

IN THE HIGH COURT OF SINDH KARACHI

Suit No. 989 of 2018

[Reliance Petrochemical Industries Pvt. Ltd. v. Federal Board of Revenue & others]

Plaintiff : Reliance Petrochemical Industries Pvt. Ltd through Mr. Ovais Ali Shah, Advocate.

Defendant No.1 : Federal Board of Revenue through the Secretary Finance through Mr. Anwar Kamal, Assistant Attorney General for Pakistan.

Defendants 2-14 : Commissioner Inland Revenue Zone-II, Karachi & others through Mr. Muhammad Aqeel Qureshi, Advocate.

Date of hearing : 02-02-2021

Date of decision : 01-03-2021

JUDGMENT

Adnan Iqbal Chaudhry J. - By this suit the Plaintiff challenged order dated 07-05-2018 issued by the Commissioner Inland Revenue to post Officers of Inland Revenue at the premises of the Plaintiff to monitor production or sale of taxable goods and the stocks position.

2. The impugned order was issued by the Commissioner Inland Revenue in exercise of powers under the proviso to section 40B of the Sales Tax Act, 1990. At the time the suit was filed on 08-05-2018, section 40B of the Sales Tax Act, 1990 read as under:

“40B. Posting of Inland Revenue Officer.- Subject to such conditions and restrictions, as deemed fit to impose, the Board or Chief Commissioner may post Officer of Inland Revenue to the premises of registered person or class of such persons to monitor production, sale of taxable goods and the stock position:

Provided that if a Commissioner, on the basis of material evidence, has reason to believe that a registered person is involved in evasion of sales tax or tax fraud, he may, by recording the reason in writing, post an Officer of Inland Revenue to the premises of such registered person to monitor production or sale of taxable goods and the stocks position.

Explanation. – For the removal of doubt, it is declared that the powers of the Board, Chief Commissioner and Commissioner under this section are independent of the provisions of section 40.”

3. It is contended by the Plaintiff *inter alia* that while the FBR has a certain discretion under section 40B of the Sales Tax Act, 1990 to post Officer of Inland Revenue at the premises of a registered person, the same power given to the Commissioner under the proviso to section 40B can only be exercised “if a Commissioner, on the basis of material evidence, has reason to believe that a registered person is involved in evasion of sales tax or tax fraud”; that the impugned order does not even insinuate tax evasion or fraud, much less refer to any material evidence that could have formed the basis of the order; and that under the garb of the impugned order, Officers of Inland Revenue have caused the business of the Plaintiff to come to a halt.

4. By order dated 08-05-2018 passed in this suit, the impugned order passed by the Commissioner was suspended. Subsequently, by Finance Act, 2018, assented on 22-05-2018, section 40B of the Sales Tax Act, 1990 was amended to read as follows:

“40B. Posting of Inland Revenue Officer.- Subject to such conditions and restrictions, as deemed fit to impose, the Board, may post Officer of Inland Revenue to the premises of registered person or class of such persons to monitor production, sale of taxable goods and the stock position.”

5. Thus, by the Finance Act, 2018, the proviso to section 40B of the Sales Tax Act, 1990 which empowered the Commissioner to post Officer of Inland Revenue at the premises of a registered person, was omitted, and presently such power is only with the FBR.

6. In view of the above, only the following issues arise for determination of the suit:

- (i) Whether the impugned order dated 07-05-2018 issued by the Commissioner under the proviso to section 40B of the Sales Tax Act, 1990 would survive after said proviso was omitted from the statute ?
- (ii) If so, whether the conditions essential for passing the impugned order were not met so as to make it an order without jurisdiction ?

(iii) What should the decree be ?

The above being legal issues not requiring evidence, with consent of learned counsel the suit was heard for final judgment in view of Order XV Rule 3 CPC.

7. Mr. Owais Ali Shah, learned counsel for the Plaintiff submitted that after the omission of the power of the Commissioner to pass an order under section 40B of the Sales Tax Act, 1990, the impugned order ceases to exist. Without prejudice to that he added that the impugned order was unlawful to begin with as it has been held by the Supreme Court of Pakistan in *Commissioner Inland Revenue Karachi v. Pakistan Beverages Ltd.* (2018 SCMR 1544) that under the proviso to section 40B of the Sales Tax Act, 1990, the Commissioner could only act where he suspected evasion of sales tax or a tax fraud; and further that an order passed under section 40B cannot be indefinite has to be time-bound.

On the other hand, Mr. Muhammad Aqeel Qureshi, learned counsel for the department submitted that the omission of the proviso to section 40B of the Sales Tax Act, 1990 brought about by the Finance Act, 2018 would not have the effect of doing away with the impugned order which had been issued prior to the Finance Act, 2018; and that the impugned order was within the parameters of section 40B of the Sales Tax Act, 1990.

8. Heard the learned counsel and perused the record.

9. On issue No.1, the submission of Mr. Aqeel Qureshi, learned counsel for the department was that notwithstanding the omission of the power of the Commissioner from section 40B of the Sales Tax Act, 1990, as brought about by the Finance Act, 2018, the impugned order would survive as it was issued prior to the Finance Act, 2018. Though learned counsel did not cite the relevant provision, his submission was a reference to section 6 of the General Clauses Act, 1897 which is as under:

“6. Effect of repeal.– Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any

enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not –

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or
- (b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.”

10. The word “enactment” in section 6 of the General Clauses Act, 1897 is defined by section 3(17) thereof to include ‘any provision contained in any Act’. Therefore, the omission of the proviso to section 40B of the Sales Tax Act, 1990 by the Finance Act, 2018, i.e., the omission of the power of the Commissioner to post Officer of Inland Revenue thereunder, is essentially a repeal of said proviso by the Finance Act, 2018. That the ‘omission’ of a provision is the same as ‘repeal’ of a provision, has also discussed in *Muhammad Tariq Badar v. National Bank of Pakistan* (2013 SCMR 314). Though the effect of repeal, per section 6 of the General Clauses Act, 1897, is to save certain actions taken under the repealed provision, that saving is qualified by the words “unless a different intention appears”. Such intention is obviously to be gathered from the amended provision. That proposition was explained succinctly by the Supreme Court of India in *State of Punjab v. Mohar Singh Pratap Singh* (AIR 1955 SC 84) as follows:

“Whenever there is a repeal of an enactment, the consequences laid down in section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention.

The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore subscribe to the broad proposition that section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such compatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material.”

11. The impugned order passed by the Commissioner under the proviso to section 40B of the Sales Tax Act, 1990 did not determine any rights or obligations, but was an order to deploy Officers of Inland Revenue at the premises of the Plaintiff so as to ‘monitor production or sale of taxable goods and the stocks position’. In other words, at the time of repeal of the proviso to section 40B, the Officers of Inland Revenue were on a monitoring assignment from the Commissioner. The repeal/omission of the proviso to section 40B of the Sales Tax Act, 1990 by the Finance Act, 2018 manifests that the legislature intended to take away the power of the Commissioner to post/deploy Officers of Inland Revenue to the premises of a registered person and to put an end to such postings made by him. Given that intent, it would be absurd to suggest that notwithstanding said repeal the legislature intended for Officers of Inland Revenue to continue the monitoring assignment tasked by the Commissioner. Thus, the saving consequences of repeal provided under section 6 of the General Clauses Act, 1897 are not triggered, and the impugned order does not survive the repeal of the proviso to section 40B of the Sales Tax Act, 1990. Since issue No.(i) is answered in the negative, the other issues become redundant. Suit is disposed of as infructuous.

JUDGE

Karachi
Dated: 01-03-2021