IN THE HIGH COURT OF SINDH AT KARACHI

(Extraordinary Constitutional Jurisdiction)

C. P. No. D – 8633 of 2017 a/w
C. P. No. D – 4165 of 2015 &
C. P. No. D – 8634 of 2017

Date	***Order with signature of Judge***

Present:

Mr. Justice Aqeel Ahmed Abbasi
Mr. Justice Mahmood A. Khan

Ghulam Ali Bhatia & others……..……..…….Petitioners

Versus

Federation of Pakistan & others. ….. ……..Respondents

Date of hearing : 07.07.2020

Date of Judgment : 09.10.2020

Ms. Navin Merchant, Advocate for the petitioners.

M/s. Muhammad Khalil Dogar, S. Mohsin Imam, Masooda Siraj & Ghulam Rasool, advocates for respondents.

Mr. Khalid Jawed Khan, advocate for intervener a/w Mr. Uzair Qadir Shoro, advocate.

M/s. Osman Hadi & Muhammad Ameenullah Siddiqui, Assistant Attorney General.

J U D G M E N T

Aqeel Ahmed Abbasi, J: Above captioned petitions have been filed by the petitioners, who claim to be manufacturers of steel products and importers of its raw material, such as re-rollable and re-meltable iron and steel scrap from various countries for their own consumption. According to petitioners, re-rollable and re-meltable steel are classifiable under PCT Heading 7204.4910 and 7204.4990 and are primarily used in manufacturing of mild steel products.

2. The petitioners have expressed their grievance and seek to challenge the discriminatory treatment accorded to importers of re-rollable and re-meltable scrap viz-a-viz, the ship breakers, who according to the petitioners, are allowed to pay the duty and taxes only on 72.5%, which is the “re-rollable scrap”, whereas there is Nil duties and taxes on the “re-meltable scrap” pursuant to amendment in Rule 58H(4) of the Special Procedure Rules, 2007 vide SRO 583/2017 dated 01.07.2017.

3. It is pertinent to note that in the aforesaid captioned petitions, besides pressing the ground of discrimination, the restriction imposed on the sizes of imported re-rollable scrap vide Serial No. 7(2) under the ban items (Negative list) of Import Policy Order and the authority to issue Notification/SRO with the approval of Federal Minister-in-Charge instead of Federal Government was also challenged for being ultra vires to the Constitution, in view of judgment of the Hon’ble Supreme Court in the case of *Mustafa Impex v. Government of Pakistan & others* [**PLD 2016 SC 808**]. However, during the course of hearing of these petitions, learned counsel for the petitioners in all these petitions, submitted that petitioners would not press the vires of the Special Procedure Rules, 2007 vide SRO 583/2017 dated 01.07.2017 in the light of the judgment of the Hon’ble Supreme Court in the case of *Mustafa Impex v. Government of Pakistan & others* [**PLD 2016 SC 808**] and would press the ground of discrimination only.

4. Accordingly, we would examine these petitions to the extent of discrimination, if any, between the petitioners, who claim to be manufactures of steel products and importers of its raw material, i.e. re-rollable and re-meltable scrap viz-a-viz the ship breakers, who according to petitioners, are their competitors in business,

however, have been granted certain relief and concession in respect of payment of duty and taxes through impugned amendment in SRO 583(I)/2017 dated 01.07.2017, and therefore, the petitioners are not in a position to carry on their business through fair market competition.

5. in nutshell, the petitioners have expressed their grievance against impugned amendment in SRO 583(I)/2017 dated 01.07.2017, whereby, sub-rule (4) of Rule 58H of Sales Tax Special Procedure Rules, 2017 was substituted. The same reads as follows:-

> ***"(4) Ship breakers, in lieu of sales tax payable against their local supplies of re-rollable scrap and other materials obtained from ship breaking, shall pay sales tax at the time of import at the rate of eight thousand five hundred Rupees per metric tonne of such supplies determined at eight percent, in case of oil tankers and gas carriers and at 72.5% for other vessels of the total LDT of the ship imported for breaking"***

6. Learned counsel for the petitioners, while giving the background and the nature of business activity of the petitioners and its comparison with the ship breaking industry with particular reference to use of re-rollable and re-meltable scrap in the manufacturing process of steel products, has submitted that in Pakistan, the raw material for producing "Mild Steel Products" is obtained primarily from two sources i.e. imported re-rollable/re-meltable scrap falling under PCT Heading 7204.4910 and 7204.4990, and re-rolable scrap/remeltable scrap obtained from ships imported for dismantling, falling under PCT Heading 8908.0000. According to learned counsel, both items are imported from various countries to cater the needs of raw material i.e. re-rollable scrap for producing mild steel products. It has been further

contended that the ship brought in for dismantling yield recovery of minimum 70% of re-rollable scrap and 30% of re-meltable scrap, including variety of serviceable materials and products, like cabins (furniture, appliances, building materials), appliances and implements; machinery; pipes; electric motors/panels/generators; cables; hydraulic equipment; radio room equipment etc. which are sold in the local market and hotel industry at huge prices per unit. According to learned counsel, these items are considered to be re-meltable by the Customs Department for the purpose of duties and taxes. It has been submitted that prior to impugned SRO 583(I)/2017 dated 01.07.2017, the ship breaking industry was liable to pay the sales tax on 70.5 of the total LDT considered to be re-rollable and Rs.5600/- per metric ton on the rest of the 29.5% of the total LDT considered to be re-meltable through SRO 484(I)/2015, which was in the field until SRO 583(I)/2015 was issued, whereby, the full and final liability of the sales tax was fixed at 72.5% making rest of 27.5% goods sales tax free, totally malafidely and illegally. However, despite the fact that the ship breakers were liable to pay Rs.5000/- per metric ton on 29.5% of the goods prior to SRO 583(I)/2017, chose not to pay the same at their free will without any action on the part of the respondents resulting in loss of billions of rupees to the government exchequer.

7. Learned counsel for the petitioners has argued that the impugned Notification/SRO, besides being violative of Constitution is also discriminatory as it is against the Fundamental Rights of a citizen guaranteed by Articles 4, 18 and 25 of the Constitution. It is contended that only one segment of the entire industry (importer of re-rollable/re-meltable) is being targeted, whereas, the move to impose various kinds of duties and taxes on the imports of the re-rollable/re-meltable scrap is aimed to give boost to the ship

breaking industry, which also recovers re-rollable/remeltable scrap and other valuable items upon dismantling the ships for the purpose of manufacturing Mild Steel Products. According to the petitioners, the decision was taken by the respondents in haste and quite discreetly without consulting the importers of re-rollable/meltable scrap obviously to give benefit to the Ship Breaking Industry by allowing them to make windfall profit. According to learned counsel, it is the inherent right of every person to be treated equally in accordance with law. It is submitted that both the scraps i.e. imported re-rollable/re-meltable scrap as well as the re-rollable/re-meltable scrap recovered from imported ships are one and the same item which is being used for manufacturing of the same end product i.e. Mild Steel products, hence both should be subjected to the same treatment. Learned counsel for the petitioners has argued that ship scrap importers are allowed to pay the duties/taxes only on 72.5%, whereas, 27.5% scrap is completely free of all kinds of taxes including serviceable items/value added items. It has been further contended that ship scrap is exempt from the Regulatory duty which has been imposed only on the imports of re-rollable scrap, whereas, ship scrap is not subjected to the Import Policy Order restriction. While concluding her arguments, learned counsel for the petitioners has prayed that Rule 58H of the Sales Tax Special Procedure Rules 2007 as amended vide SRO 583/2017 dated 01.03.2017 through Finance Act, 2017, whereby, allowing the ship breakers to pay duty only on 72.5%, be declared as ultravires to the Constitution of the Islamic Republic of Pakistan, 1973. In support of her contention, learned counsel for the petitioners has placed reliance in the following reported cases:-

(1) Collector of Customs, Excise & Sales Tax, Peshawar and 3 others v. Messrs Flying Kraft Paper Mills (Pvt) Ltd. (1999 SCMR 709)

(2) Messrs Pak Ocean and others v. Government of Pakistan through Secretary, Ministry of Finance, Central Secretariat, Islamabad and others (2002 PTD 2850)

(3) Imran Ahmed v. Federation of Pakistan and others (2014 PTD 225)

(4) Messrs Elahi Cotton Mills Ltd and others v. Federation of Pakistan and others (PLD 1997 SC 582)

(5) Dr. Mobashir Hassan and others v. Federation of Pakistan and others (PLD 2010 SC 265)

(6) Ittefaq Foundry v. Federation of Pakistan and others (PLD 1999 Lahore 121).

8. Pursuant to Court Notices issued in the instant petition(s), comments have been filed on behalf of the respondents No.1, 2 and 4, wherein, besides submitting parawise reply to the petition as to merits of the case, some preliminary objections have also been raised with regard to maintainability of instant petition(s) on the ground that respondent No.6 Collector of Customs, MCC Gwardar, Customs House, Gadani, is located as Balochistan Province, beyond the territorial jurisdiction of Sindh High Court, hence petition(s) is not maintainable as no relief can be granted against respondent No.6. Another objection as to availability of alternate forums for redressal of petitioners' grievance has also been raised, on the ground that petitioners have wrongly invoked the jurisdiction of this Court under Article 199 of the Constitution, instead of approaching the Ministry of Commerce, FBR, Engineering Development Board and Director General (Valuation), with a request to grant similar incentive and concession in duty and taxes to the petitioners, however, by establishing that petitioner's business activity is classifiable within the same category of business being carried out by the ship breaking industry, therefore, they are also entitled to be treated in similar manner and should be subjected to the same concession and incentives given to the ship

breaking industry through impugned SRO 583/2017 dated 01.03.2017. In addition to hereinabove preliminary objections, the contention of the learned counsel for petitioners to the effect that petitioners' business activity is classifiable within the same category of the business being carried out by the ship breaking industry, has been seriously controverted by the respondents for being factually and legally incorrect, as according to respondents, petitioners are importers of re-rollable and re-meltable scrap in terms of Import Policy Order, hence subjected to different rates of duty and taxes, whereas, the ship breakers do not import the re-rollable scrap, on the contrary, they import the entire ship which is classifiable under PCT Heading 8909, chargeable to custom duty of 3%, additional custom duty 1%, sales tax 0% and income tax @ 4.5 on 100% weight, whereas, sales tax is collected at the second stage i.e. after the process of cutting of the ship. According to respondents, in addition to the leviable duty/taxes at the time of import of the ship, further Sales Tax is charged at the second stage, after breaking of the ship, at the rate of Rs.8600 MT, on 80% of the vessel/ship's total weight in case of oil tankers and gas carriers, and 72.5% of the total weight in respect of other vessels, on the re-rollable scrap and other materials vide SRO 583/2017 dated 01.07.2017 under Rule 58H of the Sales Tax Special Procedures Rules, 2007. Moreover, according to respondents, the ship breakers also pay statutory duty and taxes on unnecessary tackles and serviceable items. In addition to this, the ship breaker also incur huge expenses on beaching rents of ships, breaking charges and other allied expenses as conversion costs, which are not paid by importers of scrap. It is pertinent to mention here that the Sales Tax regime with respect to breaking of ships has been concluded by the Federal Government after process of law in consultation of all the stakeholders. Hence, the Sales Tax regime is fair with respect to

breaking of ships as the extent of taxation on importers of scrap and ships breakers is balanced. It has been further stated in the comments filed on behalf of the respondents that the imports made by the petitioners and respondents are not comparable, as according to respondents, the petitioners import re-rollable and re-meltable scrap, whereas, the ship breakers import the ship/vessel under PCT Heading 8908.0000, therefore, goods imported by the petitioners and ship breakers are totally different at the time of import. According to respondents, the Regulatory Duty has been levied on the import of re-rollable/remeltable scrap under PCT Heading 8908.0000, however, after import of ship/vessel, it undergoes the process of cutting, whereafter, scrap is reduced and used for manufacturing of mild steel.

9. It is pertinent to note that during pendency of instant petitions, an application was filed under Order 1 Rule 10 CPC in C.P.No.D-8634/2017 on behalf of Pakistan Ship Breakers Association through Mr.Khalid Javed Khan Advocate, Notice of which was issued to the petitioners, who filed their Counter Affidavit, whereafter, Affidavit-in-Rejoinder was also filed, however, no order appears to have been passed on such application, requiring the petitioners to file the amended title by impleading the proposed intervenor as one of the respondents or otherwise. However, in the interest of justice, learned counsel for the proposed intervenor was allowed to make his submissions on behalf of Pakistan Ship Breakers Association for the assistance of Court, whereas, no objection was raised by the learned counsel for the petitioners in this regard. It has been argued by the learned counsel for the proposed intervenor that instant petition is misconceived and not maintainable as the petitioners have failed to point out any discrimination between the petitioners, who are the importers of re-

rollable/re-meltable scrap classifiable under PCT Heading 7204.4910, whereas, the Ship Breaking Industry, who imports the ship/vessel, which is classifiable under a different PCT Heading 8909.0000, hence there is no element of similarity of classification between the two. According to learned counsel, the provisions of Article 25 of the Constitution are not attracted in the instant case for the reason that ship breaking is a separate and distinct business activity and recognized as a ship breaking industry, which has already undergone serious financial crises, therefore, in order to revive the Ship Breaking Industry, the Government has taken a policy decision while giving incentives through amendment by Finance Act, 2017, in Rule 58H(4) of the Sales Tax Special Procedure Rules, 2007. According to learned counsel for proposed intervenor, re-rollable/re-meltable scrap is classifiable under PCT Heading 7204.4910, whereas, ship/vessel is classifiable under PCT Heading 8909.0000, therefore, both the imported entities are not comparable, hence element of discrimination, if any, is not attracted in the instant case. Per learned counsel, no additional duty and taxes have been imposed on the petitioners nor any Notification/SRO has been issued, whereby, tax liability of petitioners has been increased in violation of Constitution or while extending any discriminating treatment to the petitioners, on the contrary, an amendment has been made in the Sales Tax Special Procedure Rules, 2007, through Rule 58H(4) provides for a different formula for payment of tax and duty at import stage for ship breaking industry as per Policy decision. It has been argued by the learned counsel for the proposed intervenor that this is a case of granting incentive to Ship Breaking Industry for its revival and cannot, in any manner, by termed as discrimination between petitioners i.e. importers of re-rollable and re-meltable scrap, and the Ship Breaking Industry. While concluding his arguments,

learned counsel for the proposed intervenor submitted that since, during pendency of instant petition, the Sales Tax Special Procedure Rules, 2007, have been repealed by Finance Act, 2019, therefore, instant petitions, otherwise have become infructuous and/or in any case the relief being sought is merely an academic exercise. It has been prayed that instant petitions are not maintainable, the same may be dismissed in limine along with listed applications. In support of his contention, learned counsel for the intervenor has placed reliance in the following reported cases:-

1) Brig. (Retd.) F. B. Ali and another v. The STATE (PLD 1975 SC 506)
2) Miss Asma Jilani v. The Government of Punjab and another (PLD 1972 SC 139)
3) Messrs Elahi Cotton Mills Ltd and others PLD 1997 SC 582
4) Dr. Mobashir Hassan and others (PLD 2010 SC 265)
5) Watan Party and others v. Federation of Pakistan and others (PLD 2012 SC 299)

10. We have heard the learned counsel for the respective parties, examined the relevant provisions of SRO 583(I)/2017, dated 01.07.2017, whereby, sub-rule (4) of Rule 58(H) of the Sales Tax Special Procedures Rules, 2007, was amended and have also taken note of the submissions and have also gone through with the case-laws relied upon by the learned counsel for the parties in support of their contentions. As we have already observed hereinabove that keeping in view that petitioners have not pressed the vires of amendment in the Special Procedures Rules 2007 vide SRO 583(I)/2017 dated 01.07.2017, we would, therefore, examine the above petitions only to the extent of submissions of the learned counsel for petitioners relating to discrimination, if any, between petitioners, who are manufacturers of steel products and importers of its raw materials i.e. re-rollable and re-meltable scrap vis-à-vis the ship breakers, who, according to petitioners, are their competitors in business and belong to the same

class. The petitioners have alleged that through amendment in Sales Tax Special Procedures Rules 2007, sub-rule (4) of Rule 58(H) has been substituted and the ship breakers have been granted substantial relief and concession in respect of payment of duty and taxes and, therefore, petitioners are not in a position to carry on their business through fair market competition with the ship breakers. It is pertinent to note that there has been no imposition of any new tax or duty upon the petitioners nor it is a case of imposition of additional duty and taxes or creating any additional liability, on the contrary, reduction of liability towards payment of duty and taxes granted to the ship breaking industry through impugned amendment vide SRO 583(I)/2017 dated 01.07.2017 has been challenged for being discriminatory, whereas, petitioners have sought for a declaration to the effect that importers of re-rollable and re-meltable scrap used in the manufacturing process of steel products, may be treated at par with the ship breaking industry, so that the reduction/concession extended in respect of duty and taxes to the ship breaking industry may also be extended in similar terms to the petitioners i.e. importers of re-rollable and re-meltable scrap. Admittedly, re-rollable and re-meltable scrap imported by the petitioners is classifiable under PCT Heading 7204.4910, whereas, the ship (vessel) is classifiable under PCT Heading 8909.0000, therefore, *prima facie* it appears that both imported entities in its original form and stage of import are not of the same class, hence not comparable. Therefore, the element of discrimination among the same class, as alleged by the petitioners, is not attracted in the instant case. Moreover, while challenging the vires of any Law, Rule, Regulation or Notification on the ground of discrimination, particularly in tax matters, an aggrieved party has to establish that any tax, duty or levy imposed by the legislature or the Government is unjust and creates discrimination amongst the same class of persons, hence violative of Article 25 of the Constitution of Islamic Republic of Pakistan. Through instant petitions, petitioners have alleged discrimination for the concession granted to the ship breaking industry through impugned amendment vide

SRO 583(I)/2017 dated 01.07.2017, which according to learned counsel for the petitioners, should have also been extended to the importers of re-rollable and re-meltable scrap to keep the petitioners' business competitive with the ship breaking industry, as petitioners are in the same business and belong to same class. We are not inclined to agree with the submissions of the learned counsel for petitioners to the effect that importers of re-rollable and re-meltable scrap, who use the same for manufacturing of steel products, belong to the same class of ship breaking industry, for the reason that petitioners are importers of scrap which are covered under a different PCT Heading 7204.4910, whereas, the ship (vessel) is classifiable under PCT Heading 8909.0000. Ship breaking involves the process of ship breaking and cutting through heavy machines, and other equipments to get the re-rollable and re-meltable scrap out of imported ship (vessel) and also attracts the risk and financial implications, which prima facie are not attracted in the case of importers of scrap. It is a simple case of granting reduction of tax liability and to give incentive to ship breaking industry as a matter of Policy decision, whereas, there is no legal impropriety while making such amendment through above SRO. Moreover, Hon'ble Supreme Court in the case of ***Messrs Elahi Cotton Mills Ltd. and others v. Federation of Pakistan and others*** ***(PLD 1997 SC 582)*** has been pleased to hold as under: -

> ***"(vi) That the tests of the vice of discrimination in a taxing law are less rigorous. If there is equality and uniformity within each group founded on intelligible differentia having a rational nexus with the object sought to be achieved by the law, the Constitutional mandate that a law should not be discriminatory is fulfilled."***

Nothing has been brought on record to establish that such policy decision, as reflected in the impugned amendment by substituting sub-rule (4) of Rule 58(H) of the Sales Tax Special Procedures Rules, 2007 vide SRO 583(I)/2017 dated 01.07.2017, is based on malafide or intended to create any additional burden of duty and taxes upon the petitioners i.e. importers of re-rollable and re-meltable scrap.

11. In view of hereinabove facts and circumstances of the case, we are of the considered opinion that petitioners have not been able to establish that business activity of the petitioners is similar to the business activity of

ship breaking industry, hence cannot be classifiable under the same PCT Heading nor the same can be treated as the same class. Therefore, any incentive granted to the ship breaking industry, as in the instant case, does not amount to create any discrimination amongst the same class of persons. Accordingly, we do not find any substance in the instant petitions, which are hereby dismissed along with listed application(s).

12. Before parting with this order, we may observe that in view of the fact that the Special Procedures Rules 2007 have been omitted through Finance Act, 2017, therefore, these petitions have otherwise, become infructuous, as no useful purpose will be served, even if a different view would have been possible in these cases, as it would not reopen the past and closed transactions.

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Nadeem PA