

(Original file)

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD

DOUBLE BENCH-II

APPEAL NO. AT-40/2018

M/s Pakistan Telecom Mobile Ltd. .... Appellant

**Versus**

Assistant Commissioner, SRB ..... Respondent

Mr. Imran Younus Khan, ACA ..... For Appellant

Mr. Vicky Kumar Dhingra, Assistant Commissioner, SRB ..... For Respondent

Date of hearing 11.10.2018

Date of Order 30.10.2018

ORDER

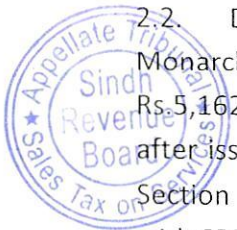
**Agha Kafeel Barik:** This appeal has been filed against order of Commissioner (Appeals) dated 19.05.2018 whereby he confirmed order in original dated 29.11.2017 upholding principal amount of tax and default surcharge, but deferred the penalty which would be payable if the principal amount of tax and default surcharge was not paid.

2. The facts of the case are as under:

2.1. The appellant is registered with SRB rendering telecommunication services under tariff heading 98.12, chargeable to SST ranging from 18% to 9.5% during the period from 2011 to July 2017.

2.2. During the period Jan 16 to Mar 17 it received services valued at 37,654,384/- from Monarch Security Services (registered under tariff code 9818.1000) on which SST amounting to Rs. 5,162,930/- was charged and claimed by the appellant. It was disallowed by AC-SRB Unit-1, after issuing show cause notice on 08.11.2017, vide order in original dated 29.12.2017, under Section 15A(1)(j) and 15A(1)(jj) read with Rule 22A(viii) and Rule 22A(viiiia) of the Rules read with SRB Notification SRB-3-4/8/2013 dated 01.07.2013.

2.3. An appeal against the order in original has been dismissed by Commissioner (Appeals), vide order dated 19.05.2018. Hence this appeal before us.



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3. The following issues have been raised by the appellant in its appeal.
- i) Disallowance is contrary to SRB notification SRB-3-4/8/2013 dated 1<sup>st</sup> July, 2013, as well as Section 15A(1)(jj) read with rule 22A(viiiia).
  - ii) Provisions of Section 15A(1)(jj) and rule 22A(viiiia) are not applicable in input claim for the period July 2016 to January 2017.
  - iii) Disallowance of input tax, not claimed by the appellant, is an error.
  - iv) Commissioner (Appeals) order to delete penalty conditionally is incorrect.

4. The Learned AR argued that disallowing input tax claimed on security services 'obtained from Monarch Security services is a mistake on the part of the assessing officer as according to him the said service provider has charged the appellant on full/ normal rate of sales tax and not the reduced rate of 10% as alleged by the assessing officer. Hence restriction of Section 15A / Rule 22A does not apply to this case.

5. Mr. Vicky the learned AC-SRB argued in rebuttal that in clause (jj) of Section 15A (1) the words are, "services as are liable to sales tax" which means that irrespective of rate of tax, normal or reduced, the recipient of service is not entitled to claim input tax. The learned AR submitted that in fact the AC has disallowed Rs.5,420,992/- whereas the appellant had actually claimed Rs.5,162,930/-. At this stage Mr. Vicky submitted that the excess amount of tax has already been reduced from the tax payable; he filed reconciliation as well.

6. The learned AR submitted that the AC-SRB has wrongly invoked clause (jj) of Section 15A (1) as it was inserted on 14.07.2017 whereas the case pertains to the period from January, 2016 to March, 2017 and that the said provision is not retrospective.

7. The learned AR further stated that Rule 22A involved in this case stands replaced by Section 15A on 01.07.2016 and in new Rule 22A there is no similar provision of law as clause (viiiia) as in the old rule 22A invoked by the assessing officer. He argued that the period of services obtained (January, 2016 to March, 2017) fall outside the application of the said provisions of law. He further submitted that the clause (j) of Section 15A is applicable since 18.07.2016, but same does not apply in this case. About the notification of SRB No.SRB-3-4/8-2013 of 01.07.2013 the learned AR submitted that it is applicable to the input claimed by Security agencies and not for the service recipient of security agency services.

8. In rebuttal the learned AC submitted that notification dated 01.07.2013 squarely applies to the rates of tax reduced for service provider which means it is about the rate of their output tax and not their input. In this case 10% is the security agencies output tax rate which in turn is the input tax of Pak Telecom the appellant. He argued that the law is very clear in this respect



and it provides that where reduced rate is applicable to a service same shall not be claimed as input tax by the recipient. He also stated that in this sector there is no option to adopt normal or higher rate of tax. Without prejudice to his arguments on the issues, the learned AC submitted that clause (VIII a) of Section 15A was applicable to cases prior to 01.07.2016 and applies to this case for the period from 01.07.2016 to 30.06.2016; his point was well taken of.

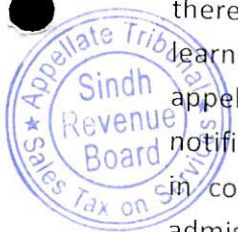
9. After the perusal of record and the argument of both sides our findings on the issues raised before us are as under.

9.1. Clause (jj) of Section 15A was inserted on 14.07.2017, whereas, this case pertains to the period Jan 16 to March 17. Since the provision of law is not retrospective in effect it shall not apply in this case.

9.2. The AC-SRB has also invoked clause (viiiia) of Rule 22A, before substitution on 28.06.2016, to disallow input adjustment claim. This clause alongwith Rule 22 was originally inserted on 24.01.2011 and has same conditions as clause (jj) of Section 15A(1). But it was substituted by new Rule 22A on by notification dated 28.06.2016 effective 01.07.2016. As the tax periods pertain from June 2016 to March 2017, in our considered opinion the said clause (viiiia) applied to the period from Jan-16 to Jun-16 but not beyond it.

9.3. Notification No.SRB-3-4/8/2013 dated 1<sup>st</sup> July, 2013 has been issued under section 8(2) which authorizes the Board, with government approval, to declare higher or lower rate of tax in respect of any taxable service provided by a registered person and the Board may impose conditions and restrictions on it. In the said notification nine (9) taxable services have been listed, including services provided by a security agency to which lower rate of 10% has been allowed. Here it is pointed out that the tax authority has imposed tax with the words 'shall be charged, levied, collected' at the specified rate and there is no option for the tax payer to adopt a higher rate. Thus the argument of the learned AR taken at one stage that since Monarch Security Agency has charged the appellant with higher rate of 14% and 15% for 2016 and 2017 respectively, the notification dated 01.07.2013 does not apply to it, is not valid. As regards the restriction in column (4) of the said Notification "input tax credit / adjustment shall not be admissible" it is in respect of tax at lower rate of 10% which would be transferred by a security agency, Monarch Security Agency in this case as service provider, to the appellant, M/s Telecom Mobile Ltd, the service recipient who would otherwise claim it as its input tax adjustment, but for the restriction under this notification, it cannot.

10. The Commissioner (Appeals) has also given his observation on the issue in para 8 of his order as under:

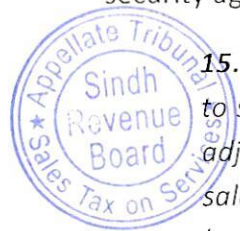


"The study of the grounds of the Appellant in this Appeal with the ground of the Order No.13/2018 in juxta position, it will be seen that a minor difference in the grounds exists. The submission of the Appellant was that it was the recipient who has charged excess tax and therefore the Appellant may not be burdened with the excess tax of ¼ % and the adjustment to this extent be allowed. Further, that without prejudice to this the service provider had the option to charge the tax @ 10% or 13% under the law. In this regard I have read the notification dated 1<sup>st</sup> July, 2013 and have also read section 16 of the Act, 2011. The notification says that the tax "shall be charged, levied, collected at the rate specified in column (3) of Table subject to the limitations, conditions and restrictions specified in column (4) of the Table:-". And in column (4) it said the "input tax credit / adjustment shall not be admissible". The study of the above part of the notification will show that there is either no discretion to charge tax at statutory rate or the discretion to adjust input tax adjustment. And in this regard the language of the notification is clear and absolute. As far as the matter of excess tax is concerned it will be seen that section 16 inversely says that a "tax or charge which is in excess of tax or charge actually payable and the incidence of which has been passed onto the person to whom service is provided, shall pay the amount of tax or charge so collected to Government". It will be seen that in the case in band the excess tax over and above the applicable rate has been charged and burden of the same has also been passed onto the Appellant being the service recipient. The above discussion made in light of the position of law clearly postulates that neither the input tax adjustment is allowed nor excess tax can be given any other treatment except to ask the Appellant to pay the total amount of tax.

11. It is noted that the notification dated 01.07.2013 issued under Section 8(2) was effective during the period under reference January 2016 to March 2017 and remained as such. It has its authority obtained from the statute and is not limited to section 15A or Rule 22A. It is also noted that had this notification been relevant to the restriction of claim of input tax by a security agency it would be issued under section 15 which reads as under:

**15. Adjustments.** The Board may, 30[by notification in the Official Gazette, and] subject to such conditions and restrictions as it may prescribe, allow registered persons to claim adjustments or deductions, including refunds arising as a result thereof, in respect of the sale tax paid on or in respect of any taxable services or class of taxable services provided by them.(emphasis provided)

<sup>4</sup>[Provided that the refund arising as a result of a claim of adjustments or deductions, if any, shall be made on yearly basis in the month following the end of the financial year.]



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Section 15 covered all such situations till section 15A was inserted on 01.07.2016 alongwith new Rule 22A to restrict input tax claim under the specified conditions.

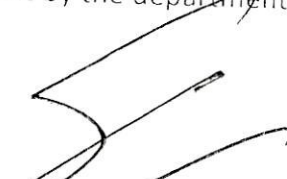
12. On the issue of amount claimed as input tax at Rs.5,162,930/- but disallowed at Rs.5,420,976/- the Commissioner (Appeals) has referred to Section 16 which provides that "a tax or charge which is in excess of tax or charge actually payable and the incidence of which has been passed onto the person to whom service is provided, shall pay the amount of tax or charge so collected to government." The Commissioner (Appeals) has further pointed out that in the instant case excess tax over and above applicable rate has been charged and the burden of the same has been passed on to the appellant, being the service recipient.

13. In view of above we hold that the disallowance of input tax on security services was justified, hence confirmed.

14. The AC concerned is however directed to make adjustment for the extra SST paid / deducted by the service provider security agencies but not given credit by the department.

15. The appeal is accordingly dismissed.

  
(Muhammad Ashfaq Balouch)  
JUDICIAL MEMBER

  
(Agha Kafeel Barik)  
TECHNICAL MEMBER

Karachi

Dated:30.10.2018

Copies supplied for compliance:-

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.

Certified to be True Copy

  
REGISTRAR  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD