IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

Present
Mr. Justice Umar Ata Bandial
Mr. Justice Munib Akhtar
Mr. Justice Yahya Afridi

Civil Appeal No. 725 of 2008
(On appeal from the order dated 26.09.2006 passed by the High Court of Sindh,Karachi in S.C.A.No.202 of 2003.)

M/s Adamjee Insurance Company Ltd. I.I. Chundrigar Road, Karachi. **...**Appellant (s)

versus

The Collector of Customs, Sales Tax and Central Excise (adjudication) Karachi-III, Karachi. ...Respondent (s)

For the appellant: : Syed Naveed Amjad Abdrabi, ASC.

For the respondent: : Dr. Farhat Zafar, ASC.
Raja Abdul Ghafoor, AOR.
Mr. Abdul Hameed Anjum, Secy. Legal, FBR.

Date of hearing: : 31.01.2019

ORDER

Munib Akhtar, J.- This appeal was disposed of by means of a short order on the date of hearing, for detailed reasons to be recorded later. Those reasons are given below. We may note that the impugned judgment of the learned High Court is reported as *Adamjee Insurance Company Ltd. v. Collector of Customs, Sales Tax and Central Excise (Adjudication)* 2007 PTD 2. The matter arose under the Central Excises Act, 1944 ("1944 Act") and the rules framed there under, being the Central Excise Rules, 1944 ("1944 Rules").

2. The appellant is an insurance company engaged in non-life business. The selling of such insurance was the providing of services under and for purposes of the 1944 Act, i.e., services on which excise duty was leviable. By means of SRO 700(I)/1990 dated 30.06.1990 a new rule was inserted in the 1944 Rules as regards the charging and payment of excise duty in respect of such services. As presently relevant, the said Rule 96ZZF provided as follows:

> "*96ZZF. Special procedure for collection of Central Excise duty on services provided or rendered by insurance companies in respect of goods insurance.--.* (1) All insurance companies shall pay the central excise duty leviable on services provided or rendered by them in respect of goods insurance.
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> (2) The duty shall be paid on the premium received by the insurance companies on goods insured;
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> Provided that the premium shall not include commission which is allowed by the insurance companies to their agents in normal course of their business."

The effect of the proviso to sub-rule (2) was that when computing the amount on which excise duty was payable (which was of course charged from the policy holder), the insurance company would not include the commission payable to its agents. However, it appears that the appellant, like other insurance companies, charged excise duty on the whole of the premium. This meant that it received an amount from the policy holders in excess of what was payable by it under Rule 96ZZF. It appears that the appellant, again like other insurance companies, deposited only that amount with the Collector (in terms of the other sub-rules of the Rule) as accorded with the proviso to sub-rule (2). The amount received from policy holders over and above that was retained.

3. By means of SRO 481(I)/95 dated 14.06.1995 the proviso to sub-rule (2) was omitted with effect from 01.07.1995. Thus, from that date onwards, excise duty became payable by the appellant on the whole of the premium. The appellant was of course already

charging duty from the policy holders on such basis. It appears that the appellant thereupon started depositing with the Collector the whole of the amount, i.e., no excess was retained. Again, this was in line with what was done by other insurance companies. Therefore, the dispute is only in relation to the period from 01.07.1990 to 30.06.1995, and the excess amount charged and retained by the appellant over this period.

4. By the Finance Act, 1993 a new section 3-D was added to the 1944 Act. This provided as follows:

> "**3-D Collection of excess duty, etc.** – (1) Every person who has collected or collects any duty, whether under misapprehension of any provision of this Act or otherwise, which is not payable as duty or which is in excess of the duty actually payable and the incidence of which has been passed on to the consumer, shall pay the amount so collected to the Federal Government.
>
> (2) Any amount payable to the Federal Government under sub-section (1) shall be deemed to be an arrear of duty payable under this Act and shall be recoverable accordingly and no claim for refund in respect of such amount shall be admissible.
>
> (3) The burden of proof that the incidence of such duty has not been, or is not, passed on to the consumer shall be on the person collecting the duty."

5. Many years later, the Department discovered that the appellant had charged an excess amount and continued to retain the same. Proceedings were started for recovery thereof and a show cause notice dated 02.01.2002 was issued in terms of s. 3-D and other provisions of the 1944 Act and the 1944 Rules. The appellant was asked to show cause also why penalty and additional duty not be imposed on it. The appellant contested the notice, but was held liable by means of an order dated 30.03.2002. It was ordered that the excess amount charged and retained by the appellant be paid in terms of s. 3-D. In addition, a penalty of twice the amount of duty involved was imposed. Further, additional duty in the manner specified in para 10 of the order was also imposed. However, it was held that the period prior to 01.01.1992 was barred by limitation.

6. The appellant filed an appeal before the learned Appellate Tribunal, which was dismissed. Thereupon it filed a tax appeal in the High Court under s. 36C, which was dismissed by means of the impugned judgment. Before proceeding further, it may be noted that it has been stated before us by learned counsel that the appellant has already paid in full the excess amount charged and retained by it. The appellant did not seek any reimbursement of this amount. However, the charging of penalty and additional duty was contested and only for such purposes did the appellant assail, on legal grounds, the basis on which it was ordered to pay the excess amount, i.e., in terms of s. 3-D. Learned counsel for the respondent-Department strongly supported the impugned judgment and prayed that the appeal be dismissed.

7. None of the grounds that the appellant took before the learned High Court, which were reiterated before us, met with success. These may be summarized as follows. It was contended that s. 3-D, having been inserted by the Finance Act 1993, took effect only from 01.07.1993 onwards, i.e., did not have any retrospective effect. The learned High Court held (pg. 8) that the words "has collected" as used in subsection (1) referred to past collections, and therefore also to the excess amount charged and retained during the period 01.07.1990 to 30.06.1993. It was also contended for the appellant, with specific reference to Rule 10 of the 1944 Rules, that the proceedings were hopelessly time barred. This plea was also rejected. It was held as follows: (pp. 5-6):

> "Since the recovery of this excess amount can neither be defined as short levied excise duty nor as erroneously refunded excise duty, which are the only two situations for recovery of evaded excise duty mentioned in Rule 10 of the Central Excise Rules, the amount recoverable under section 3-D by no stretch of imagination could be termed as 'excise duty'.
>
> As the impugned show-cause notice did not arise under the provisions of section 3 but under section 3-D, the provisions of Rule 10 of Central Excise Rules prescribing the period of limitation for recovery of short levied or erroneously refunded excise duty shall not ipso facto become applicable for initiating proceedings for recovery of the amount under the provisions of section 3-D, though the machinery and manner of its recovery

> provided in the Act is the same as prescribed for recovery of excise duty."

It was held that there was no specific period of limitation prescribed under the 1944 Act in relation to s. 3-D. The learned High Court concluded that the "obligation created under section 3-D... can easily by defined as an amount belonging to the Federal Government lying in trust with the person who has collected the same in the name of excise duty" (pg. 6). As regards this "trust", it was observed as follows (*ibid*):

> "When this amount is held in trust on behalf of the Federal Government, then the person holding the same is either to be defined as depository within the meaning and scope of the word 'depository' as provided in Article 145 of the second schedule to the Limitation Act or the holder of the amount is to be regarded as a 'trust' within the meaning of section 10 of the Limitation Act."

Reference was then made to certain case law as also the *Corpus Juris Secundum*. It was concluded as follows (pg. 8):

> "In the present case it is an admitted position that the appellant recovered an amount in the name of excise duty which was in fact in excess of the obligation towards excise duty. Under section 3-D of the Central Excise Act, the appellant was obligated to deposit this excess amount with the Federal Government, which it failed to do, and retained the excess recovered amount with itself. Thus the appellant was holding this excess recovered amount in trust for a specific purpose created under section 3-D of the Central Excise Act i.e. for depositing it with the Federal Government. In our view therefore, the status of the appellant is more of an express trust as envisaged in section 10 of the Limitation Act than of a depository as provided in Article 145 of the second schedule of the Limitation Act, which prescribes a period of 30 years.
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> The factum of recovery of excess amount may come to light several years later but the moment such fact becomes known to the Excise Authorities, the right to recover such amount accrues. In the year 2002 for the first time it becomes known to the Excise Authorities that excess amount has been recovered and retained by the appellant in the name of excise duty. As the amount was lying in trust, which was created under the express provisions of section 3-D of the Central Excise Act, the same principles as are applicable to express trusts created under section 10 of the Limitation Act would apply and no period of time would bar recovery of such amount."

8. We have carefully considered the impugned judgment and the observations and conclusions of the learned High Court. It is clear from the impugned judgment that, having held that Rule 10 of the 1944 Rules was not applicable to s. 3-D, the learned High

Court was concerned with regard to (a) the manner in which the excess amount could be recovered from the appellant, and (b) whether any recovery would be time barred, given that the show cause notice was issued in 2002 in relation to a much earlier period, covered by the financial years 1990-91 to 1994-95. As to (a), the learned High Court held that "the machinery and manner of its recovery provided in the Act is the same as prescribed for recovery of excise duty". As regards limitation, the learned High Court explored two possibilities: Article 145 of the First Schedule to the Limitation Act and s. 10 thereof, and in the end settled on the latter.

9. The learned High Court concluded that the excess amount retained by the appellant was lying in trust with it for the specific purpose created by s. 3-D, and hence s. 10 of the Limitation Act applied. With respect, we are unable to agree. The reason is that subsection (2) of s. 3-D specifically deemed any amount payable under subsection (1) to be an arrear of duty, which was recoverable accordingly. The manner in which deeming clauses are to be interpreted is too well known to require elaboration. In our view, with respect, an amount deemed to be an arrear of duty cannot be regarded as being a trust, or the corpus of a trust, for a specific purpose within the meaning of s. 10 of the Limitation Act.

10. It is to be noted that s. 2(17) defined "duty" as including "additional duty, regulatory duty and any other sum payable under any of the provisions of this Act or the rules made thereunder". Obviously, the deemed arrear of duty in terms of s. 3-D was a sum payable under a provision of the 1944 Act and hence "duty" within the meaning of s. 2(17). It was recoverable "accordingly", both in terms of subsection (2) of s. 3-D and by virtue of being "duty" as defined. The difficulty however is that the 1944 Act did not provide for any general mechanism or provision for the recovery of duty. The provisions in this regard were as contained in Rule 10. But (as was rightly held by the learned High Court) the said Rule was inapplicable to the deemed arrear of duty under s. 3-D. The reason

is that Rule 10 expressly applied only in relation to duty that was not levied, or was short levied or erroneously refunded. These were the three contingencies set out in the first three sub-rules of Rule 10. None of these contingencies applied in relation to s. 3-D, which envisaged the opposite situation. It is interesting to note that the learned High Court used the word "prescribed" while holding that the mechanism for the recovery of excise duty applied in relation to the deemed arrear of duty under s. 3-D. Section 2(30) specifically defined "prescribed" as meaning "prescribed by rules made under this Act", i.e., the 1944 Rules. There was nothing in the said Rules other than Rule 10 as could relate to recovery in the present context. Therefore, with respect, we are unable to agree with the learned High Court that although the very provision specifically given for recovery of duty was found inapplicable, there was nonetheless some mechanism in the 1944 Act or the 1944 Rules as would enable recovery of the deemed arrear of duty in terms thereof. If at all such a mechanism existed outside of Rule 10, the relevant provision would have to be shown. None however, was brought to our attention.

11. The fact that no provision, as such, existed under the 1944 Act for recovery of the deemed arrear of duty under s. 3-D did not however mean that it could not be recovered at all. Any amount of duty or tax is, ultimately, a debt owed to the Government by the person who is liable to pay the same. It can therefore, in the final analysis, be recovered as any debt can by any person, i.e., by way of suit. Of course, Government hardly ever needs to take recourse to remedy by way of suit because the relevant fiscal legislation provides for specific and tailor made methods, which are far more effective as means of recovery. This does not mean that the remedy by way of suit is barred for the Government. It is simply that this particular sort of remedy does not need to be resorted to. Unless, of course, we come across a situation of the sort created by s. 3-D. The jurisprudence behind s. 3-D (i.e., the concept of unjust enrichment) came into its own many decades after 1944, as is demonstrated by the fact that the provision (and its equivalents in

other fiscal legislation) was placed on the statute book only in 1993. Since the 1944 Act did not originally envisage circumstances of the sort captured by s. 3-D, it (and the 1944 Rules) did not provide for any recovery mechanism. Unfortunately, when the section was inserted into the Act, the recovery procedure was not "updated", and remained the same as before. This position may be contrasted with that obtaining under the Federal Excise Act 2005 ("2005 Act"), which has repealed and replaced the 1944 Act. The provision under the 2005 Act, equivalent to s. 3-D, is s. 11. This does not however refer to any "arrear of duty" at all. It simply provides that any amount collected in excess shall be paid to the Federal Government. Section 2(9) defines "duty" as meaning any sum payable under the 2005 Act. Finally, s. 14 provides for recovery from "any person [who] has not levied or paid any duty or has short levied or short paid such duty or [to whom] any amount of duty has been refunded erroneously". This section now provides for a fourth contingency, in addition to the three that were to be found under Rule 10. The law has, in other words, been appropriately "updated".

12. In our view therefore, and with respect to what was held by the learned High Court, the deemed arrear of duty under s. 3-D would have been recoverable as a debt owed to the Government and by way of a suit filed by the latter. What would have been the period of limitation for such a suit? Article 149 of the First Schedule to the Limitation Act provides that the period of limitation for a suit filed by the Government is sixty years, and time is to be computed from when "the period of limitation would begin to run under this Act against a like suit by a private person". Thus, the proper remedy in respect of the facts and circumstances at hand would have been for the Government to file a suit for recovery of the deemed arrear of duty, for which the period of limitation would be as provided for under Article 149. The contrary conclusions arrived at, and observations made, by the learned High Court cannot, with respect, be sustained. An interesting case to note in this context is *Nagappa Chettiar and another v. Union of*

India (1969) 72 ITR 255. The matter arose under the Indian Income Tax Act, 1922 and an arrear of tax payable there under. At the relevant time, s. 46(7) of the Act provided for a period of limitation of one year for the recovery of any sum payable in terms thereof. That period having expired, the Government of India filed suit for the amount due. One defence taken was that the suit was barred by limitation. The applicability of Article 149 was contested by relying of s. 29(2) of the Limitation Act. This plea was rejected. It was held that "the common law right to proceed by way of suits in the civil courts to recover the debt represented by an assessment to tax is available to the State" (pg. 260). The argument on the basis of s. 29(2), i.e., that the special provision contained in s. 46(7) overrode Article 149, was also rejected. It was held that recovery under the fiscal legislation was not by way of a suit but by way of departmental proceedings and special tribunals. The High Court also referred to an earlier decision, *Inderchand v. Secretary of State for India* (1941) 9 ITR 673, where it was observed as follows (pg. 677):

> "Mr. Das's [counsel for the assessee] contention is that the only method by which income-tax may be recovered is that laid down in Section 46. If therefore, the tax is not realised within the time limit prescribed by sub-section 7 of the section, the tax is no longer payable by the assessee. This argument, to my mind, is wholly untenable. In the first place, Section 46 of the Act prescribes only a summary remedy and there is nothing in that section or in the other provisions of the Act to indicate that that is the only remedy by which income-tax is recoverable. The time limit prescribed in Section 46(7) of the Act obviously applies to proceedings under that section. When income-tax is assessed, it becomes a debt due by the assessee to the Crown. The Crown as a creditor has the ordinary right of suit against the assessee. This is a right under the common law and there is nothing in the Indian Income-tax Act to take away this right. A suit for recovery of arrears of income-tax would undoubtedly be a suit of civil nature and such a suit would clearly be maintainable under the provisions of Section 9 of the Civil Procedure Code."

In our view, what has been said in the cited cases in respect of income tax applies generally in respect of any tax due, and equally as regards the deemed arrear of duty in terms of s. 3-D.

13. As regards the retrospective effect of s. 3-D, in our view the High Court rightly concluded that the words "has collected" used

in sub-section (1) can apply in respect of all sums collected up to 30.06.1993 and for which the person would be liable under subsection (1) as on 01.07.1993. Therefore the section did apply in respect of the excess amount retained by the appellant over the period 01.07.1990 to 30.06.1993.

14. Ultimately, after having heard learned counsel for the parties, the appeal was disposed of by means of a short order in the following terms:

> "For detailed reasons to be recorded later, this appeal is disposed of in terms as stated below.
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> 2. The order in original dated 30.03.2002, which has been upheld by the learned Appellate Tribunal as well as the learned High Court by means of the impugned judgment, stands modified in the following manner and to the following extent:
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> (i) The appellant shall pay additional duty at the rate of two percent with effect from 09.06.1994 to 30.06.2000 and thereafter at the rate of 1.5 percent to 30.03.2002, calculated on the excess amount of duty charged/collected by the appellant from 01.07.1993 to 30.06.1995.
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> (ii) The appellant shall pay penalty equal to twice the excess amount of duty charged/collected from 01.07.1993 to 30.06.1995.
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> iii) The amounts payable in terms as stated hereinabove shall not be subject to any adjustments, and must be paid in full within 90 days from today, failing which (notwithstanding anything that may be contained in the detailed reasons) the operative part of the order in original dated 30.03.2002 (as contained in para 10 thereof) shall stand revived and be operative in full."

Judge

Judge

Judge

Islamabad
31.01.2019
Not approved for reporting
Saeed Aslam/-

APPROVED FOR REPORTING