(Guard file)

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-I

APPEAL NO. AT- 10 /2019

M/s Pakistan International Bulk

Terminal Limited (Pvt.) Ltd. Karachi.....Appellant

Versus

Assistant Commissioner, SRB,
Karachi.....Respondent

Date of Filing of Appeal: 28.01.2019.

Date of hearing: 02.04.2019, 15.04.2019, and 23.04.2019.

Date of Order 13.05.2019.

Mr. Mohammad Yousuf, Advocate and Mr. Nisar ul Haq, Chartered Accountant for Appellant.

Mr. Awais Raza, AC - SRB and Mr. Imran Ali, AC-SRB for Respondent

ORDER

Justice ® Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order-in-Appeal No.11/2019 dated 11.01.2019 passed by the Commissioner (Appeals-1) in Appeal No. 87/2018 filed by the Appellant against the Order-in-Original No. 192/2018 dated

Appellate Tribunal Sindh Revenue Board Sales Tax on Services

26.03.2018 passed by the Assistant Commissioner (Ms. Anum Shaikh) SRB, Karachi.

01. The facts of the case as mentioned in the Order-in-Original are that the appellant is registered with SRB as service provider in the category of Terminal Operator, Tariff Heading 9819.9090 of the Second Schedule of the Sindh Sales tax on Services Act, 2011 (herein after referred as the Act) chargeable to Sindh sales tax at normal rate.

02. It was alleged in the order in original that during the scrutiny of the sales tax return filed by the appellant for the tax periods May, 2016 to November, 2016 transpires that appellant had claimed input tax adjustment amounting to Rs.539,766,635/=. However as evident from the Note1.2 of the audited annual account for the year ended June, 2017, the appellant commenced its business since 3rd July, 2017 and since goods or services in relation to which input tax adjustment has been claimed were procured or received during a period exceeding six months prior to date of commencement of commercial operations same is inadmissible in terms of section 15A (1) (i) of the Act.

03. That a show-cause notice dated 08.01.2018 was served upon the appellant to show-cause as to why tax inadmissible input tax credit adjustment amounting to Rs.539,766,635/= pertaining to Tax Periods May, 2016 to November, 2016 may not be disallowed in terms of section 15A of the Act and why the commensurate amount of sales tax, manifestly short paid should not be assessed and recovered under section 23 (1) of the Act and recovered under clause (a) of sub-clause (1A) of section 47 of the Act along with default surcharge and penalties prescribed under Serial No. 3, 6 (d), 11 and 13 of the Table under section 43 of the Act. The appellant filed its reply dated 08.01.2018 filed on 15.01.2028 through Mr. Mohammad Yousuf, Advocate. In the reply It was stated that the show cause notice is unlawful and without justification. It was also stated the appellant has commenced its operation in April, 2017. In the reply the contents of reported judgment in the case of Pakistan International Freight Forwarders Association

versus Province of Sindh, 2017 PTD 1 was quoted and it was stated that the registration of the appellant and subsequent creation of demand for payment of sales tax on service is in violation of various provisions of Constitution of Pakistan, laws and particularly in abject violation of the above cited judgment of High Court of Sindh.

04. The Assessing Officer in the Order-in-Original believing on the audited accounts for the year ended June, 2017 has held that the appellant commenced its operation in July, 2017. The Assessing officer also observed that the order of the High Court has already been suspended by the Supreme Court of Pakistan and the same is not applicable in this case. The Assessing Officer has passed order-in-original to disallow input tax adjustment of Rs.539,766,635/= in terms of section 15A (I)(i) of the Act and ordered to recover the said amount of Rs.539,766,635/= along with default surcharge under section 44 of the Act. The Assessing Officer also imposed penalties under the various provisions of section 43 of the Act as under:

i) Penalties under serial No. 3 of table under section 43 of the Act amounting to Rs.62,097,047/= for short payment of Sindh sales tax for the tax periods May, 2016 to November, 2016 @ 5% of the principal amount of tax.

ii) Penalties under serial No. 6(d) of table under section 43 of the Act amounting to Rs.539,766,735/= for claiming inadmissible tax credit adjustment for the tax periods May, 2016 to November, 2016 @ 100% of the principal amount of tax.

05. The appellant challenged the said order of the Assessing Officer by way of filing appeal before the Commissioner (Appeals-1), who dismissed the appeal upholding the order in original in toto. The appellant has now challenged the said order in appeal passed by the Commissioner (Appeals) before this forum.

06. Mr. Mohammad Yousuf, the learned advocate for the appellant submitted as under:

(i) That the department has erroneously disallowed the input tax adjustment claimed by the appellant after commencement of its business as certified by PQA. He also submitted that sales tax on services was levied in VAT mode and input tax adjustment is a basic ingredient of levy of sales tax on VAT mode and input tax adjustment cannot be disallowed.

(ii) He then submitted that the appellant commenced its business on 24.04.2017 on which date the first ship was handled and 1st invoice was issued on 2nd March, 2017 and in July, 2017 while e-filing monthly sales tax, input tax was claimed. He filed month wise statement showing input tax claimed for the periods May, 2016 to November, 2016. He also filed details of input tax claimed from May, 2016 to January, 2019 which includes the tax periods involved in this appeal. He also submitted that during the tax periods from May, 2016 to November, 2016 no adjustment of input tax was made.

(iii) He also submitted that the appellant does not fall within the ambit of clause (i) of sub-section (1) of Section 15A of the Act for the reason that the clause (i) deals with goods or services which are not capital goods. He then submitted that clause (f) is also not applicable to appellant as the capital goods and fixed assets acquired by the appellant are exclusively used for providing or rendering taxable services provided or rendered by port operators, airport operators, airport ground services providers and terminal operators, Tariff Heading 9819.9090. He submitted that appellant is a Terminal Operator as defined in sub-section (98) of Section 2 of the Act.

(iv) He further submitted that apart from other grounds of appeal one is that there is a dispute with regard to the commencement of business, which according to the appellant is 25th April, 2017 on which date first vessel was handled and 1st invoice No. 01 was issued on May 2, 2017 and the first taxing event took place in June, 2017.

(v) He also submitted that the appellant is not hit by mischief of any of the provisions contained in section 15A of the Act, particularly

item (i) as section 15A was inserted in the Act, 2011 vide Sindh Finance Act, 2016 assented on 18.07.2016.

(vi) Mr. Mohammad Yousuf then submitted that clause (i) of sub-section (1) of Section 15A of the Act provides for "goods or services" which, as per definition provided in sub-section (48) of Section 2 of the Act, include every kind of movable property, whereas the machinery imported by the appellant for the purpose of providing taxable services of terminal operator and the capital goods or capital assets are fixed/immovable assets and are out of purview of clause (i) of sub-section (1) of Section 15A of the Act. He then submitted that section 15 of the Act read with Rule 21, 22 and 22A of the Rules, 2011 are applicable to the case of the appellant, which do not provides any restriction on claiming input tax adjustment on payment made under Sales Tax 1990 on input of capital goods and machinery, particularly sub-rule (4) of Rule 22. He also referred to sub-section (52) of Section 2 of the Act and submitted that the case of the appellant does not fall in any of the eventualities where input tax claimed by the appellant comes under dispute or shadow when read with section 15 and Rules under Chapter V of Rules, 2011.

(vii) After hearing Mr. Muhammad Yousuf Advocate to some extent a question has been put to him that in absence of any output tax under which provision of law the appellant claimed input tax adjustment. In reply Mr. Muhammad Yousuf submitted that the appellant started receiving imported machinery (capital assets & goods) in the month of May, 2016 and on import paid sales tax on goods, which the appellant is entitled to adjust as per section 15 of the Act of 2011. He then submitted that first economic activity was performed by the appellant on 29.04.2017 and 1st invoice was generated on 02.05.2017. He then submitted that in law there is no prohibition that accumulated input tax adjustment cannot be claimed. He then submitted that the only occasion of adjustment of input tax is when economic activity commences and a taxable event takes place. He also submitted that the amount which was claimed as input tax was in fact Federal Sales Tax which was

already paid to FBR and was being claimed in the event of economic activity or taxable services under the Act of 2011.He submitted that there is no dispute that goods imported by the appellant are capital assets and capital goods as defined under Chapter 84 and 85 of the 1st Schedule to the Customs Act and referred to Section 15A and submitted that wherever the word "goods" has been used in the said section the same has to be interpreted in terms of section 2(48) of the Act, which defines "goods" and provides that "goods includes every kind of movable property" and at the time when machinery were imported the same was movable property.

07. Mr. Awais Raza the learned representative of the respondent submitted as under:

(i) He submitted that any input tax adjustment is not permissible beyond six months prior the date of commencement of business and referred to clause (i) of sub-section (1) of Section 15A of the Act. In support of his contention he also referred to the Note 1.2 of Annual Audit Accounts for the year ended June 2017 and Profit and Loss Account for the same period and submitted that in the balance sheet the date of commencement was mentioned 3rd July, 2017. He also submitted that in the Profit and Loss Account for the period ended June 2017 no profit/revenue has been shown on account of terminal services.

(ii) Mr. Awais Raza AC files Registration and Tax Profile of the appellant along with copy of notes to the Financial Statement for the year 2016-2017 and relied upon Note No.1.2. He also filed a statement showing the input claimed by the appellant. He submitted that the case of appellant falls within clause (i) of sub-section (1) of Section 15A of the Act and any claim of input tax prior to six month from the date of commencement of commercial operation for providing taxable service cannot be allowed.

(iii) Mr. Awais Raza submitted that this appeal pertains to rejection of input tax claimed by the appellant for tax periods from May 2016 to November 2016 amounting to Rs.539,766,635/- (page 67 of

Appeal para 2 of OIO). He submitted that the input claim was rejected under section 15A (1) (i), inserted on 18th July, 2016 vide Sindh Finance Act, 2016. He then referred to Rule 22 and the proviso attached to sub-rule (1) of rule 22 and submitted that despite showing/claiming the input tax in the monthly tax returns effective from May, 2016 the actual adjustment has been made in the month of May 2017 and the input tax can be adjusted within next six months (substituted for four months vide notification dated 1st July, 215). He submitted that as per the contention of advocate for appellant Rule 21 as applicable which is sub-ordinate to Section 15, which gives powers to Board to provide conditions and restrictions and under Section 15 Rule 22A was issued providing restrictions. He then submitted that Rule 22A was initially added on 07.09.2011 through a Notification and subsequently the said Rule was substituted in the present form on 28.06.2016 effective from 1st July, 2016.

(iv) On 15.04.2019 the learned Ac filed brief facts of the case. The learned AC also filed his written arguments on 23.04.2019 in reply to the arguments of the learned advocate for the appellant and submitted that the contention of the learned advocate for the appellant that the clause (i) of sub-section (1) of section 15A deals with goods and services which are not capital goods is not correct and by referring to the definition of "goods" provided in the Act submitted that the term "goods" and "includes" both have a wider scope and cover different type of goods including fixed assets and capital goods etc. He also referred to the Good Declaration (GD) filed by the appellant with customs authorities and submitted that the term "goods" has a wider scope. He then submitted that the appellant failed to give any reason for non-application of section 15A of the Act despite that the same provides conditions and restrictions upon the registered person to claim input tax adjustments. In para 3 of his submissions the learned AC submitted that "On the argument that section 15A of the Act was inserted in July, 2016 the applicability of the same has been made from such period, on this it is submitted that

appellant has not adjusted their input tax previously from this insertion. The first adjustment of input inadmissible has been made in the period of May, 2017; therefore this contention is not applicable". He then referred to Note 1.2 of the annual audit account and submitted that the date of commencement is 3rd July, 2017 and any input tax prior to six months of date of commencement of commercial operations is inadmissible. He then submitted that the appellant also failed to adjust the input tax as per rule 22 of the Act.

08. Mr. Muhammad Yousuf, advocate for appellant in rebuttal submitted that the interpretation given by the AC to the word "goods" is not correct and that the fixed and capital goods etc. are not covered as per the definition of goods provided in sub-section (48) of Section 2 of the Act. The word goods is commonly used in the Act and is not specific to Section 15A (1) (i) of the Act. He further submitted that the provisions of Section 15A inserted on 18.07.2016 is a negative covenant and inserted to deny the input tax adjustment and cannot be retrospectively applied. He then submitted that for the tax period for which the input tax was disallowed there was no occasion of adjustment of input tax as for that period no output tax was declared. He then referred to Rule 22A as of today and the one which it superseded and submitted that the provision like clause (i) of sub-section (1) of Section 15A is not available in both the rules. He then submitted that even in the order in original Rules 21 to 22A were not considered and invoked.

09. We have heard the learned representatives of the parties and perused the written submissions filed by the learned AC and the record of the case made available before us.

10. The Issue involved in this case is disallowance of input tax claimed by the appellant during the tax periods from May, 2016 to November, 2016. The appellant was registered on 24.09.2011 in the category of "Port Operator, Airport, Tariff Heading 9819.9090". The category was modified as Stevedore on 06.08.2012 and again the category was modified as Port and Terminal Operator on 28.08.2017 and the

appellant filed Null monthly sales tax returns showing only input tax without declaring output tax. According to the appellant the first economic activity/taxable activity was performed in the Month of April, 2017 when the 1st Ship was handled on 29.04.2017 and 1st Invoice was issued on 02.05.2017 and first time the input tax adjustment was claimed from the output tax in the month of May, 2017. The respondent claimed that as per audited financial accounts ended June, 2017 the appellant started its commercial operation effective from 3rd July, 2017.

11. The input tax adjustment can be claimed under section 15 of the Act, which provides for adjustments. This provision gives the power to the Board subject to such conditions and restrictions to allow registered person to claim adjustments or deductions, including refund.

12. The Board under this provision has notified Rule 22A on 07.09.2011 which provides for input tax credit not allowed. This rule 22A was substituted on 28.06.2016 effective from 1st July, 2016 and for the tax periods May, and June 2016 the Rules as available at the relevant time and was applicable read as under:-

"(i) Capital goods not exclusively used in providing or rendering of service;
(ii) Fixed assets not exclusively used in providing or rendering of service;

13. The appellant does not fall within the ambit of the above clauses as there is no allegation that the capital goods and fixed assets acquired were not for the purpose of providing or rendering services.

14. The input claim was disallowed invoking clause (i) of sub-section (1) of section 15A of the Act, which was inserted in the Act vide Sindh Finance Act, 2016 effective from 18th July, 2016. Apparently section 15A has no retrospective effect. Section 15A deals with the denial of input tax adjustment and has affected the right of the taxpayers to claim input tax adjustment and is a substantive provision of law and cannot be applied retrospectively in absence of clear intendment of the legislature. The input claim was rejected under clause (i) of sub-section (1) of section 15A, which reads as under:

"(i) Goods or services procured or received by a registered person during a period exceeding six months prior to date of commencement of the provision of taxable service by him.

15. There is also a dispute whether the word "goods" includes "capital goods, fixed assets and machinery". The Commissioner (Appeals) also interpreted the word 'goods" in relation to the definition of goods appearing in sub section (48) of section 2 of the Act used in clause (i) of sub section (1) of section 15A and has held as under:-

" It shall be learned from reading above definition of the Act, 2011 does not define the terms "capital goods" separately but defines the "goods" as whole. It is also to be kept in mind that the "capital goods" or "fixed assets" are not separately defined in the Act, 2011. Therefore, it shall mean that the terms "goods" is broader .and includes all types of goods and not certain category of goods. As compared to the section 15A the subject of section 15B is "Adjustment of input tax on certain goods and services". It says that the input tax on certain goods and services. It says that the input tax paid on acquisition of such of the capital goods, machinery and fixed assets as are classified under chapter 84 and 85 of the first schedule to the Customs Act, 1969 shall be adjustable in twelve equal monthly installments".

The legislature has used words "capital goods and fixed assets" in clause (f) of subsection 1 of section 15A of the Act, used the word "goods" in clause (i) of subsection 1 of section 15A of the Act and used the words "capital goods, machinery and fixed assets" in Section 15B of the Act. The using different terminology and different words in clauses of section 15A and section 15B by the legislature have different meaning and connotation and it cannot be said that since the capital goods and fixed assets are not defined in the Act the same are included in the goods.

16. The tax periods involved are from May, 2016 to November, 2016. The returns of May and June 2016 were filed before insertion of section 15-A of the Act and section 15A and has no application on the returns of May and June, 2016 and the input tax if any claimed cannot be rejected invoking section 15A.

17. The main point in this appeal is that for the tax periods from June to November, 2016 only the input tax was shown/claimed but in fact no adjustment has been made in that period as there was no output tax declared from which the appellant can claim input tax. For that tax periods the appellant has only showing or accumulating the input tax. According to the Statement filed by both the parties the appellant has claimed input tax of Rs.1,194,401/= and declared output tax of Rs.7,372,129/= in the month of May, 2017. In this way the first adjustment was made in the month of May, 2016. The appellant can only claim adjustment of input tax when output tax was declared in the Month of May, 2017. Without declaring output tax input tax cannot be adjusted. The input tax claim of the appellant was rejected in advance without waiting for the appellant to declare output tax for the purpose of adjustment of input tax.

18. In this case the date of commencement of taxable service is also disputed. The appellant on the basis of handling of first vessel claim that the same was on 29.04.2017, whereas the respondent on the basis of Audited Accounts ended June, 2017 claimed that the appellant started commercial operations from 03.07.2017. The question is that if the appellant has commenced taxable services on 3rd July, 2017 how it can declare input tax in the month of May, 2017 and adjusted input tax. There appears some mistake/error in the Audited Accounts.

19. The Assessing Officer has directed to recover an amount of Rs.539,766,635/= on account of claiming input tax. This amount was never adjusted from the output tax and no loss has been caused to SRB and there is no occasion to order for recovery. The Assessing Officer also imposed penalty of Rs.601,863,682/= under Serial Number 3 and 6 (d) of the Table under section 43 of the Act without even mentioning the malafide on the part of the appellant and without establishing mensrea and confirmed by the Commissioner (Appeals-1) in utter violation of various reported judgments of the superior courts i.e. 1) Pakistan through Secretary, Ministry of Finance versus Hard Castle Waud, PLD 1967 SC 1, (It has been held that even in statutory offence the

presumption is that mensrea is an essential ingredient), 2) Deputy Collector, Central Excise and Sales Tax versus ICI Pakistan Limited, 2006 SCMR 626,(It has been held that the liability to pay additional tax and surcharge being not automatic the same would be determined by the appropriate authority as to whether or not there was any reasonable grounds for default), 3) Commissioner Income Tax versus Habib Bank Limited 2007 PTD 901 (Sindh High Court has held that penalty is in the nature of penal provision is quasi criminal and presence of mensrea is mandatory condition for imposing penalty),4) Gharibwal Cement limited versus Income Tax Appellate Tribunal 2005 PTD 1 (Lahore High Court has held that revenue never succeeded in establishing the existence of mensrea and imposition of penalty was unjustified).

20. The Commissioner (Appeals) in para 5 of his order held that appellant has not taken any ground for removal or waiver of the penalties. The burden is upon the department to prove mensrea and the burden to rebut the same will shift upon the taxpayer/appellant when the department establishes the presence of mensrea and that the adjustment of input tax was malafide, contumacious and with the intention to evade tax. Nothing is available in the assessment order (OIO) in this regard. Furthermore in the reported judgment in the case of Saleem Haji Rehmatullah Dada versus Commissioner of Income Tax, Companies-V. 2003 PTD 593, *High Court of Sindh has held that ".....Relief available to a person in law should not be denied on account of technicalities. It is the duty of tax officials to act in accordance with the spirit of law and keeping the principles of justice in view. The justice should not be crucified on the altar of technicalities and an assesse should not be required to perform impossibilities, which in itself amounts to negation of justice"....."*
The Commissioner (Appeals-1) before confirming the illogical penalties imposed by the Assessing Officer should have considered on merits whether the penalties were rightly imposed keeping in view the above reported judgments, which were quoted in number of decisions by this Tribunal and is in the knowledge of Commissioner (Appeals-1).

21. The appeal is allowed and both order in appeal and order in original are setaside. Copy of the order may be supplied to the learned authorized representative of the parties.

(Agha Kafeel Barik)
Member Technical

(Justice (R) Nadeem Azhar Siddiqi)
Chairman

Karachi. Dated.13. 05.2019

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Copies Supplied to:

1) The Appellant through Authorized Representative
2) The Assistant Commissioner, SRB for compliance
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3) The Commissioner Appeals, SRB
4) Guard File
5) Office File

Order issued on 16/5/19

Registrar

Order Dispatched on 16/5/19

Registrar