

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Md. Nuruzzaman

Mr. Justice Borhanuddin

Ms. Justice Krishna Debnath

CIVIL APPEAL NO.08 OF 2007

(From the judgment and order dated 10.12.2002 passed by the High Court Division in Writ Petition No.5588 of 2000).

Government of Bangladesh represented by the Secretary, Ministry of Finance, Bangladesh Secretariat, Ramna, Dhaka and others. Appellants.

=Versus=

Ocean Containers Limited represented by its Managing Director, Summit Center, 18 Kawran Bazar C/A, Dhaka-1215.Respondent.

For the Appellants. : Mr. A. M. Amin Uddin, Attorney General with Mr. Mohammad Shaiful Alam, Assistant Attorney General and Ms. Tahmina Polly, Assistant Attorney General and Farjana Rahman Shampa, Assistant Attorney General instructed by Mr. Haridas Paul, Advocate-on-Record.

For the Respondent. : Not represented.

Date of Hearing. : The 25th May, 2022.

Date of Judgment. : The 25th May, 2022.

J U D G M E N T

Borhanuddin, J: This civil appeal by leave is directed against the judgment and order dated 10.12.2002 passed by the High Court Division in Writ Petition No.5588 of 2000 making the Rule absolute.

Brief facts leading to disposal of the appeal are that the respondent herein as petitioner preferred Writ

Petition No.5588 of 2000 under Article 102 read with Article 44(1) of the Constitution impugning notification dated 02.12.1999 vide SRO No.354-Ain/99 (Annexure-'D' to the writ petition) giving effect of the said notification from the date of promulgation and purporting to exclude the petitioner from the benefit under Section 46A(2)(b)(i) and (ii) and also the impugned memos dated 18.10.1999 and 17.02.2000 (Annexure-'C' and 'F' to the writ petition) rejecting the applications filed by the petitioner under section 46A of the Income Tax Ordinance,1984 (hereinafter stated as 'the Ordinance').

Petitioner's case is that the petitioner is a private limited company incorporated under the companies law and engaged in the business of containers depot operations and containers freighting stations; The petitioner company is the owner of the 1st private sector Inland Containers Depot (ICD) established in the Chattogram Port Area providing off-dock facility to the container owners and other incidental facilities; Section 46A of the Ordinance,1984 inserted through the finance Act,1995 providing exemption from tax of the newly established

industrial undertakings provided physical infrastructure facility set up in Bangladesh in between 1st day of July,1995 and the 30th day of June,2000 (both days inclusive); The petitioner company started its commercial operation of the 'Unit-2' an unit constituting an identifiable unit for production on operation of the physical infrastructure facility of the container terminal on 1st February,1999; The petitioner company submitted an application on 22.07.1999 seeking tax exemption of the said 'Unit-2' of the petitioner company under section 46A(2)(f) of the Ordinance in prescribed form enclosing all the documents and certificate as per Rule 59A (2) of the Income Tax Rules,1984 (hereinafter stated as 'the Rules,1984'); On receiving the application, the NBR held an inquiry at the field level and rejected the application of the petitioner company on 18.10.1999 on the ground that the 'Unit-2' was not providing physical infrastructure facility; Subsequently, SRO No.354-Ain/99 issued by the National Board of Revenue(hereinafter stated as 'the NBR') vide gazette notification dated 02.12.1999 specifying some areas as

physical infrastructure facilities through the delegated power of legislation given under the explanation appended to sub-section 2(b) of section 46A of the Ordinance, 1984; By the said SRO the NBR recognized the undertaking of the writ-petitioner company as the undertaking providing physical infrastructure facility; In this backdrop, the writ-petitioner filed an application before the NBR for review of its earlier order dated 18.10.1999 but the application was rejected on 17.02.2000 on the ground that the provision of SRO dated 02.12.1999 would not entitle the writ-petitioner for getting tax exemption of its undertaking; As such, the petitioner company constrained to file the writ petition.

After hearing the writ-petitioner, a Division Bench of the High Court Division issued Rule Nisi upon the respondents.

The Rule obtained by the writ-petitioner was opposed by the Government i.e. writ-respondent no.1 and also by the NBR i.e. writ-respondent no.2 by filing affidavit-in-opposition contending primarily that the nature of business as carried on by the writ-petitioner is not an

undertaking providing physical infrastructure facility from the date of its commercial operation but from the date when the writ-petitioner was recognized as providing infrastructure facility by the SRO dated 02.12.1999 and as such the writ-petitioner was not entitled to tax exemption as per provision of section 46A of the Ordinance; The undertaking of the writ-petitioner was not recognized as an undertaking providing physical infrastructure facilities on the date when it went into commercial operation on 01.02.1999 and as such application seeking tax exemption filed by the writ-petitioner although made within 180 days of its commercial operation was of no avail to writ-petitioner.

After contested hearing, a Division Bench of the High Court Division made the Rule absolute holding that the NBR rejected writ-petitioner's application seeking tax exemption "on a misconceived ground that the undertaking of the petitioner company was not providing physical infrastructure facility in disregard of its own field level inquiry report", that although the NBR recognized the writ-petitioner's undertaking as the undertaking

providing physical infrastructure facilities as provides in section 46A of the Ordinance and also by SRO dated 01.02.1999 but rejected writ-petitioner's petition filed under section 46A of the Ordinance on untenable ground, that "the legislature intended that Clause-1 of the SRO dated 02.12.1999 should form part of the explanation and it should take effect from the date section 46A was enacted in the Ordinance, 1984," that "the NBR sought to deny the tax exemption to the petitioner company by Clause-2 of the impugned SRO dated 02.12.1999 by giving prospective operation. Such action on the part of the NBR is designed to deprive the petitioner company from the tax exemption under section 46A without any legal excuse and it is therefore vitiated by malice in law. Hence Clause (2) of the said SRO dated 02.12.1999 is of no legal effect being void." Further hold that "in this case NBR has refused to allow tax exemption on an extraneous as well as misconceived ground by trying to recognise the undertaking of the petitioner company as providing physical infrastructure facility from 02.12.1999 instead of 01.02.1999 on the strength of Clause (2) of the said

SRO dated 02.12.1999 which is neither intended nor authorised by the statute particularly section 46A thereof. Hence Clause (2) of the said SRO dated 02.12.1999 is liable to be struck down."

And thereby disallowing tax exemption to the petitioner company vide orders dated 18.10.1999 and 17.02.1999 declared illegal and without jurisdiction by the impugned judgment and order passed by the High Court Division.

Feeling aggrieved, the writ-respondents as petitioners preferred Civil Petition for Leave to Appeal No.825 of 2004 and this Division issued leave granting order on 16.11.2006 in the following manner:

"The learned Deputy Attorney General submits that the sub-ordinate legislature having no authority to make law giving retrospective effect the High Court Division erred in law in holding "the intention expressed in Clause-2 of the said SRO that the recognition would take effect from the date of SRO i.e. 02.12.1999, in our view, not only militates against the provision of section 46A conferring benefit by way of tax exemption but it is also violative of the spirit in which section 46A was enacted."

The learned Deputy Attorney General further submits that the High Court Division erred in law in holding "Clause-2 of the said SRO 02.12.1999, Annexure-'D' to the writ petition is therefore, held to be ultra-vires of section 46A of the Ordinance, 1984 and thus it has no legal effect."

Point of law raised in the aforesaid submissions appears to be of great public importance and as such merits consideration.

Accordingly, leave is granted."

Consequently, this civil appeal arose.

Mr. A. M. Aminuddin, learned Attorney General appearing for the appellants submits that because the sub-ordinate legislature having no authority to make law giving retrospective effect the High Court Division erred in law in holding "the intention expressed in Clause (2) of the said SRO that the recognition would take effect from the date of SRO i.e. 02.12.1999, in our view, not only militates against the provision of section 46A conferring benefit by way of tax exemption but is also violative of the spirit in which section 46A was enacted," as such impugned judgment and order is liable to be set aside. He also submits that because the High Court

Division erred in law in holding that "Clause-(2) of the said SRO dated 02.12.1999, Annexure-'D' to the writ petition therefore held to be ultra-vires of section 46A of the Ordinance,1984 and thus it has no legal effect," as such impugned judgment and order is liable to be set aside.

In support of his submissions, learned Attorney General cited an unreported decision dated 10.02.2021 passed by this Division in Civil Appeal No.131 of 2004.

No one represent the respondent.

Heard the learned Attorney General and perused the papers/documents contained in the paper book.

We have gone through the impugned judgment and order passed by the High Court Division and other relevant papers on record. Section 46A of the Ordinance, 1984 was inserted in the ordinance through Finance Act, 1995, which provides exemption from tax of newly established industrial undertakings or physical infrastructure facility in Bangladesh between 01.07.1995 and 30.06.2000 (both dates inclusive) and thereafter said section amended by subsequent Finance Acts but for the purpose of

this case, amendment up to 1999 is applicable. Admittedly, the petitioner company started its commercial production of the 'Unit-2' a unit constituting an identifiable unit for production on operation of the physical infrastructure facility of the 'container terminal' on and from 01.02.1999.

Explanation to the section 46A(2) (b) of the Ordinance provides as under:

"(b) Explanation given to this section for the purpose of the same industrial undertaking, tourist industry or physical infrastructure facility includes expansion of an existing undertaking if the expansion unit constitutes an identifiable unit for production or operation of similar rather or other goods or class of goods or services.

(c) Explanation given in the said section defines the term 'Physical Infrastructure Facility' which reads as follows:

"Explanation-for the purpose of this section, 'physical infrastructure facility' means generation, transformation, conversion, transmission and distribution or supply of electrical energy or hydraulic

power, or road, highway, bridge, airport, or the system of railway or telecommunication or such other public facility of similar nature as may be specified by the Board in this behalf by notification in the official Gazette."

(Emphasis supplied by us)

SRO No.354-Ain/99 determining physical infrastructure facilities as per explanation to section 46A(2) (b) published in the gazette notification on 02.12.1999 with effect from the date of publication. For better appreciation the SRO 354 dated 02.12.1999 is reproduced below:

গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
অর্থ মন্ত্রণালয়
অভ্যন্তরীণ সম্পদ বিভাগ
জাতীয় রাজস্ব বোর্ড
(আয়কর)

প্রজ্ঞাপন

তারিখ, ১৮ই অগ্রহায়ণ, ১৪০৬ বাং/২রা ডিসেম্বর, ১৯৯৯ইং

এস.আর.ও নং ৩৫৪-আইন/৯৯-Income Tax Ordinance, 1984 (XXXVI of 1984) এর section 46A এর sub-section(2) এর Clause (b) এর Explanation অংশে প্রদত্ত ক্ষমতা বলে জাতীয় রাজস্ব বোর্ড, উক্ত section 46A এর উদ্দেশ্যে, নিম্নবর্ণিত ভৌত অবকাঠামোসমূহকে physical infrastructure facility বলিয়া নির্ধারণ করিল, যথা:

- (ক) সমুদ্র/নৌ বন্দর;
- (খ) Bulk cargo terminal;
- (গ) সার, খাদ্যশস্য, ক্রিংকার ইত্যাদি বিশেষ পণ্যের টার্মিনাল;
- (ঘ) কন্টেইনার টার্মিনাল/ইন্টারনাল কন্টেইনার ডিপো (ICD)/কন্টেইনার ফ্রেইট স্টেশন (CFS);
- (ঙ) ভোজ্য/জ্বালানী তেলের ট্যাঙ্ক টার্মিনাল;
- (চ) এল এন জি টার্মিনাল ও ট্রান্সমিশন লাইন;
- (ছ) সি এন জি টার্মিনাল ও ট্রান্সমিশন লাইন;
- (জ) গ্যাস পাইপ লাইন;

- (ঝ) বাস টার্মিনাল;
- (ঞ) ভূ-তল রেলওয়ে;
- (ট) Monorail বা বৈদ্যুতিক ট্রাম লাইন;
- (ঠ) ফ্লাই ওভার;
- (ড) বৃহদাকার পানি শোধনাগার ও এর পাইপ লাইনের মাধ্যমে সরবরাহ;
- (ঢ) পয়ঃ লাইন;
- (ণ) বর্জ্য প্রক্রিয়াজাতকরণ প্লান্ট;
- (ত) রপ্তানী প্রক্রিয়াকরণ এলাকা;
- (থ) পাবলিক ওয়ার হাউজ (Public warehouse);
- (দ) টেলিযোগাযোগ; এবং
- (ধ) ইন্টারনেট এবং সংশ্লিষ্ট সেবা প্রদানকারী প্রতিষ্ঠান সমূহ (Internet and its related services)।

এই প্রজ্ঞাপন উহা জারীর তারিখ হইতে কার্যকর হইবে।

জাতীয় রাজস্ব বোর্ডের আদেশক্রমে,

মুহাম্মদ আব্দুস সাভার
সদস্য (আয়কর নীতি)

The petitioner company as it is stated in the writ petition submitted an application seeking tax exemption of the said 'Unit-2' of the petitioner company on 22.07.1999 under section 46A(2)(f) of the Ordinance within the prescribed period of time. From the explanation (b) and (c) to the section 46A(2)(b) it is evident that "Physical Infrastructure Facility" identified therein not includes 'container terminal' but the explanation (c) continued with the words "or such other public facility of similar nature as may specified by the Board in this behalf by notification in the official gazette." And the notification published in the official gazette on 02.12.1999 vide SRO No.354-Ain/99

includes 'container terminal' in Clause (Gha) of the said SRO giving effect of the SRO from the date of its publication i.e. from 02.12.1999. As such findings of the High Court Division that "the NBR sought to deny the tax exemption to the petitioner company by Clause 2 of the impugned SRO dated 02.12.1999 by giving prospective operation. Such notion on the part of the NBR is designed to deprive the petitioner company from the tax exemption under section 46A without any legal excuse and it is therefore vitiated by malice in law" is wrong and not tenable in the eye of law.

It is cardinal principle of construction that every statute is *prima facie* prospective unless it is expressly or necessary implication made to have a retrospective operation.

In *Zile Singh v. State of Haryana*, reported in (2004) 8 SCC 1, Indian Supreme Court observed that:

"15. *Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, 7th Edn.), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by*

necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated. (p. 388) The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right. (p. 392)"

From the SRO 354 dated 02.12.1999 it appears that the gazette notification was not operated by giving retrospective effect as such applications seeking exemption by the petitioner company were rejected justly and correctly by the NBR inasmuch as the 'container terminal' of the petitioner company was not entitled to get tax exemption before publication of gazette notification dated 02.12.1999. As the 'container

terminal' in question was not within the purview of physical infrastructure facility when the petitioner company filed application seeking tax exemption and thus the NBR justly and legally rejected the application for exemption and also correctly rejected the review application dated 31.01.2000 seeking review of earlier order dated 18.10.1999 since there left no scope to review of that application by the NBR.

Accordingly, we hold that the SRO No.354-Ain/99 dated 02.12.1999 having effect from the date of its publication left no scope to allow tax exemption to the 'Unit-2' of the respondent company and the NBR justly and legally rejected the applications filed by the respondent company.

In result, the appeal is allowed.

No order as to costs.

J.

J.

J.