

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD, KARACHI

DB-I

APPEAL NO. AT-25/2016

M/S Pakistan Mobile Communication Pvt. Ltd.....Appellant

Versus

Commissioner (Appeals), SRB,

Karachi and another.....Respondents

Mr. Ayaz Shaukat, Advocate and Mr. Mustafa Soomro, ITP for Appellant.

Ms. Uzma Ghory, AC-DR and Mr. Hunain Tariq, Ac for Respondent.

Date of Filing of Appeal: 13.04.2016

Date of hearing of Appeal: 09.03.2020

Date of Order: 20.04.2020

ORDER

Justice (R) Nadeem Azhar Siddiqi. This appeal has been filed by the

appellant challenging the Order-in-appeal (hereinafter referred to as the OIA) No. 11/2016 dated (no date is appearing on the OIA) passed by the Commissioner (Appeals) in Appeal No. No. 112/2014 partly confirming Order-in-Original (hereinafter referred to as the OIO) No.471/2014 dated 08.09.2014 passed by the Assistant Commissioner-I (Ms. Nida Noor), SRB, Karachi.

02. The facts of the case as briefly stated in OIO are that the appellant is a registered person and engaged in providing taxable services of



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(ii) The period of 120 days provided in Sindh Laws was inconsistent with the Federal tax laws, which provided that the input tax could be claimed and

(i) The input tax was claimed in the respective tax periods in which actual payment was made and there was no delay in adjustment. The appellant filed written reply dated 12.03.2014, which are summarized a under. of the Table Under section 43 of the Act. The appellant filed default surcharge and penalties under Serial No. 2, 3 and 6 (d) recovered under section 23 and 47 (1A) of the Act along with amounting to Rs.445,868,870/= may not be assessed and the appellant to show cause as to why the Sindh Sales Tax (SST) 04. A show Cause Notice (SCN) Dated 11.02.2014 was served upon

(iv) Non furnishing of scanned copies of evidence.

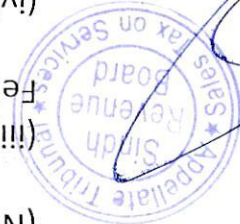
(iii) Non furnishing returns for the periods January, 2013 and February, 2013.

(ii) Input tax claimed on goods and services relating to other jurisdiction. (Not exclusively used in providing services). Rs. 324,681,377/=

(i) Input claimed on the basis of invoices prior to four succeeding months (Time barred). Rs. 121,187,493/=

03. The allegations against the appellant mentioned in the OIO were that perusal of Annexure-A to the sales tax returns for the tax periods January, 2013 to December, 2013 filed by the appellant showed that it had not claimed input tax adjustment or deduction lawfully and did not fulfill the requirement of section 15 of the Act read with Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules). The details of the inadmissible input tax claimed by the appellant were as under:-

Telecommunication Services under Tariff Heading 98.12 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) chargeable to Sindh sales tax @ 19.5%.



06. The appellant challenged the said OIO by filing appeal before Commissioner (Appeals) who after hearing reduced the inadmissible input tax adjustment to Rs.9,836,468/= and imposed default surcharge and penalties under Serial No. 3 and 6 (d) of Table under section 43 of the Act, hence this appeal by the appellant.

05. Finally after hearing the OIO was passed disallowing the input tax adjustment of Rs.480,515,585/= (against Rs.445,868,870/= confronted in the SCN. Moreover default surcharge was imposed under section 44 of the Act and penalty of Rs.24,385,779/= under serial No. 2, 3 and 6 (d) of the Table under section 43 of the Act.

were inapplicable.

output tax, thus the provision of Rule 20 of the Rules input claimed did not exceeds 20 percent of total 20 percent of total output tax. In case of appellant consumed and utilized for providing services exceeds evidence, if the input tax claimed on goods used, appellant was required to file scanned attachment as



(v) As per the provision of rule 20 of the Rules the

Annexure-A were discontinued.

the practice of e-filing one-line declaration in

returns since according to appellant's understanding

(iv) The telecom sector was not required to revise

returns since August, 2013 onward.

complete invoice-wise details in Annexure- A to the

never claimed. Moreover the appellant had uploaded

amount of input tax relating to other jurisdiction was

(iii) During the tax periods March, 2013 to July, 2013 the

invoice.

adjusted within 180 days from the date of the

evidence, if the input tax claimed exceeds 20 percent

appellant was required to file scanned attachment as

As per the provision of rule 20 of the Rules the

07. The learned representatives of the appellant Mr. Ayaz Shaukat advocate in his oral arguments submitted as under:-

- (i) Rule 22A was added in the Rules effective from 7th September, 2011 without the approval from the Government of Sindh.
- (ii) The Notification under which Rule 22A was added in the Rules was not published in Official Gazette which is a condition precedent for its implementation as provided in the 19 A of the General Clauses Act 195
- (iii) The Commissioner (Appeals) in Para 28 of the (OIA) had failed to consider very important legal point in its true perspective.
- (iv) The appellant challenged the SCN before the Honorable High Court in which Mr. Zameer A. Khalid now Commissioner (Appeals) had appeared as an Advocate for SRB. Thus in all fairness he should not had heard the appeal as Commissioner (Appeals) and instead referred the matter to the Board for appointing some other officer to hear the appeal.

08. The learned representative of the respondent Mr. Muhammad Ali, DC on 16.05.2016 submitted as under:-

- (i) That he brought some documents and wanted to submit the same for the perusal of the Tribunal with the request that same may be kept confidential in view of instructions of Mr. Mushtaq Kazmi, Adviser Tax Policy.
- (ii) The official gazette was not available for the reason that the Department had sent the Notification for publication but the same was not published in the official gazette.
- (iii) The approval for Rule 22A of the Rules was obtained from Government of Sindh vide Summary to Chief Minister, Sindh dated 27.07.2011 which was approved on 20.08.2011.

09. The representative of the respondent was directed by the Tribunal on 16.05.2016 to place on record the Gazette notification Dated



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not available although the approval had been obtained vide strict confidence. He also submitted that official gazette was Kazmi, Advisor Tax Policy to keep classified documents in section 15 of the Act but he was instructed by Mr. Mushtaq Notification dated 07.09.2011 and its approval under Muhammad Ali, DC-SRB had stated that he brought the order sheet dated 16.05.2016 of this appeal whereby granted to SRB by the Chief Minister, Sindh. He referred to formulate rules (under section 13 & 72 of the Act was blanket approval, empowerment, and authorization to signed by Mr. Vicky Dhingra, AC stating therein that the He then referred to written synopsis dated 10.10.2018 adopt Special Procedure in terms of section 13 of the Act. approved a summary on 20.08.2011 authorizing the SRB to earlier submitted that the Chief Minister of Sindh had Ms. Lubna Najmi, AC vide letter dated 05.06.2017 had submitted as under:-



11. Mr. Ayaz Shaukat the learned Advocate for the appellant further requested that the matter may be decided on merits.

10. Mr. Zain Manzoor, AC on 17.07.2019 had placed on record Minutes of the Cabinet Meeting dated 25.02.2019 and pointed out Agenda No.13 (Ex-post Facto approval by the cabinet in relation to the Rules issued under section 72 of the Sindh Sales Tax on Services Act, 2011 and its decision appearing at item No.14.3 which provided that "the Cabinet accorded ex-post facto approval to the 21 notifications issued under section 72 (1) of the Sindh Sales Tax on Services Act, 2011 during the period from 30.06.2011 to 01.07.2014". He further submitted that any defect in issuance of notifications has been cured by the Cabinet's decision and the same cannot be agitated before this forum. He requested that the matter may be decided on merits.

07.09.2011 alongwith approval from the Government and if the Department claimed that the documents were privileged the same may be submitted in a sealed envelope. These instructions were not complied with besides repeated opportunities.



Besides ex-post facto approval dated 25.02.2019 from the Sindh Cabinet the notification dated 07.09.2011 was

(i)

under:-

12. Mr. Zain Manzoor, AC further submitted on behalf of the respondent as

1988 SCMR 810 and e) PLD 1997 SC 315.

V/s Ziaullah Khan, PLD 1964 SC 293 c) PLD 1963 SC 633, d) Commissioner and other, PLD 1971 SC 252, b) Fazal Ahmed Razuddin V/s Chief Settlement & Rehabilitation be applied retrospectively. He relied upon a) Mian from any date prior to this as the executive orders cannot date when the same was approved by the Cabinet and not The Ex-Post facto approval would be applicable from the record.

(iv)

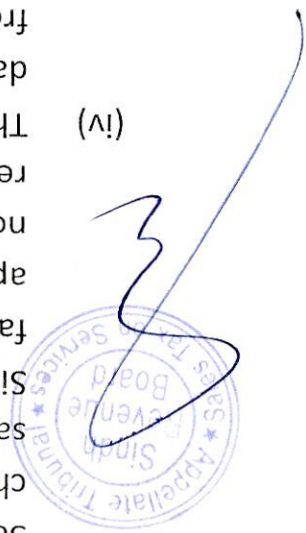
notification dated 07.09.2011 is apparent on the face of the approval of Government of Sindh for issuance of false statements given by the officers of SRB regarding Sindh vide Cabinet Meeting held on 25.02.2019. Thus the said rule was got approved by SRB from Government of changed when it was contended by the respondent that the Section 72 read with Section 15 of the Act. This stance was approval of Government of Sindh in view of requirement of the Notification dated 07.09.2011 was issued with the For the last three and a half years the stand of SRB was that in accordance with law may be taken against them.

(iii)

Tribunal under the instructions of Senior Officers and action of SRB had deliberately made false statements before this inserting rule 22A in the Rules. Moreover and the Officers Department before issuing Notification dated 07.09.2011 Chief Minister Sindh on 20.08.2011 as alleged by the 25.02.2019 that no such approval was obtained from the framed under section 72 of the Act by the Sindh Cabinet on It was evident from the Ex-Post Facto approval of the Rules approved on 20.08.2011.

(ii)

summary to Chief Minister dated 27.07.2011 which was



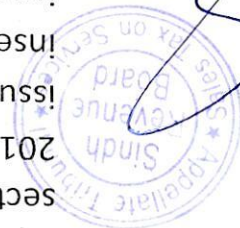
protected under sub-section (60A) of section 2 of the Act inserted vide Sindh Finance Act, 2016 effective from 18.07.2016 with retrospective effect which provided that the notification under the Act shall be effective from the day specified therein notwithstanding the fact that the issue of the official Gazette in which such notification appeared was published at any time after that day.

(iii) The notifications issued were further validated under sub-section (2) of Section 84 of the Act and he placed reliance upon the last three lines of the section starting from "shall be deemed" and ending on "as the case may be". He then submitted that defect if any in issuance of Notification dated 07.09.2011 was cured and the appellant was not entitled to claim input tax in violation of provision of rule 22A of the Rules. He submitted that the sub-section 2 of section 84 of the Act was inserted in the Sindh finance Act, 2019 (XII of 2019) to revalidate the notifications and order issued in exercise of the powers under the Act. The newly inserted section clearly provided that if the Board had issued any notification for which the approval of Government was required under this Act without approval of the Government the same shall be deemed to have been issued with approval of Government.

(iii) The words "with the approval of the Government" appearing in section 15 and sub-section (1) of 72 of the Act were omitted vide Sindh Finance Act, 2014 (XVII of 2014) effective from 07.07.2014 and since the said amendment in the Act was procedural in nature the same shall apply retrospectively.

(iv) The learned AC relied upon the reported judgment in the case of Molasses Trading and Export (Pvt.) Limited versus Federation of Pakistan and others cited as 1993 SCMR 1905 where in it was held that:

"when a legislature intends to validate a tax declared by a Court to be illegally collected under an invalid law, the cause



for ineffectiveness or invalidity must be removed before the validation can be said to take place effectively. It will not be sufficient merely to pronounce in the statute by means of a non obstante clause that the decisions of the Court shall not bind the authorities, because that amount to reversing a judicial decision rendered in exercise of the judicial power which is not within the domain of the legislature. It is therefore necessary that the conditions on which the decision of the Court intended to be avoided is based, must be altered circumstances. One of the accepted modes of achieving this object by the legislature is to re-enact retrospectively a valid and legal taxing provision, and adopting the fiction to make the tax already collected to stand under the re-enacted law."

The ex-post facto approval was given to the impugned notification in order to remove the defect and further the impugned notification was also validated under sub section (2) of the section 84 of the Act. Thus the action taken by the respondent was within four corners of law. The AC relied upon the reported judgment in the case of Ch. Nazir Ahmed versus Government of Punjab and other cited as PLD 2013 Lahore 621 wherein it was held that:

"To explain the legal effect of afore noted S.16 that is described a validation legislation, learned counsel for the respondents has relied on the judgment of the Hon'ble Supreme Court in Syed Waqid Ali and 4 others v. Globe Automobile Ltd. and another (1993 SCMR 819) which follows the rule laid down in Commissioner of Sales Tax (West), Karachi v. Messrs Krudsons Ltd. (PLD 1974 SC 180). In the case of Syed Waqid Ali (supra), Shafiqur-Rehman J. Speaking for the Court has not at all taken into consideration the Validation Act i.e., Ordinance No. XIII of 1964 (Displaced Persons Laws Amendment Ordinance 1964). Such validation statutes are curative and remedial. They operate in retrospect. They correct omissions and mistakes.



(v)

They have to be given effect to in pending proceedings. A decision cannot be rendered oblivious to them".

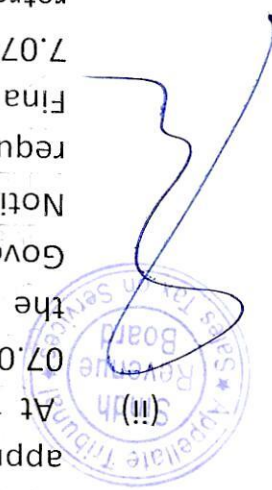
13. Mr. Ayaz Shaukat, advocate for the appellant in rebuttal submitted as under:-

(i)

The validation under sub-section (2) of 84 of the Act pertained to the notifications and orders issued and notified in exercise of the powers conferred upon Government or with the approval of the Government under the Act, before the commencement of the Sindh Finance Act, 2019. These shall be deemed to have been validly issued and notified in exercise of those powers and with the approval of Government, as the case may be. However the same did not apply to the notifications issued by SRB without approval of the Government of Sindh.

At the time of issuance of impugned Notification dated 07.09.2011, section 15 and sub-section (1) of section 72 of the Act expressly required approval of the Sindh Government (not Chief Minister) before issuance of Notification. It is pertinent to mention here that this requirement was only removed in 2014 through Sindh Finance Act, 2014 (Act XVII of 2014) effective from 7.07.2014 and was not removed expressly with retrospective effect. The legislature did not validate the impugned notification dated 07.09.2011, which was issued without approval of the Government; the legislature only re-validated already issued and notified notifications and orders which were issued with approval of the Government. If there was any intent of the legislature to validate the impugned notification dated 07.09.2011 then the legislature must have used the words in first part of the said section 'required to be issued with approval of the Government' or the words can be used in first part 'without approval of the Government'. Thus the interpretation of the learned AC may be accepted that the notification which

MS



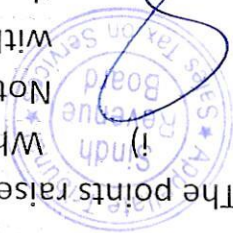
The facts and law relating to Point No. (i) are elaborated as under:-
General Clauses Act 1956.

17. Point No. (i) Whether rule 22A of the Rules was added in the Rules vide Notification dated 07.09.2011 was issued by SRB without the approval from the Government of Sindh and the said Notification was also not published in the official Gazette, which is a condition precedent for implementation of the same as provided in the Clause 19A of the

sub-section (2) of Section 84 of the Act.
07.09.2011 was covered by the validation clause inserted in the Act was retrospective and the Notification dated
Whether the amendment made in section 15 and 72 (1) of

Cluses Act 1956.
of the same as provided in the Clause 19A of the General
Gazette, which is a condition precedent for implementation
the said Notification was also not published in the official
without the approval from the Government of Sindh and
Notification dated 07.09.2011, which was issued by SRB

16. The points raised by the parties worth consideration are as under:-



15. The dispute between the parties was on account of disallowance of the input tax claimed by the appellant during the tax periods from January, 2013 to December, 2013 on the pretext that the same was not permissible under Rule 22A of the Rules. The OIO was passed at the sum of Rs.480,515,585/= which was reduced to Rs.9,836,468/= by Commissioner (Appeals) in the appeal filed by the appellant.

14. We have heard the learned representatives of the parties and perused the record made available before us.
Government through this deeming provision.

shall be deemed to have been issued with approval of the Government or which was issued without approval of the Government was required to be issued with approval of the Government

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class of taxable services provided by them".
of the sale tax paid on or in respect of any taxable services or
deductions, including refund arising as a result thereof, in respect
Government, allow registered persons to claim adjustments or
restrictions as it may prescribed and with the approval of the
"15. Adjustment—The Board may, subject to such conditions and

December, 2013 section 15 read as under:-

output tax. At the relevant tax periods i.e. January, 2013 to
appellant was given right to adjust input tax from the
In the instant case by virtue of section 15 of the Act the

(iv)

effect".
invade upon vested right cannot be applied with retrospective
given retrospective effect and those which adversely affect or
"Executive order which confer rights are beneficial would be
under:-

Development Organization, 2005 SCMR 492 it was held as
reported case of Government of Pakistan versus Village
same was approved and not from any previous date. In the
The said approval will be applicable from the date when the



(iii)

Act.
input tax adjustment as provided under section 15 of the
said Notification the appellant was deprived from claiming
retrospectively particularly in view of the fact that through
was through an executive order and thus cannot be applied
approval from the cabinet on 25.02.2019. The said approval
acted upon. The SRB claimed that it had got Ex-Post Facto
Government of Sindh has no legal value and cannot be

(ii)

The issuance of Notification without approval of
official Gazette in which such Notification was published.
department it had failed to produce the approval as well as
Notification. Despite providing several opportunities to the
approval of the Sindh Government before issuance of
07.09.2011, section 15 and 72 of the Act expressly required

(i)

At the time of issuance of impugned Notification dated
the appellant was not provided with any opportunity to
the appellant the appellant was not provided with any opportunity
the appellant was not provided with any opportunity to
the appellant was not provided with any opportunity to

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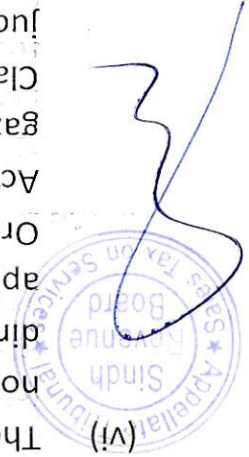
"21.....Merely issuing a notification without publication in official Gazette and keeping it in the closet shrouded in the secrecy is opposed to public policy and law, otherwise, it would add another tool of oppression in the arsenal of the public

In the same judgment it was further held as under:-

"17. General Clauses Act 1897 and Sindh General Clauses Act 1956 were enacted with object to shorten the language used in Federal and Provincial Statutes respectively passed by the respective legislature. Provisions of General Clauses Act, unless a different intention appears in any statute are to be read as integral part of any statute (see section 31 of the General Clauses Act 1897 and section 28 of the General Clauses Act 1956).

Sind. PLD 2010 Karachi, 236 as under:-

judgment in the case of Ummatullah Versus Province of Clause Act was applicable. It was held in the reported Act there was no condition of publication on the official Orders, etc. to be published. In the original section 15 of the applicable to province of Sindh provides that Rules and directions. Section 19A of the General Clauses Act, 1956 no such copy could be produced despite numerous The Notification was not published in the official gazette as



post facto approval. which the Notification dated 07.09.2011 was granted ex-Minutes of Cabinet Meeting dated 25.02.2019 through Government of Sindh and such fact was confirmed from the 07.09.2011 was issued without the approval of the specifically conferred on it. The Notification dated powers and could only exercise those powers which were conditions and restrictions had to act under delegation of the approval of the Government. The SRB in placing the restriction in respect of adjustment of sales tax paid with powers were given to SRB to place conditions and It is therefore clear from the above discussion that the

(v)

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action was without legal force.

and without its being published in official Gazette thus such was issued without approval of the Government of Sindh answered in positive that the Notification dated 07.09.2011 In view of the above discussions the Point No. (i) is

(viii)

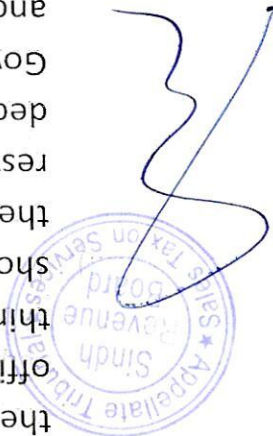
"4.....It is well settled proposition of law that a thing required by law to be done in a certain manner must be done in the same manner as prescribed by law or not at all"

under:-
Khyber Electric Lamps, 2001 SCMR 838 it has been held as reported case of Assistant Collector Customs versus M/s undertaken in this matter by the Chairman/Board. In the statements, which is highly objectionable and probe may be and the Officials of SRB tried to take shelter in the false Government. Admittedly no such approval was obtained deductions and refunds with the approval from the restrictions on the registered person to claim adjustments, the Act provides that the SRB may place conditions and should not be done at all. In the instant case section 15 of things are required to be done strictly according to law, or it official Gazette. Moreover it is a settled principle of law that the same cannot be implemented unless published in the the right of the appellant to claim input tax adjustment and

(vii)

In the instant case the Notification 07.09.2011 has curtailed the right of the appellant to claim input tax adjustment and prior date.
notification which curtails or extends rights of citizens will take effect from date of its publication in Gazette and not from any
"8....."It has been laid down by the superior Courts that a
Amna Bibi, 2008 SCMR 1717 it has been held as under:-
In the reported case of Chief Administrator Augaf versus Mst.

and fancies for extraneous considerations"
impinge any privilege, benefit or right of a person at their whims
functionaries, who may arbitrarily or selectively confer or



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The legislature did not validate the impugned notification dated 07.09.2011, which was issued without approval of the Government of Sindh. It is pertinent to mention here that the legislature only re-validated already issued and notified notifications and orders which were issued with the approval of the Government. If there was any intent of the legislature to validate the impugned notification dated 07.09.2011 then the legislature must have used the words in first part of the said section, required to be issued with

(!!!!)

approval of Government, as the case may be.
issued and notified in exercise of those powers and with the Sindh Finance Act, 2019, shall be deemed to have been validly the Government under the Act, before the commencement of the powers conferred upon Government or with the approval of

“(2) All notifications and orders issued and notified in exercise of provides as under:-
Sub-section (2) to section 84 of the Act was added which

(!!!)

the back date.
government” will take effect from 07.07.2014 and not from SRB. The omission of words “with the approval of Government of Sindh. No such approval was obtained by notification could only be issued with the approval of the given by legislative intent. The Notification was issued on 07.09.2011 when the condition was that such are prospective unless retrospective effect is specifically retrospective application. The law is very clear that all laws 2014. The amendment does not provide that it had any the Act vide Sindh Finance Act, 2014 assented on 7th July, omitted from section 15 and sub-section (1) of section 72 of The words “with the approval of the government” were

(i)

The facts and law relating to Point No. (ii) are elaborated as under:-

of the Act.
covered by the validation clause inserted in sub-section (2) of Section 84 of the Act were retrospective and the Notification dated 07.09.2011 was 18. Point No. (ii) Whether the amendment made in section 15 and 72 (1)



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approval of the Government' or the words can be used in first part 'without approval of the Government'.

(iv) In our opinion, the interpretation of the concerned learned AC could be accepted only if the defect in issuance of Notification dated 07.09.2011 had been cured by the legislature by express deeming provision to the effect that "notification which was required to be issued with approval of the Government was issued without such approval of the Government shall be deemed to have been issued with approval of the Government. in the case of Molasses Trading and Export (Pvt.) Limited versus Federation of Pakistan and others relied upon by the learned AC cited as 1993 SCMR 1905 is distinguishable. Since in the instant case the cause for ineffectiveness or invalidity of the notification had not been removed before the validation clause can be said to take place effectively.

(v) In view of the discussions Point No. (iii) is answered in positive as the amendment made in section 15 And 72 (1) of the Act cannot be retrospective and the Notification dated 07.09.2011 cannot be covered by validation clause under sub-section (2) of section 84 of the Act.

19. In the light of the above discussions since both the points are answered in positive the appeal is allowed and both the OIO and OIA are set aside and annulled. The copy of the order may be provided to the learned representatives of the parties.

(Imtiaz Ahmed Barakzai)
Member Technical

(Justice® Nadeem Azhar Siddiqi)
Chairman

Karachi
Dated: 20.04.2020

Copy for compliance:

11/05/2020
Order issued on 11/05/2020

1. The appellant through authorized Representative.
2. The Assistant Commissioner (Unit-), SRB, Karachi.
- Copy for information to:-
3. The Commissioner (Appeals), SRB, Karachi
4. Office Copy.
5. Guard File.

