

2016 P T D 961

[Sindh High Court]

Before Faisal Arab, C.J. and Muhammad Iqbal Kalhoro, J

CIVIL AVIATION AUTHORITY through Airport Manager

Versus

FEDERAL BOARD OF REVENUE through Chairman and others

C.P. No.D-693 and C.M.A. No.2180 of 2014, decided on 9th September, 2015.

Sales Tax Act (VII of 1990)---

-----Ss. 2(35), 3, 3(5), 3(41) & 13---Constitution of Pakistan, Art.199---Constitutional Petition---Applicability---Scope---Civil Aviation Authority Ordinance (XXX of 1982), Preamble---S.R.O. No. 509(I)/2013 dated 12-06-2013---Scope of Tax---Additional tax, collection of---Object and Scope---Contention of petitioner Civil Aviation Authority was that it was neither a "manufacturer" nor a "retailer" or "importer" or a "wholesaler" or "person required to be registered" under any other law for tax or duty or a "commercial exporter" to be made subject of S.R.O. No. 509(I)/2013 dated 12-06-2013---Civil Aviation Authority having come into being through Pakistan Civil Aviation Authority, Ordinance 1982, object for its creation were enumerated in the Ordinance which was to promote and regulate civil aviation activities to develop an infrastructure for safe, efficient, adequate, economical and properly coordinated civil air transport service in Pakistan---Petitioners' (Civil Aviation Authority's) duty was to carry on all affairs relating to management of airports, air traffic and navigational services to aircrafts, communication services at the airports etc. and not one of said functions, however showed that petitioner was engaged in making any "taxable supplies in furtherance of any taxable activity" to hold that it was liable for registration as required under law---Department plea that since petitioner was a body corporate, it was liable to pay additional tax was not valid S.R.O. No. 509(I)/2013 dated 12-6-2013 was applicable on persons having industrial or commercial electric and gas connections, and who had either not provided sales tax registration number to supplier or whose names were not on Active Taxpayer list and whose bills exceed fifteen thousand rupees---Petitioner had no commercial and industrial electric and gas connections as there were number of buildings used for residential purpose nor was it carrying on any taxable activity by making supply of such utilities to persons doing some business in its premises---Any such contention that many business concerns were operating in premises of airport under the control of petitioner and it was earning a lot of revenue by granting them access and permission to so operate in its premises, could not be considered a valid point to infer that Department was rightly charging tax from the Civil Aviation Authority under S.R.O. No. 509(I)/2013 dated 12-06-2013---Such revenue as earned by Civil Aviation Authority could be made subject and be declared liable to duty or levy of some tax chargeable under some different laws but not under S.R.O. No. 509(I)/2013, dated 12.06.2013 which had specific connotation in present context---Activities carried out by petitioner definitely did not fall

within the definition of scope for which Sales Tax Act, 1990 had been promulgated and any such inference contrary to it would neglect and be against the very scope and object of the Sales Tax Act, 1990---Petitioner was not required to be registered under Sales Tax Act, 1990 and it was only engaged in services relating to promotion of civil aviation activities, hence, it was not liable to pay additional tax under S.R.O. No. 509(I)/2013 dated 12-06-2013---High Court observed that this would not mean that Department could not charge tax under S.R.O. No. 509(I)/2013, dated 12-6-2013 from individual entities, either registered or liable to be registered which were making taxable supplies in course of any taxable activity within the premises of petitioner in any capacity---Mode and mechanism for collecting tax under S.R.O. No 509(I)/2013 dated 12-06-2013 could however be worked out by parties mutually either by installing sub-meters in respect of electricity and gas connections on such premises independently or by devising some other procedure permissible under Sales Tax Act, 1990---Constitutional, petition was allowed, accordingly.

PLD 2001 SC 600 and 2009 PTD 43 rel.

Emad ul Hassan for Petitioner.

Asim Iqbal and Farmanullah for Respondents.

Ainuddin Khan, D.A.G. for Federal Government.

Date of hearing: 19th August, 2015.

ORDER

MUHAMMAD IQBAL KALHOR, J.---Before aggrieved by the Notification No.S.R.O.509(I)/13 dated 12.06.2013 issued by the Federal Government the petitioner has through this petition seeking reliefs reproduced herein below. The terms of the impugned notification show that the Federal Government has levied an extra tax at the rate of five per cent of the total billed amount excluding the amount of federal taxes, in addition to the tax payable under subsection (1) of section 3 of the Sales Tax Act, 1990 (for short, the Act), on supplies of electric power and natural gas to persons having industrial or commercial connections, and whose bill in any month, exceeds rupees fifteen thousand, but who have neither obtained sales tax registration nor are on the Active Taxpayers List maintained by the Federal Board of Revenue. The reliefs prayed for are:-

1. Declare that the petitioner is not required to obtain a sales tax registration number under the provisions of the Sales Tax Act and therefore, cannot be made the subject of the impugned notifications and impugned legislations.
2. Restrain the respondents Nos.1, 2 and 3 from imposing and seeking to recover any sum from the petitioner pursuant to the impugned notifications and impugned legislation through the electricity bills issued by the KESC and gas utility bills issued by the SSGC in respect of the Airport premises.

3. Direct the respondent No.1 to refund/adjust the sum of Rs.26,359,665 (Rupees Twenty Six Million Three Hundred and Fifty Nine Thousand Six Hundred and Sixty Five only) already paid as extra sales tax by the petitioner to the respondent No.2 (KESC) for electricity consumed during the months of August 2013 to December 2013, together with the refund of such further sums of money as the petitioner may be compelled to pay pursuant to the impugned notifications and impugned legislation during the pendency of this petition.

4. Direct the respondent No.1 to refund/ adjust the sum of Rs.106,491/- (Rupees One Hundred and Six Thousand Four Hundred and Ninety One only) already paid extra sales tax by the petitioner to the respondent No.3 (SSGC) for gas consumed during the months of July 2013 to December 2013, together with the refund of such further sums of money as the petitioner may be compelled to pay pursuant to the impugned Notifications and impugned Legislation during the pendency of this petition.

5. Pass such other orders as may be deemed appropriate in the circumstances of the case and in the interests of justice.

6. Award costs of this petition to the petitioner.

2. Case of the petitioner in nutshell is that it is Civil Aviation Authority, a statutory body established by Federal Government under Section 3 of the Pakistan Civil Aviation Authority Ordinance, 1982 to promote and regulate civil aviation activities and to develop an infrastructure for safe efficient, adequate and economical civil air service in Pakistan. Respondent No.2/ Karachi Electricity Supply Company (KESC) from very beginning has been supplying electricity to the entire Jinnah International Airport premises (under petitioner's control) through nine electricity feeders. Similarly respondent No.3/ Sui Southern Gas Company Ltd. (SSGC) has been providing natural gas for consumption at the airport. In order to decide category of applicable tariff for electricity consumption, the KESC categorizes its consumers in terms of categories defined by respondent No.4/ NEPRA, and although the petitioner has been classified by KESC as "Industrial Consumer" and it so appears in the electricity bills but it is charged tariff applicable to a mix-load consumer i.e. residential plus commercial, as in the airport premises besides official building, there are a number of buildings used for residential purposes. Simultaneously SSGC categorizes its retail consumer according to the class defined by respondent No.5/ Oil and Gas Regulatory Authority (OGRA) for determining the sales prices and minimum charges on which natural gas is sold by the gas supplying companies. Although the petitioner is not a commercial establishment as per class defined by OGRA, yet SSGC charges such tariff from it which is applicable to a commercial consumer. The reason why the petitioner is so categorized by KESC and SSGC is that there is no other distinct category for the kind of retail consumers such as the petitioner. On 12th June 2013 the Federal Government through Ministry of Finance Economic Affairs, Statistics and Revenue (Revenue Division) issued S.R.O. 509(I)/ 2013 levying tax as stated above. The modus operandi for collection and payment of such extra tax was notified vide S.R.O. 510(I)/2013 which amended the Sales Tax Special Procedures Rules, 2007 by adding the new chapter IV-A therein. Pursuant to that in July 2013 an amendment was made by the Federal Government to section 3 of the Act, through section 5(2) of the Finance Act, 2013 inserting subsection (1A) therein. Since in the record of

KESC and SSGC, the petitioner is mentioned as industrial and commercial consumer, although it does not undertake any such activities, additional tax at the rate of 5 percent was imposed on it in July and August 2013 by FBR through SSGC and KESC and additionally for the same months, an extra tax of 1% was also imposed on the petitioner by FBR in respect of the gas and electricity supply in pursuance of impugned notification. The petitioner has paid huge amounts to that effect. Since it is not supplying any taxable supplies, it is neither liable to be registered under the Act nor is able to provide Sale Tax Registration Certificate or proof of activity on ATL to the KESC and SSGC. The petitioner made such representations and entered into continuous correspondence with the respondents to redress its grievance but in vain. Receiving no response, the petitioner has invoked jurisdiction of this Court under Article 199 of the Constitution.

3. Mr. Emad-ul-Hasan, learned counsel for the petitioner argued that petitioner was neither registered nor required to be registered under the Act, as it was not carrying out any commercial activity. According to the learned counsel, the petitioner was engaged in promotion and regulation of civil aviation activities and services and at no point of time had been supplying any taxable goods as defined in the Act. He next contended that the impugned notifications were vague and ambiguous and they did not provide any protection against imposition of extra tax on the person who was not required to obtain sales tax registration number pursuant to the provision of the Act. In order to explain his position viz-a-viz taxable supplies and scope of the subject tax in the given context learned counsel read sections 3 and 4 of the Act; and to emphasize that the petitioner was not required to be registered, he referred to rule 4 of the Sales Tax Act Rules, 2006. Learned counsel also made reference to Sections 2(21), 2(25), 2(41) and sections 14, 22, 23 and 26 of the Act to explain his case. And while defending the petitioner against the levy of subject tax and to highlight the functions of the petitioners he read out several sections from Pakistan Civil Aviation Authority Ordinance, 1982, and stated that the petitioner cannot be subjected to impugned notifications. He relied upon PLD 2001 SC 600 and 2009 PTD 43.

4. Mr. Asim Iqbal learned advocate for the respondents conversely contended that petitioner was a body corporate as defined in Ordinance 1982 and was engaged in taxable activities as defined under the Act. According to him, as the petitioner was engaged in making taxable supplies to the persons doing business in its premises, it was liable to pay additional tax under the impugned notification. He further contended in this regard that the petitioner within the premises of Jinnah Airport was supplying electricity to many concerns having business activities, for instance MacDonald, for hoardings, for car parking and renting out several shops to different persons etc. whereby it was earning huge revenue. He emphasized that all those activities come within definition of commercial activities, hence were subjected to levy of tax.

5. We heard the learned counsel and perused the record. Per vires of the impugned notification, the persons having industrial and commercial connections of electricity and gas are liable to pay an extra tax at the rate of five percent of the total billed amount on supplies of electric power and natural gas, if their bill exceed Rs. 15000/-. Such extra tax is in addition to tax payable under subsection (1) of section 3 of the Act and it is to be charged from the consumer who has either not provided his sales tax registration number to the supplier or his name is not shown on the Active Taxpayers List maintained by the Federal Board of Revenue. It is evident that the impugned S.R.O. has been issued by the

Federal Government in exercise of powers under subsection (5) of section 3 of the Act, which mandates it to levy and collect additional tax from persons, which is other than the tax imposed under subsections (1), (2) and (4) of Section 3, at extra rate not exceeding seventeen percent of the value of goods. The mode, manner and at what time and subject to what conditions and limitations such extra tax is to be levied is left to the discretion of the Federal Government but exercise of that discretion is subject to prescribed rules. Section 3 of the Act exhaustively defines scope of sales tax that is to be charged at the rate of seventeen percent of the value of taxable supplies made by a registered person in the course or furtherance of any taxable activity carried on by him; and it is also to be levied on the goods imported into Pakistan. The taxable activity, defined in subsection (35) of section 2 of the Act, means any economic activity that is carried on by a person either for profit or not and it includes an activity carried on in the form of a business, trade, or manufacture; an activity that involves the supply of goods, the rendering or providing of services or both to another person; a one-off adventure or concern in the nature of a trade; and anything done or undertaken during the commencement or termination of the economic activity. The Act also prescribes taxable supply in subsection (41) of Section 3, which means a supply of taxable goods made by an importer, manufacturer, and wholesaler including dealer, distributor or retailer, and the taxable goods are the goods other than exempted under section 13 of the Act. It is obvious that application of this law is, inter alia, restricted to taxable supplies made by a registered person while carrying on taxable activities aimed at doing some commerce; and additionally, the scheme of this law will also come into play, if some goods are imported into Pakistan. The registered person is defined in clause (25) of section 2 of the Act, which means a person who is either registered or liable to be registered. The person who is required to be registered is detailed in rule 4 of the Sales Tax Rules, 2006. According to which a manufacturer (not being a cottage industry); a retailer (whose value of supplies, in any period during the last twelve months exceeds five million rupees); an importer; a wholesaler including dealer and distributor; a person required under any other federal law or provincial law to be registered for the purpose of any duty or tax collected or paid as if it were a levy of sales tax to be collected under the Act; and a commercial exporter (who intends to obtain sales tax refund against his zero-rated supplies) engaged in making of taxable supplies in Pakistan, which may include zero-rated supplies, in the course or furtherance of an taxable activity carried on by them, if not already registered, are required to be registered. It will not be therefore out of place here to appreciate whether the petitioner is registered or liable to be registered for the purpose of the Act and, hence consequently liable to pay tax under the impugned SRO. The petitioner came into being through Pakistan Civil Aviation Authority Ordinance, 1982. The object for its creation enumerated in the said Ordinance is to promote and regulate civil aviation activities to develop and an infrastructure for safe, efficient, adequate, economical and properly coordinated civil air transport service in Pakistan. The functions the petitioner has to perform are also detailed therein, which mostly relate to and include regulation and control of civil aviation activities; making plans for the development of infrastructure to promote safe, efficient, adequate, economical and properly coordinated civil air transport service. In addition to above, the petitioner's duty is to carry on all affairs relating to management of airports, air traffic and navigational services to aircrafts, communication services at the airports etc. None of these functions, however, show that the petitioner is engaged in making any taxable supplies in furtherance of any taxable activity to hold that it is liable for registration as required under the law. The petitioner is admittedly neither a manufacturer nor a retailer or importer or wholesaler or a person required to be registered

under any other law for tax or duty or a commercial exporter to be made subject of the impugned SRO. The contention of the learned counsel for the respondent was that since the petitioner was a body corporate, it was liable to pay additional tax, we are afraid to subscribe to such proposition of law for the simple reason that the effect of the impugned notification is applicable on the persons having industrial or commercial electric and gas connections, and who have either not provided sales tax registration number to the supplier or whose names are not on the Active Taxpayer List and whose bills exceed fifteen thousand rupees. Whereas in the case in hand, the petitioner admittedly has no commercial and industrial electric and gas connections in the exact sense of implications these words convey as there are a number of buildings used for residential purpose nor is it carrying on any taxable activity by making supply of these utilities to the persons doing some business in its premises. Therefore any such contention that many business concerns are operating in the premises of airport under the control of the petitioner and it is earning a lot of revenue by granting them access and permission to so operate in its premises, could not in our view be considered a valid point to infer that respondents are rightly charging tax from the petitioner under the impugned SRO. Such revenue as earned by the petitioner could be made subject and be declared liable to duty or levy of some tax chargeable under some different laws but not under the Act, which has specific connotation in the present context. Such activities carried on by the petitioner definitely do not come within the definition of scope for which the Act has been promulgated and any such inference contrary to it would neglect and be against the very scope and object of the Act. We are of the view that the petitioner is not required to be registered under the Act and it is only engaged in services relating to promotion of civil aviation activities, hence it is not liable to pay additional tax under the impugned SRO.

6. Having decided so would not mean that the respondent cannot charge tax under the impugned SRO from individual entities, either registered or liable to be registered, which are making taxable supplies in the course of any taxable activity within the premises of the petitioner in any capacity. The mode and mechanism for collecting the tax under the impugned notification from such individuals can however be worked out by the parties mutually either by installing sub-meters in respect of electricity and gas connections on such premises independently or by devising some other procedure permissible under the law. In terms of above observations, the petition is allowed, and these are the reasons of our short order dated 19.08.2015.

RR/C-17/Sindh Order accordingly.

;