IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

Present
Mr. Justice Umar Ata Bandial
Mr. Justice Munib Akhtar
Mr. Justice Yahya Afridi

Civil Appeals No. 94 of 2012 and 243 of 2013
(On appeal from the order dated 29.9.2011 passed by the Peshawar High Court, Peshawar in W.P.No.412 of 2001 and T.R.No.2 of 2006)

Pakistan Match Industries (Pvt) Ltd.
(C.A.94/12)

Naeem Match Industries (Pvt) Ltd (formerly Usman Match Industries (Pvt) Ltd.)
(C.A.243/13)

...Appellants

vs

The Assistant Collector, Sales Tax and Central Excise Mardan and others
(in C.A.94/12)

The Deputy Commissioner Inland Revenue, Regional Tax Office Peshawar and another.
(in C.A.243/13)

...Respondents

For the appellants: : Mr. Imtiaz Ali, ASC.
Mr. Mahmood A. Shaikh, AOR.
(in C.A.94/12)

Mr. Isaac Ali Qazi, ASC.
Syed Rifaqat Hussain Shah, AOR.
(in CA 243/13)

For the respondents: : Dr. Farhat Zafar, ASC
(in both cases)

Date of hearing: : 11.02.2019

ORDER

Munib Akhtar, J.- These two appeals were taken up together and at the conclusion of the hearing it was announced that CA 94/2012 was dismissed while

CA 243/2013 stood allowed. The following are our reasons for the aforesaid order.

2. Both matters come from the Peshawar High Court. It is pertinent to note that CA 94/2012 arose out of a constitutional petition (WP 412/2001) whereas CA 243/2013 arose out of a tax reference (TR 2/2006). The matters were heard together by the learned High Court and disposed of by a common judgment dated 29.09.2011, impugned herein. Leave to appeal was granted vide order dated 25.01.2012 in the matter arising out of the constitutional petition, to consider whether the appellant taxpayer was entitled to the benefit of SRO 77(I)/95 dated 19.01.1995, which had been denied by the learned High Court. In the other matter, where there had been a similar denial to the taxpayer therein, leave was granted vide order dated 14.02.2013 on the basis of the earlier order.

3. SRO 77(I)/95 dated 19.01.1995 ("SRO 77"), as amended by SRO 87(I)/96 dated 30.01.1996, was an exemption notification issued under s. 13 of the Sales Tax Act, 1990. As presently relevant the notification provided as follows:

> "**S.R.O. 77(I)/95.-** In exercise of the powers conferred by sub-section (1) of section 13 of the Sales Tax Act, 1990, the Federal Government is pleased to direct that supplies of end products made by the manufacturers or producers of all such industrial units, excluding those specified in the Table below, which are not already in existence till the date of issue of this notification and have been set up in the Special Industrial Zones, to be notified later by the Federal Government, shall be exempt from the sales tax payable under the said Act for a period of eight years from the date the industrial unit is set up:
>
> Provided that exemption under this notification shall be available to only such industrial units which have opened letters of credit for the import of plant and machinery upto the 31st January, 1996:
>
> Provided further that such an industrial unit commences its commercial production, upto the 30th June, 1999.
>
> Explanation.--For the purposes of this notification, the expression "set up" shall mean the date on which the industrial unit commences its production, including trial production which date shall be intimated, in writing, by the manufacturer or producer to the Assistant Collector of Sales Tax having jurisdiction in the area at least fifteen days before commencing such production but shall not include the date of expansion, balancing, modernization or replacement of such unit…."

We may note that SRO 32(I)/2002 dated 18.01.2002 amended SRO 77 further, such that in the second proviso, for "30th June, 1999", "31st December, 2002" was substituted.

4. As mooted before us, the primary controversy related to the proper interpretation and application of the first proviso. The question was whether on account thereof the benefit of the notification could only be claimed by those taxpayers who opened letters of credit for the import of plant and machinery up to 31.01.1996. In other words, was the notification limited only to those industrial units that were set up with imported plant and machinery, or was it also available to those set up with plant and machinery that was locally manufactured? The learned High Court concluded that the notification was limited only to those units that fell in the first category and was unavailable to those set up with locally manufactured plant and machinery. After reproducing SRO 77 in material part, the learned High Court held as follows (emphasis supplied):

> "A bare look at the above quoted provision would reveal that exemption there-under is available only when the Industrial Units have opened letters of credit for the import of plant and machinery upto 30th June, 1996 and have commenced commercial production upto 30th June, 1999. The explanation there-under further clarifies that the expression set up shall mean the date the industrial units commenced their production including the production on trial basis and that it shall be intimated to in writing by the manufacturer or the producer to the Assistant Collector of Sales Tax, having jurisdiction in the area at least 15 days before the commencement of the production. *Admittedly the industrial units of the petitioners have not opened letters of credit for the import of plant and machinery upto 30th June, 1996. Nor have they established units with imported plants and machinery. When this being the case, the condition stipulated in the first proviso cannot be said to have been fulfilled. The other condition providing for commencement of production upto 30th June, 1999 too has not been fulfilled in this case as nothing has been brought on the record in black and white to show that the petitioners being the manufacturer and producers have intimated in writing to the Assistant Collector of Sales Tax having jurisdiction in the area at least 15 days before the commencement of production.*"
>
> It was also held as follows:
>
> "Reading inclusion of industrial units set up with the locally manufactured plants and machinery in the SRO would amount to reading what is not there. We cannot supply omission in the

> circumstances of the case when the meanings and terms of the SRO do not permit it."

5. Learned counsel for the appellants submitted that the learned High Court had interpreted SRO 77 incorrectly. It was submitted that the main paragraph of the notification did not draw any distinction between units set up with imported plant and machinery, and those in which only locally manufactured plant etc was involved. On the face of it, it was submitted, the main paragraph of SRO 77 applied to all units that came within the scope and fulfilled the conditions thereof, regardless of how the plant and machinery was sourced. The first proviso was precisely that: a simple or "true" proviso, which ought to be applied in accordance with well established principles of interpretation. That meant that it was only intended to carve an exception out of the main paragraph. Read this way, learned counsel submitted, the word "only" appearing therein related only to the date by which, in the case of units set up with imported plant and machinery, the letters of credit had to be opened. In other words, while the main paragraph of the notification applied to all industrial units, the effect of the proviso was that in relation to those set up with imported plant and machinery it limited the benefit only to those situations where the letters of credit were opened by or before 31.01.1996. That alone was the true and proper interpretation and application of the proviso. It was submitted that the learned High Court had erroneously taken the "only" as affecting the scope of the main paragraph in its entirety, and had read it as limiting the effect and benefit of the latter to only such industrial units as were set up with imported plant and machinery and then too only where the letters of credit were opened by or before 31.01.1996. It was respectfully submitted that this was patently erroneous. SRO 77 could not be interpreted and applied in this way. The appellant taxpayers came within the scope of the notification when properly applied. It was prayed that the appeals be allowed.

6. Learned counsel for the Department prayed that the appeals be dismissed. It was submitted that the learned High Court had correctly interpreted and applied SRO 77, and in particular the first proviso thereof. The notification was limited only to those industrial units as were set up with imported plant and machinery, and that too where the letters of credit were opened by or before 31.01.1996. Since the appellant taxpayers did not come within the scope of the notification when so read and applied, they had been rightly denied the benefit thereof. Learned counsel submitted further that the appellants were also non-compliant

with the other requirements of the notification, as set out in the second proviso and the Explanation. With particular reference to the appellant in CA 94/2012, it was submitted that in the para-wise comments filed in the High Court to the writ petition filed by the appellant, it was the Department's case that the plant and machinery was not supplied by the alleged supplier (one M/s Long Life Engineering (Pvt) Ltd.). Reference was made in this regard to the "Preliminary Objections", and what was stated in its various paragraphs. Learned counsel further submitted that although a rejoinder was filed by the taxpayer, it was evasive and non-responsive to the specific and particular factual averments made in the para-wise comments. As regards the taxpayer in the other appeal, CA 243/2013, it was submitted that there also the terms of the second proviso read with the Explanation were not met. It was prayed accordingly.

7. The right of reply was exercised. Learned counsel for the respective appellants submitted that the factual aspects of the case had been misread by the Department as well as the High Court. Each appellant came squarely within the scope of the second proviso and the Explanation. There was no aspect or requirement of SRO 77, when properly interpreted and applied, that was not met by either appellant.

8. After hearing learned counsel as above and examining the record, we came to the conclusion, and made the order, as set out in the beginning of this judgment. We begin with the main controversy, i.e., the correct interpretation and application of the first proviso to SRO 77. The principles that apply to the interpretation of exemptions in fiscal statutes and provisos in general are well settled and need not be rehearsed here in any detail. As regards provisos, it is well settled that they are intended to qualify the main part of the provision and carve out an exception from the same, taking out (as it were) something that but for the proviso would be included therein. Such provisos are generally referred to as "true" provisos. It is no doubt correct that sometimes a proviso is construed to be a substantive clause that operates in its own right. However, such instances are rare, and for a proviso to be so construed the language of the provision must be clear. In our view, a reading of SRO 77 makes it clear that the main paragraph thereof, when read on its own and without taking the first proviso into account, would apply to all industrial units otherwise within the scope thereof, i.e., without any reference to whether the plant and machinery were locally manufactured or

imported. The question therefore is whether the first proviso was intended to operate as a "true" proviso or, in effect, a substantive clause. If the former, then its scope would be limited to carving out an exception from the main paragraph only in relation to those industrial units set up with imported plant and machinery, and limiting the benefit to those where the letters of credit were opened by or before 31.01.1996. In other words, the applicability of the main paragraph in relation to industrial units set up with locally manufactured plant and machinery would be left untouched. On the other hand, if the first proviso were intended to apply as a substantive clause, acting in its own right, then it would affect the operation of the whole of the main paragraph. On this reading, the scope of the latter would be limited only to those industrial units which were set up with imported plant and machinery, and that too only when the letters of credit were opened by or before 31.01.1996.

9. Having considered the matter, we came to the conclusion that it was the first, and not the second, possibility that was the correct interpretation and application of the first proviso. It was, in other words, only a "true" proviso and not a substantive clause operating in its own right. It carved out an exception, and nothing more. It took something out of the main paragraph that, but for it, would have come within the scope thereof. In our view therefore, and with respect, the learned High Court has misinterpreted and misapplied the first proviso. It was not intended to operate, as in effect concluded by the learned High Court, as affecting the whole of the field covered by the main paragraph, and altering and limiting it in the manner as held. That conclusion in our view substantively altered the scope and effect of the proviso. Such an approach was, with respect, mistaken and incorrect.

10. However, it must be remembered that the first proviso (and of course the main paragraph) are located and operate within an exemption notification, i.e., SRO 77. It is well settled that if two reasonable interpretations of an exemption are possible, then the one against the taxpayer and in favor of the Revenue will be adopted. Would this principle be applicable in the context of the first proviso, having (as it were) an overriding effect? In our view, the answer to this question should be in the negative. For it is also well established that if a taxpayer fairly comes within the scope of an exemption, then the same cannot be denied on the basis of some supposed intention of the law-maker. Here, the first proviso (with

the interpretation and effect of which alone we are concerned) operated within, and as part, of SRO 77 when read as a whole. As already noted, in our view the main paragraph was broad enough, on a plain and natural reading thereof, to include in its benefit all industrial units regardless of whether the plant and machinery were locally manufactured or imported. Within this framework, to conclude that the first proviso was intended not to be a "true" proviso but rather a substantive clause would be to deny the appellants the benefit of SRO 77 on the basis of a supposed intention. Also as stated above, it is rarely that a proviso is regarded to be a substantive clause. For that to be so the language must be clear. We can see no reason why the first proviso should be so construed and applied. It is only a "true" proviso and must take, and be given, effect accordingly. We therefore conclude that the learned High Court was, with respect, wrong in coming to the conclusion that it did as regards the interpretation and effect of SRO 77 in general and the first proviso in particular.

11. Since the primary points goes against the Department, we turn to consider the other aspects of its case, namely that neither of the appellants, in the facts and circumstances of its case, was compliant of the second proviso or the Explanation. Now, the objections taken by the Department were factual in nature, and the learned High Court was pleased to accept its case in this regard as well. As noted above, one appeal arose out of a writ petition (CA 94/2012 arising out of WP 412/2001), while the other came by way of a tax reference (CA 243/2013 arising out TR 2/2006). With respect, the learned High Court failed to appreciate that the treatment of the factual aspects of the record differs markedly in the case of a writ petition on the one hand and a tax reference on the other. In the case of the former, relief may be denied if there are material factual controversies or disputes which cannot be resolved by the Court on the basis of the record as available. In the case of the latter however, all factual aspects of the case are closed by, and at the level of, the Appellate Tribunal. It is only questions of law that can travel to the High Court. Factual points cannot be allowed to be opened or (re-)agitated, unless there has been a material misreading or non-reading of the evidence, which is itself a question of law that can be taken to the High Court.

12. When considered in this perspective, the conclusions arrived at by the learned High Court in relation to the tax reference were, with respect, erroneous. In the Appellate Tribunal the taxpayer's appeal was heard by a two Member

Bench. The learned Member (Technical) ruled on the factual points in favor of the taxpayer. In particular, the learned Member held that the taxpayer had commenced production within the period stipulated in the second proviso, and that it had done all that was required of it in terms of the Explanation. However, the learned Member (Judicial) disagreed. The matter was accordingly sent to the learned Chairman, who referred the appeal to another learned Member (Technical). The latter agreed with the Member (Judicial). Thus, the taxpayer's appeal was dismissed by a 2:1 majority, with a dispute on the factual aspects of the case. There was therefore, in our view, clearly a question as to whether there had been a misreading or non-reading of the evidence, which was a question of law that came within the scope of a tax reference. It ought to have been so decided. With respect, the learned High Court failed to appreciate this aspect, and treated the tax reference essentially in the same manner as it did the writ petition (as to which see below). Had the learned High Court kept in mind the difference between the two types of proceedings, it would have properly examined the record of the tax reference, in the context of the question of law posited. And had it done that, in our view it would then have found, as we did, that the conclusions arrived by the Member (Technical) who would have allowed the taxpayer's appeal on the factual aspects of the case were clearly correct. The other two Members erred materially in coming to contrary conclusions. In other words, there was a material misreading of the evidence and record, which presented a proper question of law before the High Court. It ought, with respect, to have been so considered. Had that happened then in our view the answer would have been in favor of the taxpayer. The learned High Court therefore erred materially in dismissing the tax reference, out of which CA 243/2013 arises.

13. The position with regard to the other appeal was however quite different. There, the matter before the High Court was by way of a writ petition. The factual aspects of the case were strongly contested and disputed by the Department. Specific factual allegations were made, which were not properly responded to by the taxpayer. In other words, there were factual controversies and issues that could not be resolved. In such a situation the High Court, quite independently of its conclusions as to the interpretation and application of SRO 77, could have denied relief to the taxpayer. This was, it is to be noted, an additional point taken by the High Court. In our view, it was correct and justified in doing so. There was a material factual dispute between the taxpayer and the Department, and the

former had failed to meet the strong and specific averments made by the latter. Therefore, even if the High Court had reached the correct interpretation of SRO 77 and applied it properly it would have been justified, on the facts of the taxpayer's case, in denying relief. In the end therefore, on the facts and circumstances as presented in CA 94/2012 no material error was made by the High Court as would require interference by this Court.

14. For the foregoing reasons, we concluded that CA 94/2012 ought to be dismissed while CA 243/2013 should be allowed, and so announced in Court at the conclusion of the hearing. There will be no order as to costs.

Judge

Judge

Judge

Bench-IV
Islamabad
11.02.2019

Not approved for reporting

Saeed Aslam