and thus those appellants could not have resorted to civil suits to escape the hierarchy of the grievance-redressal mechanism provided in the Customs Act, 1969.

Thus, the *ratio decidendi* in *Searle* is that even though an ouster clause in a special statute barring the jurisdiction of a 'civil court' did not apply to the High Court of Sindh at Karachi dealing with civil suits, there was nonetheless an 'implied' bar to jurisdiction as contemplated under section 9 CPC, arising as a consequence of special law which envisaged exclusive jurisdiction by a special forum, which implied bar could only be circumvented if the plaintiff demonstrates that the case attracted one of the established exceptions to the ouster of jurisdiction.

10. Applying the ratio of *Searle (supra)* to the instant suit, while the jurisdiction of this High Court of Sindh at Karachi to entertain the suit is not barred by reason of the ouster clause in section 227(1) of the Income Tax Ordinance, 2001, there is nonetheless an implied bar within the meaning of section 9 CPC when the Income Tax Ordinance provides for a special mechanism and special *fora* to determine matters arising under the said Ordinance. That implied bar to jurisdiction can only be circumvented if the Plaintiff can demonstrate that its case attracts one of the established exceptions to the ouster of jurisdiction (highlighted in para 9 above), failing which the Plaintiff will have to resort to the hierarchy of the special *fora* under the Income Tax Ordinance, 2001. In a nutshell, this Court will exercise jurisdiction only if the impugned show-cause notice suffers from a jurisdictional defect that warrants intervention by a High Court."

7. Learned counsel for the Plaintiff submits that if this Court concludes that reinsurance of the nature provided and availed by the Plaintiff is not a service covered by the SSTA, then the show-cause

notice is without jurisdiction. In my view, that argument goes to the liability of tax and not to the jurisdiction of the Defendants 2 and 3 to issue the impugned show-cause notice. It cannot be said that the show-cause notice is unfounded, or that the conditions essential to its issue under section 23(2) of the SSTA are absent. Also, the argument that the assessment contemplated is unlawful, is premature when no such order has been passed as yet.

8. The plaint manifests that what the Plaintiff essentially seeks is a determination by this Court on the show-cause notice so as to by-pass the special *fora* and remedies provided under the SSTA. Such practice has time and again been discouraged by the superior courts as in *Commissioner of Income Tax v. Hamdard Dawakhana (Waqf)* (PLD 1992 SC 847); *Deputy Commissioner of Income Tax v. Punjab Beverage Company (Pvt.) Ltd.* (2007 PTD 1347); *Indus Trading and Contracting Company v. Collector of Customs (Preventive) Karachi* (2016 SCMR 842); *Dr. Seema Irfan v. Federation of Pakistan* (PLD 2019 Sindh 516), and more recently in *Commissioner Inland Revenue v. Jehangir Khan Tareen* (2022 SCMR 92).

9. To conclude, the plaint does not raise any ground that constitutes an exception to interfere in the exercise of jurisdiction by the special *fora* prescribed under the SSTA. Consequently, the implied bar to the jurisdiction of this Court that arises by reason of the special provisions of the SSTA remains intact. Therefore, issue No.1 is answered in the negative and the suit is dismissed.

JUDGE

Karachi:
Dated: 01-04-2024