

IN THE HIGH COURT OF SINDH, KARACHI
C. P. No. D-8480 of 2019

Date

Order with signature of Judge

Present: *Mr. Justice Muhammad Junaid Ghaffar*
Mr. Justice Adnan-ul-Karim Memon

Petitioner: M/s. Hayat Kimya Pakistan (Pvt.) Ltd.,
Through Mr. Qazi Umair Ali, Advocate.

Respondents: Federation of Pakistan & Others.
Through Mr. Muhammad Khalil Dogar,
Advocate.

**Mr. Kashif Nazeer, Assistant Attorney
General.**

Date of hearing: 05.03.2024.

Date of Judgment: 11.03.2024.

J U D G M E N T

Muhammad Junaid Ghaffar, J: Through this Petition, the
Petitioner has prayed for the following reliefs:-

- (a) Declare that the Impugned Letter bearing File No. Weboc/57/2019-BG//PQ/ dated 21.12.2019 (the "Impugned Letter") has been issued without lawful jurisdiction and is unlawful, illegal and unconstitutional and of no legal effect;
- (b) Declare that the failure by the Respondents to extend benefit of the SRO 41(I)/2009 and SRO 1097(1)/2012 (the "SROs") in respect of the import of Petitioner's Products i.e. electric installation along with accessories and firefighting system with standard accessories (the "Products") is illegal, unlawful, unconstitutional and perverse interpretation of the SROS;
- (c) Declare that the Petitioner is entitled to the exemption from payment of custom duty and sales tax on the import of the Products in accordance with the SROS;
- (d) Direct the Respondents to allow the Petitioner the import of the Products without payment of customs duty and sales tax in accordance with the SROs;
- (e) Permanently restrain and prohibit the Respondents and / or their agents, officers and representatives from taking any coercive or adverse action against the Petitioner on the basis of the Impugned Letter;
- (f) Grant any further relief that this Honourable Court deems appropriate.
- (g) Grant the costs of the Petition."

2. Learned Counsel for the Petitioner has contended that the Petitioner had imported certain consignments consisting of firefighting and lightning equipment and claimed exemption from customs duty and sales tax under SRO No. 41(I)/2009 dated 19.01.2009 (“SRO 41”) which was denied by the Customs Department; however, on the request of the Petitioner the goods were released against Bank Guarantees for the differential amount of duties and taxes and matter was referred to FBR. Per learned Counsel, FBR vide its Letter dated 14.12.2018 has endorsed the view point of the Respondent Collectorate and subsequently, Notice dated 21.12.2019 was issued seeking encashment of Bank Guarantees pertaining to six different consignments. According to him, the imported goods are covered by the definition as provided in the SRO, whereas, the factory of the present Petitioner is located in a Special Economic Zone and the concerned Province has also certified the list of equipment; hence, the Petitioner is entitled for the benefit of the claimed SRO. In support he has relied upon the cases reported as **SIUT**¹ and **Pak Elektron**².

3. On the other hand, learned Counsel for the Collectorate has opposed this Petition on the ground that the equipment in question does not fall within the definition of machinery as provided in the SRO, whereas, in the year 2019 the said item has been inserted under HS Code 9917; hence, the benefit cannot be extended for the earlier imports. Similarly, Assistant Attorney General has also opposed this Petition on the ground that in the definition of machinery, the equipments are also defined and such equipments is only entitled for exemption if it is operated by power of any description and is used in industrial process; hence, no case for the claimed concession has been made out.

¹ Sindh Institute of Urology and Transplantation v. Federation of Pakistan (2017 PTD 603)

² Commissioner Inland Revenue v. Pak Elektron Ltd. (2022 SCMR 757)

4. We have heard all the learned Counsel as well as learned Assistant Attorney General and have perused the record. It appears that the Petitioner has set-up an industry in the Special Industrial Zone, Faisalabad, Punjab, and imported 6 different consignments of firefighting and lightning equipment and its claim of exemption under SRO 41 was denied by the Respondent-Collectorate; however, on the representation of the Petitioner, the goods were released against Bank Guarantee, whereas, subsequently, the concerned Collectorate wrote a Letter to FBR on 14.12.2018 highlighting the issue and also submitted its view point. The said Letter reads as under:-

"GOVERNMENT OF PAKISTAN
MODEL CUSTOMS COLLECTORATE
PORT MUHAMMAD BIN QASIM
KARACHI

No. Group-VI-991-2018-PQ/697

Dated: 14.12.2018

Mr. Mushtaq Ali Shahani,
Secretary (Tariff-II),
Federal Board of Revenue,
Islamabad,

Subject: REFUSAL OF SPECIAL ECONOMIC ZONE BENEFITS - HAYAT KIMYA PAKISTAN (PVT.) LIMITED.

Please refer to the Board's letter C.No. 1(9)Mach/92-150318-R dated 12.12.2018 on the subject cited above

2. The representation of M/s. Hayat Kimya Pakistan (Pvt.) Limited Lahore dated 07.12.2018 has been examined. The issue in brief is that the aforesaid importer was allowed to set up manufacturing unit in Special Economic Zone (SEZ) M-3 Industrial City, Faisalabad established under Special Economic Zone Act, 2012 as confirmed by the Board vide its letter C.No. 1(9) Mach./92 dated 12.09.2018 read with Board of Investment's UO No. 4(24)2018-SEZ dated 29.08.2018.

3 M/s. Hayat Kimya Pakistan (Pvt.) Limited imported various partial shipments of plant and machinery for developing and manufacturing of products i.e. baby diapers, adult diapers, female sanitary napkins, tissues and home care products etc in the aforesaid SEZ. Now the importer has claimed the benefit of exemption of customs duty and sales tax in respect of "firefighting equipment" and "lighting fixtures" under Special Classification Provisions 9917 and SRO 41(I)/2009 dated 19.01.2009.

4. The aforesaid claim for exemption of customs duty and sales tax was examined in the wake of above said concessionary provision of law with particular reference to the definition of the expression "machinery" as prescribed under the SRO 41(1)/2009 dated 19.01.2009. And it is viewed that the goods such as "firefighting equipment" and "lighting fixtures" do not qualify for exemption under SRO 41(I)/2009 on account of the fact that the same do not have direct application/usage in the industrial process as per definition of expression "machinery" gives in the SRO which reads as under-

- (i) machinery and equipment operated by power of any description, such as is used in industrial process;

- (ii) apparatus and appliances, including metering and testing apparatus and appliances specifically adopted for use equipment specified in sub-clause (i);
- (iii) mechanical and electrical controls and transmission gear adapted for use of goods specified in sub-clause (i); and
- (iv) component parts of machinery-and-equipment, as specified in sub-clauses (i), (ii) and (iii), identifiable for use in or with machinery

5. An opportunity of hearing was also provided to the representatives of the importer and the matter was discussed in detail. On the suggestion of the importer this Collectorate agreed to release the disputed goods against Bank Guarantee pending clarification from the Board. But the importer has not so far has deposited the financial security for the differential amount of duty/taxes to the tune of Rs. 80 million (approx) to get release of the consignments.

6. This is for Board's information.”

5. Since the above letter has to be read along with the SRO in question i.e. SRO 41; therefore, it will also be advantageous to refer to the said SRO and the definition of machinery provided therein, which reads as under:-

“GOVERNMENT OF PAKISTAN
MINISTRY OF FINANCE, ECONOMIC AFFAIRS, STATISTICS & REVENUE
(REVENUE DIVISION)

Islamabad, the 19 January, 2009.

NOTIFICATION
(CUSTOMS)

S.R.O. 41(I)/2009.- In exercise of the powers conferred by section 19 of the Customs Act, 1969 (IV of 1969), and clause (a) of sub-section (2) of section 13 of the Sales Tax Act, 1990, and in supersession of its Notification No. S.R.O. 316(I)/2007, dated the 12 April, 2007, the Federal Government is pleased to direct that **capital equipment** (plant, machinery, **equipment** and accessories), if not manufactured locally, shall be exempt from the whole of customs-duty and sales tax if imported for the development of projects in the Special Industrial and Economic Zones and for establishing projects in these Zones, subject to the following conditions, namely:-

- (i) locations and perimeters shall be notified by the Board of Investment of Investment Division;
- (ii) the benefit of this notification shall be admissible only for capital equipment (plant, machinery, equipment and accessories), and not for raw materials;
- (iii) the goods imported under condition (ii) for the zones will not be removed without the permission of the FBR within five years of their importation;
- (iv) in case of partial shipments of machinery and equipment for setting up a plant, the importer shall, at the time of arrival of first partial shipment, furnish complete details of the machinery, equipment and components required for the complete plant, duly supported by the contract, lay out plan and drawings; and
- (v) Board of Investment (BOI) shall certify in the prescribed manner and format as per Annex-A that the imported goods are bona fide project requirement. In case the clearance of the imported goods is through Pakistan Customs Computerized System (PaCCS), the authorized officer of the BOI shall furnish all relevant information online to PaCCS against a specific user ID and password obtained under section 155D of the Customs Act, 1969 (IV of 1969). In already computerized Collectorates or Customs stations where the PaCCS is not operational, the Project Director or any other person authorized by the Collector in this behalf shall enter the requisite information in the Customs Computerized

System on daily basis, whereas entry of the data obtained from the customs stations which have not yet been computerized shall be made on weekly basis.

Explanation.- In this notification,-

- (a) the expression "machinery" means,
 - (i) machinery and equipment operated by power of any description, such as is used in industrial process;
 - (ii) apparatus and appliances, including metering and testing apparatus and appliances specifically adopted for use in conjunction with machinery and equipment specified in sub-clause (i);
 - (iii) mechanical and electrical controls and transmission gear adapted for use of goods specified in sub-clause (i); and
 - (iv) component parts of machinery and equipment, as specified in sub-clauses (i), (ii) and (iii), identifiable for use in or with machinery, and

- (b) the expression "not manufactured locally" means the goods which are not listed in the locally manufactured list, notified through a Customs General Order issued by the Federal Board of Revenue from time to time or, as the case may be, certified as such by the Engineering Development Board."

6. From perusal of the aforesaid Letter of Respondent Collectorate and approved / endorsed by FBR, it appears that the entire gist of the Respondents case is with reference to the definition of machinery as provided in SRO 41 and based on it the Collectorate has come to a conclusion that fire-fighting equipments and lighting fixtures do not qualify for such exemption as they do not have any direct application / usage in the industrial process as provided and required under the definition of machinery given in the said SRO. Since FBR has not by itself decided the issue independently, but has merely endorsed the view of the Collectorate, it has to be treated as decision of FBR as well. When the opinion of Collectorate / FBR is read in juxtaposition with the preamble of the SRO in question, it seems that their contention is legally incorrect. SRO 41 has been issued in exercise of the powers conferred by section 19 of the Customs Act, 1969 and clause (a) of sub-section (2) of section 13 of the Sales Tax Act, 1990, and it provides that **capital equipment** (plant, machinery, **equipment** and accessories-emphasis supplied), if not manufactured locally, shall be exempt from the whole of customs-duty and sales tax if imported for the development of projects in the

Special Industrial and Economic Zones for establishing projects in these Zones, subject to certain conditions. It has not been disputed that the goods in question are not being manufactured locally; nor it is in dispute that the present Petitioner has set up a project in the Special Industrial Zone. Therefore, we are only required to decide that whether the goods in question are otherwise entitled for exemption under SRO 41 or not. From perusal of the preamble of the SRO, it appears that the exemption is available on **capital equipment** which has then been defined / elaborated in parentheses as plant, machinery, *equipment* and accessories, whereas, in the explanation to Notification, it is only **“machinery”** which has been defined and not capital equipment. Even if the contention of the Respondents as well as learned Assistant Attorney General that the equipment in question is not covered by the definition of machinery as appended with the SRO is accepted to be correct; it has, otherwise no bearing on the case of the Petitioner. It may be noted that the exemption is not restricted to **“machinery”** only as misunderstood by the Respondents. In fact, the exemption is for all sorts of **capital equipment** which could be *plant*, machinery, *equipment* and *accessories* as well. Machinery, in the instant SRO is one of the **capital equipment** in addition to *plant*, *equipment* and *accessories*. These three items have not been defined or explained like machinery. Therefore, the restriction in respect of exemption is only on machinery for which such stipulated conditions are applicable and not in respect of the remaining capital equipment. We need not reiterate that the goods in question are equipment and not machinery by Respondents own claim. In view of such position, we are in no doubt that the product in question falls within the definition of equipment. Time and again, the Respondent’s Counsel and the learned Assistant Attorney General were confronted that apparently, in SRO No. 41(I)/2009 there is no definition of plant, equipment and accessories and none of

them was in a position to assist us or controvert this admitted fact.

7. In view of such position, for the present purposes, we are not required to interpret that whether the equipment in question falls within the definition of machinery as provided in the SRO in question or not. Admittedly, the goods in question are equipments and are independently covered for exemption as being capital equipment. For these reasons we are unable to agree with the interpretation of the Respondent Collectorate / FBR for denying exemption to the Petitioner under the SRO in question.

8. In view of hereinabove facts and circumstances of the case, this Petition is allowed by declaring that the firefighting equipment as well as lighting equipments covered by this Petition falls within the definition of capital equipment under SRO 41 and therefore, entitled for exemption from customs duties as well as Sales Tax as provided therein. As a consequence, thereof, the impugned Notice dated 21.12.2019 as well as Letters dated 14.12.2018 issued by Respondent No. 3 duly endorsed FBR by confirming the said opinion are hereby set aside. The Bank Guarantees furnished by the Petitioner stands discharged accordingly.

9. Petition is ***allowed*** in the above terms.

Dated: 11.03.2024

J U D G E

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Arshad/