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IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE FAISAL ARAB
MR. JUSTICE IJAZ UL AHSAN

(AFL)

CIVIL PETITION NO.3224 OF 2019.

*(Against the judgment dated 03.06.2019
passed by the Islamabad High Court,
Islamabad in Writ Petition No.271 of 2018).*

M/s Pak Gulf Construction Company (Pvt) Ltd. Islamabad.

...Petitioner(s).

Versus

Federation of Pakistan through Secretary Finance,
Ministry of Finance, Islamabad and others.

...Respondent(s)

For the petitioner(s): Hafiz M. Idrees, ASC.
 Syed Rifaqat Hussain Shah, AOR.

For the respondent(s): Mr. Baber Bilal, ASC.

Date of Hearing: 29.10.2019.

ORDER

IJAZ UL AHSAN, J.- The petitioner which is a private limited company seeks leave to appeal against a judgment of the Islamabad High Court, Islamabad dated 08.03.2019. Through the impugned judgment a Constitutional Petition challenging a demand for payment of Capital Value Tax ("CVT") raised by the tax authorities was dismissed.

2. Briefly stated the facts necessary for disposal of this petition are that the petitioner is engaged in the business of construction. It constructs buildings consisting of various units and thereafter sells these units/flats/apartments

through sale agreements. The petitioner had constructed a building named "Centaurus" which, amongst others, also consists of flats/apartments which were admittedly sold on the basis of agreements to sell to various individuals/entities. The petitioner received a notice from the tax authorities alleging that it had transferred various properties/flats/ apartments from 06.10.2016 to 28.09.2017. Therefore, a sum of Rs.169,631,161/- was payable by it as CVT. The petitioner alongwith a large number of other parties challenged such notices/demand before the Islamabad High Court on various legal and constitutional grounds. The specific ground urged by the petitioner was that Respondent No.3 had no jurisdiction to declare the petitioner as a collecting authority being attesting and transferring authority. Further, a declaration was sought that the petitioner being a private limited company was not an attesting/transferring authority and was not under any legal obligation to collect and pay any CVT. A declaration was also sought that the notice issued by Respondent No.3 was without lawful authority. The said petition amongst many others was dismissed by the Islamabad High Court vide the impugned judgment. Hence this petition.

3. The only ground urged by the learned counsel for the petitioner before us is that the petitioner is neither a registering authority nor an attesting authority under the law. Hence the proceedings initiated by Respondent No.3 were illegal, void ab-initio and without lawful authority. He further maintains that the petitioner was not under any legal

obligation to collect CVT at the time of sale of flats/apartments as only sale agreements were executed. He argues that the petitioner has no authority to attest or transfer any property. As such the demand raised by Respondent No.3 for payment of CVT is illegal.

4. We have heard the learned counsel for the petitioner and examined the record with his assistance.

5. The CVT was imposed through Section 7 of the Finance Act, 1989 which has been amended from time to time. Section 7 of the Act places the responsibility of collecting CVT on the registering or attesting authority. For ease of reference the relevant portions of Section 7 of the Act are reproduced below:

"7. Levy of tax on Capital Value of certain assets.-(1) A tax on the capital value of assets, to be called the capital value tax, shall be payable by every individual [association of persons, firm or a company which] acquires by purchase [gift, exchange, [power of attorney/other than revocable and time bound (not exceeding sixty days) executed between spouses, father and son or daughter, grand parents and grand children, brother and sister] surrender or relinquishment of rights by the owner (whether effected orally or by deed or obtained through Court decree) except by inheritance, or gift from spouse, parents, grand parents, a brother and a sister) an asset or a right to the use thereof for more than twenty years [or renewal of the lease or any or a right to the use thereof for more than twenty years [or renewal of the lease or any premium paid thereon [and shares of a public company, listed on a registered stock exchange in Pakistan by a person defined in Section 80 of the Income Tax Ordinance, 2001 (XLIX of 2001)].

[Provided that in case of bank, the capital value tax shall be paid when general power of attorney is used to sell the mortgaged of

property offered as collateral [other than traded security for obtaining loan].

[Explanation.- For the purposes of this section, the expressions—

- (a) "association of persons" and "firm" shall have the same meaning as contained in the /Income Tax Ordinance, 2001 (XLIX of 2001); and
- (b) "company" shall have the same meaning as defined in the [Income Tax Ordinance, 2001 XLIX of 2001 except a local authority;]
- (c) "development authority" means an authority formed by or under any law for the purpose of development of an area and includes any authority, society, agency, trust association or institution declared as development authority by the Central Board of Revenue by a notification in the official Gazette; and
- (d) "registration authority" means the person responsible for registering or attesting the transfer of the asset or of the asset or of the right to use thereof more than twenty years, and in the case of a development authority or a cooperative society, its principal officer.]

.....

- (4) The capital value tax shall be collected by the person responsible for registering or attesting the transfer of the asset in respect of which the tax is payable, at the time of registering or attesting the transfer.

.....
"

6. It is evident from a plain reading of Section 7(4) *ibid* that CVT is required to be collected by the person responsible for registering or attesting the transfer of the asset in respect of which the tax is payable at the time of registering or attesting the transfer.

7. The procedure for levying and collecting of CVT is contained in the Capital Value Tax Rules, 1990 ("Rules 1990"). Rule 4 thereof provides as follows:

".....
"

4. Collection of capital value tax.

(2) The tax required to be collected by the registration authority [manufacturer or, as the case may be, seller] shall be credited to the Federal Government through a challan in the form set out [in rule 11]."

8. A bare reading of Section 7 of the Act shows that a tax on the capital value of assets is payable by every individual, association of persons, firm or company which is acquired for a period of more than twenty years. Asset includes immovable properties and structures thereon. The liability to pay is on the purchaser at the time when the transfer in her/his/its name takes place and the responsibility to collect the same is on the person/authority, registering or attesting such transfer. Ordinarily, title of immovable property is transferred through a registered instrument which is required to be registered with the Registrar of documents in terms of the provision of the Registration Act, 1908 on payment of Stamp Duty under the Stamp Act and a Registration Fee. A transaction of this nature does not present any difficulty in view of the fact that where the sale deed is registered under the law the purchaser is required to pay CVT at the time of registration of the sale. In this case, the authority to collect CVT vests with the registration authority namely, the Registrar of Documents. However, during recent years with the

development of co-operative housing societies and statutory authorities engaged in the business of development and sale of real estate, a methodology of transferring immovable property has evolved, whereby properties are transferred privately without involving the Registrar of Documents. Such private transfers are designed to avoid transactional costs, taxes and duties which in turn lead to higher turnover of such properties for investment purposes. Such societies, statutory authorities and even limited liability companies (such as the petitioner) adopt various modes of undertaking such transfers including issuance of transfer letters, allotment letters, agreements to sell and other similar documents which do not require registration. Although such mode of transfer is not a legally recognized mode of transfer of immovable property, a practice has evolved over the past few decades whereby such properties change hands on the basis of allotment letters, agreements to sell, transfer letters etc. This method has obvious financial benefits by way of saving Stamp Duty, Registration Fee and CVT. The sum combined effect such savings comes to substantial amounts of money in addition to being convenient and less hasslesome. Instead, co-operative housing societies, statutory authorities and some limited liability companies have designated departments/sectors which handle transfer of the properties from sellers to buyers against a fee determined by such societies, authorities or companies which goes into the pocket of the company and not into the Government treasury. Consequently, despite multiple sale transactions where a

immovable property may change hands variously by way of such sale transactions, the exchequer does not receive any amount by way of Stamp Duty, Registration Fee and CVT. It appears that it was in an effort to deal with this situation that Circular No. 7 of 1991 dated 23rd of May, 1991 was issued. In the said Circular, co-operative societies were made responsible for collection of CVT at the time of transfer of properties amongst their members which was essentially an internal/inhouse transaction not necessarily requiring registration with any authority or payment of Stamp Duty, Registration Fee or CVT, except for a transfer fee payable to the society or authority.

9. There is no denial of the fact and has been admitted by the learned counsel for the petitioner that the petitioner enters into agreements to sell with buyers, receives the full sale consideration and issues documents evidencing such transaction. On the basis of the said transaction the buyer is put into possession of the immovable property by the petitioner-company whereafter the buyer has the option to apply to the Capital Development Authority (which is the Regulatory Authority for specified areas of the Islamabad Capital Territory) and inter alia maintains the records of the properties within its jurisdiction, to enter the name of such buyer in its records for regulatory purposes. It is nobodys case that Capital Development Authority registers or attests the agreement to sell. In case the argument of the learned counsel for the petitioner to the effect that it is the CDA which is

required to collect CVT is accepted, the buyer in whose favour an agreement to sell has been executed by the company continues to have the freedom to use the agreement to sell and transfer the property to any number of buyers without payment of any duty and thereby deprive the exchequer of what is lawfully due to it against each sale transaction. The methodology adopted by the petitioner is, in all material terms the same as a co-operative societies which have been obligated to collect CVT at the time of transfer of properties amongst the members. To say that there is a difference between co-operative societies and limited liability companies may be true for other technical reasons but the transaction and the methodology adopted by both in order to undertake transfer of the property is in essence, pith and substance the same. The CVT demanded by the petitioner is against admitted sale of properties through agreements to sell and issuance of other related documents. The totality of the transaction has the effect of transfer of the property in favour of a buyer and as such brings the petitioner within the purview of Section 4 of the Act (ibid). Consequently, if the petitioner has failed to collect CVT from the person/entity liable to pay the same, being the registering agency and or attesting authority it is obligated to pay the same to the Federal Government.

10. Learned counsel for the petitioner on conclusion of his arguments tried to argue that the Capital Development Authority has been collecting CVT or that it should be directed to do so. We have found the arguments of the learned counsel

to be misconceived. In the first place nothing has been placed on the record to show that Capital Development Authority has been collecting CVT. In the second place the learned counsel for the petitioner has not been able to persuade us to hold that Capital Development Authority should be directed to collect CVT, for the various reasons enumerated above. Therefore in the facts and circumstances of this case, we hold that even if CDA has actually recovered CVT from any person who has purchased property from the petitioner, (and which should have been collected by the petitioner) the department shall after due verification of the same, give due credit to the petitioner.

11. For the reasons enumerated above, we are in no manner of doubt that the sale, purchase, transfer and other similar transactions are undertaken between the petitioner-company which is the owner of the immovable assets and buyer in whose favour the transfer takes place, therefore, it is only logical that the petitioner should be obligated to collect CVT from the purchaser and deposit it with the Federal Government. Even otherwise, the petitioner squarely falls within the purview of Section 7(d) and (4) of the Act read with Rule 4 of Rules, 1990 cannot deny its liability by relying upon hyper technicalities and stratagems.

12. The learned counsel for the petitioner has not been able to demonstrate any legal, procedural or

jurisdictional error, defect or flaw in the impugned judgment that may furnish basis for grant of leave.

13. For reasons recorded above, we do not find any merit in this petition. It is accordingly dismissed. Leave to appeal is refused.

Sd/- ————— J
Sd/- ————— J
Sd/- ————— J

ISLAMABAD.

29.10.2019.

Zubair/*

Not Approved For Reporting

Sd/- ————— J

QW/
08/11/19