IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE MUNIB AKHTAR
Mr. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI

Civil Appeal No.243 of 2011
And
Civil Appeal No.1136 of 2018
(On appeal against order dated 23.12.2010 and 05.10.2017 passed by the Peshawar High Court, Peshawar in Custom Reference No.68/2010 with C.M.No.29/2010 and 108/2010 and Sales Tax Reference No.68-P/2007.)

Commissioner Inland Revenue, Peshawar ... **Appellant** (in both cases)

vs

M/s Pakistan Tobacco Company (Ltd.), 1st Floor, Evacue Trust Complex, F-5/1, Islamabad and another : (in CA 243/2011)

Khurshid Ali, Pepsi Cola Dealer, Margazar Road, Saidu Sharif, Swat : (in CA 1136/2018)

... **Respondents**

For the Appellant : Dr. Farhat Zafar, ASC
Mr. Bahadur Sher Afridi, Additional Commissioner, FBR, Peshawar
(in both cases)

For Respondent No.1 : Mr. Farrukh Jawad Panni, ASC
Mr. Ahmed Nawaz Ch. AOR
(in CA 243/2011)

Mr. Masoor ur Rehman, ASC
Sh. Mahmood Ahmed, AOR
(in CA 1136/2018)

Date of Hearing : 31.05.2022

ORDER

Munib Akhtar, J.: There are before us two appeals which arise out of the Sales Tax Act, 1990 ("Act"). Although the appeals were disposed of by different judgments (of the same learned High Court), the issues involved are the same. Indeed, leave to appeal

was granted in CA 1136/2018 on the basis that leave had earlier been granted in CA 243/2011. The cases were therefore clubbed for hearing. Before us, the appellant-department was represented by learned counsel, ably assisted by the Additional Commissioner FBR, Peshawar, who with the permission of the Court also made submissions before us.

2. In CA 243/2011 the respondent-taxpayer is a well-known manufacturer and seller of cigarettes. On or about 17.08.2000 it was served with a show cause notice in relation to the tax periods July, 1999 to May, 2000. It was alleged that the respondent had supplied its goods to various unregistered dealers, all of whom did business in the erstwhile PATA/FATA (herein after "the Tribal Areas"). It was alleged that on such supplies the respondent was required to charge additional sales tax in terms of s. 3(1A) of the Act but had failed to do so. A demand was sought to be raised accordingly. The notice was resisted by the respondent on the ground (as now relevant) that the Act having not been extended to the erstwhile Tribal Areas in terms of Article 247 of the Constitution, it had no obligation to charge additional sales tax, or any liability on failure to do so. An order-in-original was made against the respondent and its appeal to the Collector (Appeals) failed. However, when the matter was taken up by the Appellate Tribunal by way of further appeal, the respondent met with success and the demand was set aside. The department filed a tax reference in the learned High Court, which was dismissed by means of the impugned judgment dated 23.12.2010. Leave to appeal was sought, which was granted *vide* order dated 24.03.2011 in the following terms:

> "Learned counsel *inter-alia* has contended that the department intends to effect recovery of sales tax in the area where Sales Tax Act, 1990 is applicable, therefore, the plea of the respondent that in FATA and PATA, section 3(1-A) of Sales Tax Act 1990 and the subsequent enactment has not been extended in terms of Article 247 of the Constitution is not relevant."

3. In CA 1136/2018 the facts are that the respondent was a dealer of a well-known brand of soft drink in the erstwhile Tribal Areas. On or about 18.02.2003 it was served with a show cause notice that, being unregistered, it was liable to pay additional sales

tax under s. 3(1A) for the tax periods March, 2000 to September, 2001 but had not done so. This demand was resisted, *inter alia*, on the same ground as noted above. An order-in-original was made against the respondent. Its appeal before the Collector (Appeals) succeeded. In this case it was therefore the department that took the matter before the Appellate Tribunal, which dismissed its appeal. The department took the matter further by way of tax reference before the learned High Court which dismissed the same by means of the impugned judgment dated 05.10.2017. The department brought the matter before this Court and at the leave stage reliance was placed on the leave granting order made in the other appeal. Leave was granted accordingly and, as noted above, the matters were clubbed for hearing and disposal. We have heard learned counsel for the department and also the Additional Commissioner, FBR and have had the advantage of their able submissions in their challenge to the impugned judgments. Learned counsel for the respondents have, on the other hand, supported the decisions. At the conclusion of the hearing we were of the view that the appeals ought to be dismissed for reasons to be recorded later, which are set out below.

4. Although the two appeals approach the question from opposite angles, the point in issue is the same, i.e., whether for the tax periods involved there was any liability for the payment of additional tax in terms of s. 3(1A) in respect of a situation where the person making the taxable supplies was located in Pakistan whereas the recipient of those supplies was located in the erstwhile Tribal Areas. It is to be noted that we use the words “in Pakistan” in a special sense, which is how they were understood and applied before the 25th Amendment (2018), by which the erstwhile Tribal Areas ceased to exist and stood absorbed in the Provinces of Khyber Pakhtunkhwa (which is presently relevant) and Balochistan. That special sense was that, *inter alia*, federal laws which otherwise applied in the whole of Pakistan nonetheless did not so apply in relation to the Tribal Areas by reason of Art. 247 of the Constitution (since omitted). For a law to apply in the Tribal Areas, there had to be a specific direction in that regard in terms of Article 247(3), and admittedly there was no such direction in relation to the Act at the relevant time. Learned counsel for the

department and the Additional Commissioner placed strong reliance on the fact that in CA 243/2011, the supplier of the taxable goods was admittedly in Pakistan, and in CA 1136/2018 could safely be assumed to be so. Reliance was placed on s. 3(3)(a) of the Act. On such basis it was contended that the fact that the recipients of the supplies were in the Tribal Areas was not relevant, and Article 247 had no application. The supplies were taxable supplies within the meaning of the Act and, inasmuch as the recipients were not registered thereunder, additional tax was attracted in terms of s. 3(1A). With respect, we were unable to agree. We may note that the relevant provisions of the Act as considered below, including s. 3(1A), have undergone several changes and amendments over time. We are of course concerned with the provisions as they stood during the tax periods involved. The statutory language set out below is as applicable at the relevant time.

5. Subsection (1A) of s. 3 sought to impose a tax in addition to the one, inter alia, levied in terms of subsection (1) on "taxable supplies ... made in Pakistan to a person other than a registered person...". The language of the charge required consideration of the relevant definitions as given in s. 2 of the Act. Clause (41) thereof defined "taxable supplies" as meaning "a supply of taxable goods made in Pakistan...". Clause (39) defined "taxable goods" in terms that included the goods involved in the present appeals. This left for consideration the definition of "supply" at the relevant time. Clause (33) defined "supplies" as including "sale, lease ... or other disposition of goods carried out for consideration...". For present purposes the effect of these definitions can be summed up as follows. For there to have been a valid levy and charge in terms of s. 3(1A), there had to have been a sale of taxable goods in Pakistan. The sale of goods is of course a transaction well-known to the law and is, in general terms, governed by the Sale of Goods Act, 1930 ("1930 Act"). That Act provides (see s. 4) that where property in the goods is transferred from the seller to the buyer the contract is called a "sale" but where a transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is to be called an "agreement to sell". Section 19 of the 1930 Act provides, *inter alia*,

that unless a different intention is shown, ss. 20 to 24 set out the rules that are to apply for ascertaining the intention of the parties as to the time when the property in the goods is to pass to the buyer. Now, there can be no doubt that in relation to any transaction of the sale of goods, in determining whether sales tax is to be levied, charged and recovered in terms of the Act, the provisions of the 1930 Act will apply subject to what is stated in the former statute, either expressly or by way of necessary implication. Thus, the term "sale" as used in the definition of "supply" in clause (33) of s. 2 the Act can include both a 'sale' and an 'agreement to sell' in terms of the 1930 Act. One reason for this is that the Act, in clause (44) of s. 2, also contains a definition of "time of supply". At the relevant time, this definition provided as follows: "a supply made in Pakistan shall be deemed to have taken place at the earlier of the time of delivery of goods or the time when any payment is received by the supplier in respect of that supply...". Learned counsel for the department, as also the Additional Commissioner, placed reliance on this definition as well. It is to be noted that this definition also contained the words "in Pakistan". Thus, on any view of the matter the sale between the respondent and its dealers in CA 243/2011 and between the respondent and its principal in CA 1136/2018 had to take place "in Pakistan", in the special sense in which these words were used prior to the 25th Amendment. In our view, the question as to whether the supplies over the relevant tax periods were indeed made "in Pakistan" was essentially one of fact, or at least had significant factual elements. Quite obviously those factual aspects had to be properly alleged in any show notice issued by the department, and proved or otherwise established from the record. However, when the show cause notices in both the appeals are examined there is no such allegation, and when the record is examined there are no relevant factual findings as could result in a conclusion that the supplies over the relevant tax periods were indeed made "in Pakistan". Learned counsel for the appellant as also the Additional Commissioner sought to rely, insofar as the factual aspect of the cases were concerned, only on the fact (which was admitted in CA 243/2011 and was sought to be impliedly established in CA 1136/2018) that the supplier was "in Pakistan". However, in our view this was not enough. The reason is that the

Act taxes supplies as defined. It is certainly true that in terms of s. 3(3)(a) the legal liability to pay the tax falls on the person making the taxable supplies. However, the crucial question in the present cases was whether or not the supplies were made "in Pakistan". That question was not, as a matter of fact, established from the record and was not even alleged in the show cause notices. This defect was, in our view, fatal to the case sought to be made out by the department, and in the absence of any such findings the show cause notices simply could not succeed. We may note that the learned High Court in both the impugned judgments as well as the learned Appellate Tribunal proceeded to reach the conclusion that the department had no case on a line of reasoning which was rather different from the one that finds favour with us. We say nothing as to the correctness or otherwise of the views that were expressed by the forums below. However, we are satisfied that on a correct reading of the Act as it stood at the relevant time in relation to the tax periods involved, and in the facts and the circumstances of the two cases before us, the respondents were rightly entitled to the relief they were granted. That relief is affirmed by us.

6. For the foregoing reasons, these appeals stood dismissed at the conclusion of the hearing.

Judge

Judge

Judge

Islamabad, the
31st May, 2022
Naveed/*
Approved for reporting