IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE MUNIB AKHTAR
MRS. JUSTICE AYESHA A. MALIK

Civil Appeals No.477 and 478 of 2021
(On appeal against judgment dated 24.04.2019 passed by the High Court of Sindh at Karachi in High Court Appeals No.139 and 109/2019.)

Province of Sindh through Secretary Agriculture Department, Government of Sindh	:	C.A.477/2021
Multiline Enterprises	:	C.A.478/2021
	...	**Appellants**
vs		
Multiline Enterprises	:	C.A.477/2021
Province of Sindh through Secretary Agriculture Department, Government of Sindh	:	C.A.478/2021
	...	**Respondents**

For the Appellants : Mr. Sibtain Mehmood, Addl. AG, Sindh
Mr. Shahab ud Din Abro, D.G.
Mr. Zulfiqar Ali, Focal Person, Agriculture Department, Sindh
(via Video-Link, Karachi)
(in C.A.477/2021)

Mr. Ali Asad Gondal, ASC
(via Video-Link, Karachi)
(in C.A. 478/2021)

For the Respondents : Mr. Sibtain Mehmood, Addl. AG, Sindh
Mr. Shahab ud Din Abro, D.G.
Mr. Zulfiqar Ali, Focal Person, Agriculture Department, Sindh
(via Video-Link, Karachi)
(in C.A.478/2021)

Mr. Ali Asad Gondal, ASC
(via Video-Link, Karachi)
(in CA 477/2021)

Date of Hearing : 25.10.2023

JUDGMENT

Munib Akhtar, J.: These are cross appeals against a judgment of a learned Division Bench of the High Court. The relevant facts can be stated briefly. The Province of Sindh advertized a tender on or about 23.09.2010 inviting bids for the supply of 15 crawler tractors. Tractors meeting the requirements were not manufactured locally and would have to be imported. Multiline Enterprises ("Multiline") participated in the tender and was awarded the contract on or about 10.03.2011. Clause 26 of the general conditions appended to the contract, on which these appeals turn, related to "Taxes and Duties" and provided as follows:

> "1. All taxes and duties levied for delivery on 'DDP' i.e. Delivery Duty Paid basis shall be to the account of the Supplier.
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> 2. In case the Supplier, under this Contract is [eligible] for exemption from any taxes and duties such exemptions shall be obtained by the Supplier at his own expenses. The Purchaser shall not be liable to pay to the Supplier amounts that may be paid by him towards any taxes and duties, under which is exemptible."

The Province was of course the "Purchaser" and Multiline the "Supplier". At the time the contract was entered into there was an exemption from the payment of sales tax at import stage. The collection of advance income tax at import stage was also at a concessional rate. However, by the time the goods came to be delivered the exemption from sales tax at import stage was wholly withdrawn, and the rate at which advance income tax was to be collected at that stage was also enhanced. Multiline demanded a reimbursement on the sales tax that it had to pay, as also the payment of advance income tax at the enhanced rate in terms of s. 64A of the Sale of Goods Act, 1930 ("1930 Act"). When the Province refused to do so, it filed a suit on the Original Side of the High Court, claiming in all recovery of a sum of Rs. 35,048,260/- plus markup etc.

2. The suit was decided by judgment dated 24.12.2018. The learned single Judge dismissed the claim insofar as it related to the reimbursement of advance income tax at import stage at the

enhanced rate. However, the claim for reimbursement of sales tax was sustained and decreed, in the principal amount of Rs. 22,959,536/-. The basis for this was the aforesaid s. 64A.

3. Both the Province and Multiline, being aggrieved by the judgment and decree, filed High Court Appeals. The Province was aggrieved to the extent that the claim for reimbursement of sales tax at import stage had been decreed. Multiline was aggrieved to the extent that its claim for reimbursement of advance income tax at the import stage at the enhanced rate had been dismissed. The appeals were taken up together and decided by the learned Division Bench by means of the impugned judgment. In the event, both appeals were dismissed. Both parties petitioned this Court for leave to appeal, which was granted vide order dated 20.05.2021.

4. After hearing learned counsel for the parties, we concluded, and so announced in Court, that the appeal filed by Multiline had to be dismissed and that filed by the Province stood allowed.

5. Since the matter turns essentially on the applicability or otherwise of s. 64A of the 1930 Act, we begin by setting it out below:

> "**64A. In contracts of sale amount of increased or decreased duty or tax to be added or deducted**. In the event of any duty of customs or excise or tax on any goods being imposed, decreased or remitted after the making of any contract for the sale of such goods without stipulation as to the payment of duty or tax where the duty or tax was not chargeable at the time of the making of the contract, or for the sale of such goods duty paid or tax-paid where duty or tax was chargeable at that time,-
>
> (a) if such imposition or increase so takes effect that the duty or tax or increased duty or tax, as the case maybe, or any part thereof, is paid, the seller may add so much to the contract price as will be equivalent to the amount paid in respect of such duty or tax or increase of duty or tax, and he shall be entitled to be paid and to sue for and recover such addition, and
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> (b) if such decrease or remission so takes effect that the decreased duty or tax only or no duty or tax, as the case may be, is paid, the buyer may deduct so much from the contract price as will be equivalent to the decrease of duty or tax or remitted duty or tax, and he shall not be liable to pay, or be sued for or in respect of, such deduction.

> *Explanation*.- The word "tax" in this section means the tax payable under the Sales Tax Act, 1951 (III of 1951)."

The reference to the Act of 1951 in the explanation must now of course be read as meaning the Sales Tax Act, 1990 ("1990 Act").

6. Even on a bare perusal s. 64A applies only in relation to three types of taxes: central excise duty, customs duty and sales tax. These are taxes normally classified as indirect, in relation to which the economic incidence or financial burden is regarded as being passed (or at least capable of being passed) on to the consumer. The section makes no mention of income tax, which is normally classified as a direct tax, in relation to which the financial burden is regarded as falling on the person who is the subject of the tax. Since s. 64A does not apply to income tax, both the learned single Judge and the learned Division Bench disallowed Multiline's claim. We agree. Multiline's suit was rightly dismissed to this extent and its appeal both before the learned Division Bench and in this Court had also to fail. Accordingly, CA 478/2021 stood dismissed.

7. We turn to the sales tax aspect, in respect of which Multiline succeeded at both stages in the High Court. We are unable to agree that these decisions could be sustained. The learned single Judge appears not to have at all noticed clause 26 of the general conditions of the contract. In our view, with respect, this is an error that goes to the root of the learned Judge's reasoning, and which led him to apply s. 64A to the facts and circumstances of the case. Section 64A clearly provides that it applies only if there is no stipulation as to what is to happen if a duty or tax not payable at the time the contract is made subsequently becomes payable or, being payable at a certain rate at that time subsequently becomes payable at some other rate. As we hold below, clause 26 was a stipulation of such a nature. But at the very least it was a contractual provision that merited consideration and a determination of its applicability or otherwise. To disregard it altogether was an error that fatally undermined the judgment of the learned single Judge in this respect.

8. The learned Division Bench did have regard to clause 26. However, the clause was held not to apply. The learned Division

Bench, alluding to the "spirit" of s. 64A, found it attracted to the claim for reimbursement of sales tax paid at import stage. With respect, we were unable to agree.

9. We begin by noting that clause 26.1 stipulated that the contract was on DDP basis, i.e., Delivery Duty Paid. Now, DDP is a term that is part of Incoterms. This system is well known and established in international trade, where it has very wide currency. Incoterms are explained as follows on the relevant Wikipedia page (internal footnotes omitted; emphasis in bold in original, in italics supplied):

> "The **Incoterms** or **International Commercial Terms** are a series of pre-defined commercial terms published by the International Chamber of Commerce (ICC) relating to international commercial law. Incoterms define the responsibilities of exporters and importers in the arrangement of shipments and the transfer of liability involved at various stages of the transaction. They are widely used in international commercial transactions or procurement processes and their use is encouraged by trade councils, courts and international lawyers. A series of three-letter trade terms related to common contractual sales practices, *the Incoterms rules are intended primarily to clearly communicate the tasks, costs, and risks associated with the global or international transportation and delivery of goods*. Incoterms inform sales contracts defining respective obligations, costs, and risks involved in the delivery of goods from the seller to the buyer, but they do not themselves conclude a contract, determine the price payable, currency or credit terms, govern contract law or define where title to goods transfers.
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> *The Incoterms rules are accepted by governments, legal authorities, and practitioners worldwide for the interpretation of most commonly used terms in international trade*. They are intended to reduce or remove altogether uncertainties arising from the differing interpretations of the rules in different countries. As such they are regularly incorporated into sales contracts worldwide....
>
> The first work published by the ICC on international trade terms was issued in 1923, with the first edition known as Incoterms published in 1936. The Incoterms rules were amended in 1953, 1967, 1976, 1980, 1990, 2000, and 2010, with the ninth version — **Incoterms 2020** — having been published on September 10, 2019."

It is clear that in respect of the contract before us it was eighth version, Incoterms 2010, which was applicable.

10. As noted, the purpose of Incoterms is to provide, in instantly recognizable and standardized form, how the tasks, costs and risks associated with international trade are to be divided between the buyer and seller. One of those risks and costs is the duties and taxes payable. Now, a contract on DDP basis is most favorable for the buyer in that almost all the risks, costs and tasks are to the account of the seller. This includes any duties or taxes payable. Thus, a contract on DDP basis maximizes the risks and responsibilities of the seller and minimizes those of the buyer. Given this distribution, it is hardly surprising that the Province chose to incorporate this term in the general conditions of its contract. Clearly, being the Provincial Government itself, it (rightly) wished to minimize its exposure for any untoward event or unseen or unforeseeable change in circumstances. That included, in particular, duties and taxes payable since those were, as presently relevant, entirely in the Federal domain, i.e., outside the power of the Provincial Government. The taxes and duties referred to in s. 64A are all federal levies. There can therefore be little doubt that clause 26, and the requirement that the contract was on DDP basis, was a stipulation that was precisely within the contemplation of s. 64A, i.e., it was an agreement between the parties as to what would happen if there was a change in the duties and taxes applicable after the contract had been entered into. That burden fell entirely upon, and was wholly and solely the responsibility of, Multiline. Section 64A, on its own terms, did not have any application to the case at hand. The conclusion to the contrary by the learned Division Bench is therefore, with respect, erroneous and unsustainable.

10. Before us, learned counsel for Multiline also submitted that the sales tax, i.e., the 1990 Act, was in VAT mode and that therefore the amount paid by it at import stage was its input tax for which it was entitled to make a claim on the Province, which would, in effect, be its output tax. The basic principles applicable to payment of sales tax in VAT mode have been explained by one of us while in the High Court in a judgment reported as *Pakistan Beverage Ltd. v Large Taxpayer Unit Karachi* 2010 PTD 2673, and reference may be made thereto, especially at paras 10-17. It is important to keep in mind that the supply chain, which is such a

basic feature of sales tax in VAT mode, is not to be found here since the contract was directly between the seller/importer (i.e., Multiline) and the buyer/final consumer (i.e., the Province). Furthermore, the distinction between the legal liability to pay a tax on the one hand and (if it be an indirect one) the "liability" to bear its economic incidence or financial burden on the other must be kept in mind. Section 3(3) of the 1990 Act clearly places the legal liability for the tax on the seller. This is so regardless of whether the seller is able to pass on the economic or financial burden of the tax. As presently relevant, it provides as follows: "The liability to pay the tax shall be... in the case of goods imported into Pakistan, of the person importing the goods", i.e., Multiline. It is true that in the normal and ordinary course of its application, the 1990 Act contemplates a supply chain, with there being output tax-input tax payments (and consequent liabilities of the amount payable) at each "link" of the chain. However, here there was no chain as such. The legal liability to pay the sales tax lay on Multiline, and clause 26 threw the financial burden also on it. Multiline therefore could not base a claim in these terms either. Accordingly, CA 477/2021 had to be allowed.

11. For the foregoing reasons the appeals were decided as stated above, with the result that Multiline's suit failed in its entirety and was liable to be dismissed. It is so ordered.

Judge

Judge

Judge

Islamabad, the
25th October, 2023
Naveed/*

Approved for reporting