Taxhelpline Case No. 150 of 2013

[LAHORE HIGH COURT]
Writ Petition No.21507 of 2011, decided on 22nd October, 2012

Before Ijaz ul Ahsan, J

Mian Abdul Ghaffar for Petitioners. Sarfraz Ahmad Cheema along with Asad Khan Inspector ASO for Respondents

GHULAM NABI and 3 others
Vs
FEDERATION OF PAKISTAN through Member Customs (Legal) Revenue Division FBR, Islamabad and 3 others

ORDER

IJAZ UL AHSAN, J.---Brief facts giving rise to this petition are that the petitioners purchased auto scrap consisting of old and used auto parts in an open auction held by the Customs Department Quetta conducted by Messrs KNF Enterprises, Government Auctioneer Quetta vide auction voucher dated 7-4-2003. The said parts along with local scrap were booked for Lahore through Messrs Sitara Al-Usman Goods Forwarding Agency Quetta on Truck No.QUE-6883 driven by the petitioners Nos.1 and 2. The said truck was intercepted by staff of respondent No.1 near Niazi Shaheed Chowk, Lahore on 30-9-2003 on the allegation that auto scrap contained old and used but serviceable auto parts and that the same were allegedly brought into the country without payment of duties and taxes. The local scrap was also seized on the allegation that the same was used for concealment of old and used auto parts. On seizure of goods port dated 10-10-2003 was prepared. It was sent to respondent No. 2, who issued show cause notice dated 25-11-2003. The petitioner submitted a detailed reply. However, respondent No.2 out-rightly confiscated the auto scrap/old and used auto parts under section 156(1)(89) of the, Customs Act, 1969. The local scrap was also confiscated with an option for its redemption on

payment of fine equal to 40% of the assessable value. The truck was also confiscated under section 157(1) of the Customs Act, 1969 and allowed to be redeemed on payment of fine of Rs.25,000. A personal penalty of Rs.25,000 was also imposed on petitioner No. 1 vide order dated 15-5-2004.

2. Aggrieved of order dated 15-5-2004, the petitioners filed an appeal before the learned Appellate Tribunal. The same was dismissed vide order dated 29-8-2005. The Custom Reference filed by the petitioner also failed and was dismissed vide order/judgment dated 21-4-2006. The petitioners thereafter filed CPLA No.21815-L/ 2006 before the Hon'ble Supreme Court of Pakistan. During pendency of the CPLA, respondent No.1 amended S.R.O. 574(I)/2005 dated 6-6-2005 vide S.R.O. 179(I)/2006 dated 15-6-2006. Through the amended S.R.O. old and used auto parts were allowed to be released against 30% redemption fine. The said S.R.O. was later superseded vide S.R.O. 499(I)/2009 dated 13-6 2009, which is still holding the field.3. On gaining knowledge about the aforesaid S.R.O., the petitioner withdrew the CPLA in order to take the benefit of the amendment. Thereafter the petitioner approached respondent No.4 vide application dated 2-9-2006 for release of goods in terms of S.R.O. 574(I)/2005 dated 6-6-2005 as amended vide S.R.O. 179(I)/2006 dated 15-6-2006. Respondent No.4 sought advice from the Legal Advisor of the Department, who opined that if the confiscated goods had not yet been disposed of, under the principle of locus poenitentiae, the goods may be released inn terms of S.R.O. 574(I)/2005 dated 6-6-2005 as amended vide S.R.O. 179(I)/2006 dated 15-6-2006. It appears that the department did not act upon the said advice despite repeated applications filed by the petitioners. This forced the petitioner to file Writ Petition No.19692 of 2009. Vide order dated 14-6-2011, this Court directed respondent No.4 to decide the applications of the petitioners in accordance with law and to examine whether S.R.Os. in question were applicable to the goods of the petitioner. The matter was subsequently taken up by the respondent No.4. However, vide order date 30-8-2011, he dismissed the applications by holding that the request for release of confiscated old and used serviceable auto parts under the benefit of S.R.O. 574(I)/2005 dated 6-6-2005 could not be acceded to.

4. The petitioners are aggrieved of denial on the part of respondent No.4 to correctly interpret the provisions of S.R.O. 574(I)/2005 dated 6-6-2005 as amended vide S.R.O. 179(I)/2006 dated 15-6-2006 and presently superseded vide S.R.O. 499(I)/2009 dated 13-6-2009.

5. The learned counsel for the petitioners submits that a plain reading of the aforesaid S.R.Os. makes it abundantly clear that the petitioners are entitled to the benefit of the same. He argues that the reasoning adopted by respondent No.4 in holding that the benefit of S.R.O. 574(I)/2005 dated 6-6-2005 was prospective in nature and could not be retrospective is patently erroneous. He submits that it is settled law that the beneficial legislation can be given retrospective effect and the petitioners were entitled to be granted the said benefit. He further points out that respondent No.4 went contrary to the advice of the Legal Advisor of the department, who advised that in case the confiscated goods had not been disposed of, the same may be released to the petitioners on payment of entire amount of duties in addition to 30% redemption fine. He further points out that in view of the nature of the goods i.e. used auto-motive parts, which have been lying in the warehouses of the Custom Department since the past more than 9 years, there is no likelihood of the same fetching any sizable sum, if disposed of by the department as scrap. On the contrary, the petitioners are ready and willing to pay not only the taxes and duties but also redemption fine, which would bring substantial revenue to the exchequer without wasting time and effort to undertake an exercise of disposing of such goods through auction.

6. The learned counsel for the respondents has opposed this petition. He has supported the order passed by respondent No.4 on the ground that benefit of S.R.O. 574(I)/2005 dated 6-6-2005 as amended from time to time cannot be granted to the petitioners in view of the fact that the same cannot be given retrospective effect. He further maintains that the goods were confiscated on 15-4-2004 in favour of the Federal Government and had become property of the Federal Government. Since the matter has become a past and

closed transaction any subsequent legislation cannot change the nature of confiscated goods. He therefor argues that the benefit of the aforesaid S.R.Os. is not available to the petitioners.

7. I have heard the learned counsel for the parties and gone through the record. The main questions requiring determination by this Court are:--

(1) Whether the provisions of S.R.O. 574(I)/2005 dated 6-6-2005 as amended vide S.R.O. 179(I)/2006 dated 15-6-2006 and S.R.O. 499(I)/2009 dated 13-6-2009 can be given retrospective effect for the benefit of the petitioners? And

(2) Whether the petitioners are entitled to be given the option for redemption of goods on payment of fine equal to 30% of their value in addition to duties and taxes leviable thereon in terms of the aforesaid notification?

8. On consideration of the arguments of the learned counsel for the parties and examination of the record, in my opinion, the answers to both questions has to be in the affirmative for the following reasons:--

(i) Admittedly, the goods were seized on 10-10-2003, a show cause notice was issued on 25-11-2003 and thereafter the local scrap/ old and used auto parts were confiscated under section 156(1)(89) of the Customs Act, 1969 vide order dated 15-5-2004. However, the matter did not end there. The order of respondent No.2 was challenged before the Appellate Tribunal and thereafter by way of Custom Reference No.5 of 2006 before this Court. While the matter was pending before the Hon'ble Supreme Court of Pakistan in CPLA No.21815-L of 2006, respondent No.1 amended S.R.O. 574(I)/2005 dated 6-6-2005 vide S.R.O. 179(I)/2006 dated 15-6-2006. Through the said modification, old and used automotive parts were allowed to be released against 30% redemption fine. In order to avail the benefit of said amendments in the law, the petitioners withdrew

their CPLA which was dismissed as withdrawn vide order dated 25-7-2006 in the following terms:--

"The learned counsel states that in pursuance of S.R.O. 574(I)/2005 dated 6th of June, 2005, petitioner contemplates to avail remedy before the Customs Department, therefore, seeks permission to withdraw this petition.

Dismissed as withdrawn."

Thus it is clear that proceedings relating to confiscation of the smuggled goods were still pending before the highest forum when the aforenoted S.R.Os./amendments were introduced. Therefore, the argument made by the learned counsel for the respondents that it was a past and closed transaction does not hold force. The matter was still pending and was specifically withdrawn for the purpose of availing the benefit, which had become available to the petitioners in the meantime by virtue of amendment in the law. As such the petitioners were entitled to claim the benefit of the said S.R.Os.

It may be noted that on an application moved by the petitioners before respondent No.4 claiming the benefit of S.R.O. 574(I)/2005 dated 6-6-2005 as amended vide S.R.O. 179(1)/2006 dated 15-6-2006, respondent No.4 sought advice from the Legal Advisor of the Department, who opined that if the confiscated goods had not yet been disposed of, under the principle of locus poenitentiae, the goods may be released under the said S.R.O. as the same holds the field. It was further pointed out that such was the policy of CBR. However, without giving much consideration to the opinion of their own Legal Counsel and without assigning any cogent reasoning, the request of the petitioners was denied on the ground that S.R.Os. were prospective in nature and the same could be given retrospective effect. The question of retrospectivity of beneficial legislation has come up before the Hon'ble Supreme Court of Pakistan in various cases. In Messrs Army Welfare Sugar Mills Ltd. and other v. Federation of Pakistan (1992 SCMR 1652), the Apex Court held as follows:--

"21. It seems to be well-settled proposition of law that a notification which purports to impair an existing or vested right or imposes a new liability or obligation, cannot operate retrospectively in the absence of legal sanction, but the converse i.e. a notification which confers benefit cannot operate retrospectively, does not seem to be correct proposition of law ...

25. The High Court has wrongly placed reliance on the general proposition that a notification cannot operate retrospectively without realizing that there is a marked distinction between a notification which purports to impair existing/vested rights or imposes new liabilities or obligations retrospectively and a notification which purports to confer benefit retrospectively."

Subsequently, the same question was considered by a Full Bench of the Apex Court in Messrs Elahi Cotton Mills Ltd. and others v. Federation of Pakistan through Secretary M/O Finance, Islamabad and 6 others (PLD 1997 Supreme Court 582). In the cited judgment relying upon Army Welfare Sugar Mills's case the Apex Court held as follows:--

"We may point out that an executive order/notification, which is detrimental or prejudicial to the interest of a person, cannot operate retrospectively. However, a beneficial executive order/notification issued by an executive functionary can be given retrospective effect. In this regard it will suffice to refer to the judgment of this Court in the case of Army Welfare Sugar Mills Ltd. and others v. Federation of Pakistan and others 1992 SCMR 1652. The above written undertaking of the Central Board of Revenue to make this circular applicable retrospectively is in consonance with the aforesaid judgment of this Court."

In the case of Collector of Customs, Lahore v. A.A. Corporation, Lahore (2004 PTD 2738) a Division Bench of this Court while examining the question of retrospectivity of beneficial statute came to the conclusion that concessionary S.R.O., notification, regulation or executive order could be given retrospective effect if it goes to the comfort of taxpayer.

In the case of Mrs.Shahida Anwar v. Deputy Collector Customs, Lahore and 4 others (2009 PTD 1860), this Court while examining the question of retrospectivity held as follows:--

"The general principle of law settled by the Honourable Supreme Court in the Messrs Army Welfare Sugar Mills Ltd. And others v. Federation of Pakistan and others 1992 SCMR 1652 is to the effect that a beneficial or concessionary Notification or executive order may be given retrospective effect as it confers benefit and advantage on the assessee or citizen but a Notification or order that imposes new liability, obligation or burden on an assessee or citizen cannot be given such effect and must operate prospectively. One justification of this rule of retrospectivity of a beneficial Notification lies in the principle that a regulatory authority cannot whilst administering a law draw distinction between like parties in the enjoyment of a concession conferred by the State unless there is specific classification or exclusion in the Notification or as observed in the afore-noted case of Messrs World Traders, the relevant transaction is a past and closed one."

In Anoud Power Generation Limited and others v. Federation of Pakistan and others (PLD 2001 SC 340), the aforenoted principle was re-affirmed in the following terms:--

"At this juncture another important aspect of the retrospectivity of notification may also be noted that if the notification has been used for the benefit of the subject then it can be made operative retrospectively but if its operation is to the disadvantage of a party who is the subject of the Notification then it would operate prospectively. This point has been elaborately discussed by this court in the judgment pronounced in the case of Messrs Army Welfare Sugar Mills Limited and others 1992 SCMR 1652."

The learned counsel for the petitioners has also placed at least six judgments of different functionaries of the department granting relief in identical circumstances by releasing the goods on payment of redemption fine equal to 30% of the assessed value of goods

along with payment of taxes and duties leviable thereon. The learned counsel for the respondents has been confronted with the said judgments. He has not been able to controvert the same or to make out a case that said judgments are distinguishable from the facts and circumstances of the present case. Therefore, in addition and without prejudice to the case of the petitioners on its merits, the petitioners are, on the principle of equal protection before law and equal treatment to all citizens, entitled to the same benefit.

As far as the argument of the learned counsel for the respondents that the proceedings against the petitioners had attained finality, reference may usefully be made to a judgment of the Hon'ble Supreme Court of Pakistan reported as Central Board of Revenue and others v. Chanda Motors (1993 SCMR 39) and may usefully be reproduced as follows:--

"17. It is the language used in Paragraph III(d) of Circular 9 of 1985, which requires detailed examination. What is meant by "assessments already finalized"? "Assessment" is defined in the Income Tax Ordinance, 1979, as including reassessment and additional assessment, which shows that scope of assessment is wider and larger than its ordinary meaning. Word "finalized" is derived from the word "final" which is defined in the Chambers 20th Century Dictionary to mean "last, decisive, conclusive: respecting the end or motive of a judgment ready for execution-last of series". "Finality" is defined as state of being final, completeness or conclusiveness. In Black's Law Dictionary, Fifth Edition, word 'final" is defined as, "last; conclusive, decisive, definitive; terminated; completed". In its use in reference to legal actions this word is generally contrasted with "interlocutory:. Viewed in the light of meanings of the words "assessments" and "finalized", it appears that assessment orders as such do not have touch of finality unless all the forums are exhausted in which such orders can be challenged so that the order takes the shape of final decision.

18. Legally speaking order of assessment passed by Income Tax Officer is an order of original authority but is not final for the reason that it can be challenged in appeal or revision as the case may be

and would be final only when it goes through all the findings and the finding of the last forum shall he binding as conclusive.

19. The question whether appeal and other remedies provided under the law forms part of the proceedings or not came up for consideration before the Supreme Court of India in the case of Garikapati Veeraya v. N. Subbiah Chourdlity and others reported in PLD 1957 Supreme Court (Ind.) 448. It is held as pet-majority opinion that legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding. Reference can be made to the case of Commissioner of Wealth Tax v. Vimlaben Vadilal Mehta reported in (1984) 145 ITR 11, in which it is held that it is well-settled that when an appeal is filed against an assessment order before the AAC, the assessment is thrown open and the appellate proceeding constitutes a continuation of the assessment proceeding.....

21. On, the question of construction, in the light of what is stated above, it can be said without fear of contradiction that order passed in original proceedings is not final unless it crosses all the forums set up under that law in which it can be challenged and the order of the last forum would become final. Mr.Rehan Hassan Naqvi, learned counsel for the respondent has submitted before us that there is plethora of case-law on the point that even within the frame-work of Income Tax law, appeals and other remedies provided therein formed part of the same proceedings regarding assessment. In this context our attention is drawn to the case of Chatturam and others v. Commissioner of Income Tax, Bihar reported in (1947) 15 ITR 302. In the reported case assessees of partially excluded areas were served with notices under section 22(2) of the Income Tax Act for furnishing returns. Subsequently Governor of Bihar by Notification directed that India Income-tax (Amendment) Act, 1939, the Income-tax Law Amendment Act, 1940 should be deemed to have been applied to the Chotanagpur Division containing partially excluded areas with retrospective effect. Subsequently Regulation I of 1941 was also issued by the Governor to remove doubts as to the retrospective applicability of the Acts mentioned in the Notification. Assessees were assessed and their appeals were pending when

Regulation I of 1941 was issued. It was contended that assessment proceedings initiated and completed against them were invalid and neither the Notification nor the Regulation was competent in law to validate those proceedings. It was held by the Federal Court of India, inter alia, that appeals to the Appellate Assistant Commissioner were an integral part of the machinery of assessment and therefore, it could not be contended that assessment proceedings were over when Regulation I of 1941 was made and the Regulation could not apply to the proceedings covered by those appeals."

Admittedly, the appeal of the petitioners was pending before the Hon'ble Supreme Court of Pakistan when the aforesaid S.R.Os./ amendments were introduced. As such the case of the petitioners had not become a past and closed transaction and in case the goods in question were available with the respondents, which they were and still are, the petitioners are entitled to the benefit of said S.R.Os.

9. Finally, when the arguments were concluded, in order to satisfy myself, I directed the respondents to depute an authorized official to appear before this Court and refute the claim of the learned counsel for the petitioners that 30% redemption fine in addition to duties and taxes leviable thereon would infact lead to a higher recovery than the amount likely to be recovered if the confiscated goods which consist of used auto parts, which have been kept in Customs Warehouse for the past 8 years are put to auction by the Department. The representative of the department, who has appeared on Court's call, has not been able to specifically or convincingly refute the said claim. Therefore, in the absence of any loss to the exchequer by reason of allowing the petitioners to avail the benefit of S.R.Os. which can admittedly be given retrospective effect being beneficial in nature, appears to be fair and just in the facts and circumstances of the present case.

10. For the reasons recorded above, this petition is allowed. It is declared that letter dated 30-8-2011 refusing the option in terms of S.R.O. 574(I)/2005 dated 6-6-2005 as amended vide S.R.O. 179(I)/

2006 dated 15-6-2006 and presently superseded vide S.R.O. 499(I)/2009 dated 13-6-2009 is illegal, without lawful authority and of no legal effect. Respondent No.4 is directed to extend the option for redemption of the goods on payment of fine equal to 30% as visualized in the aforesaid notification in addition to payment of duties and taxes leviable thereon as expeditiously as possible and preferably within a period of one month from the date of receipt of a certified copy of this order.

Petition allowed

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