

Grand file

**BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD AT
KARACHI**

DB-I

APPEAL NO. AT-49/2020

M/s Huaneng Fuyun Port & Shipping (Pvt.) Ltd
(SNTN: S7255686-3) Bungalow No. 76/I,
Main Khayaban-e-Shaheen Phase, IV,
DHA, Karachi.....Appellant

Versus

Assistant Commissioner-(Unit-05)
Sindh Revenue Board,
09th Floor, Shaheen Complex,
M.R. Kiyani Road, Karachi.....Respondent

Date of filing of Appeal 24.12.2020
Date of hearing 08.09.2021
Date of Order 20.09.2021

Mr. Mian Saleem Akhtar, Advocate along with Mr. Muhammad Din, Tax Manager
for appellant.

Mr. Ghulam Murtaza Shar, AC-SRB along with Mr. Nasir Bachani, AC-DR, SRB for
respondent

ORDER

Justice ® Nadeem Azhar Siddiqi: This appeal has been filed by the appellant
challenging the Order-in-Appeal (hereinafter referred to as the OIA) No. 94/2020
dated 07.10.2020 passed by the Commissioner (Appeals) in Appeal No. 393/2019
filed by the Appellant against the Order-in-Original (hereinafter referred to as the
OIO) No. 733/2019 dated 28.10.2019 passed by the Mr. Saddam Hussain,
Assistant Commissioner, (Unit-05) SRB Karachi.



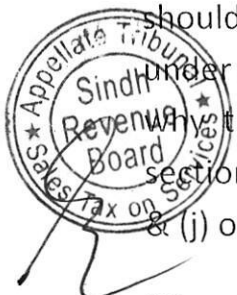
[Handwritten Signature]
Page 1 of 10

02. The facts as stated in the OIO were that the appellant got voluntarily registration with Sindh Revenue Board (SRB) on 27th October, 2016 under the service category of "Freight Forwarding Agent" under Tariff Heading 9805.3000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) which was chargeable to Sindh Sales Tax (SST) under section 8 of the Act at the statutory tax rate with effect from 1st July, 2011. However, in terms of the provisions of Rule 32(3) of the Sindh Sales Tax on Services Rules, 2011(hereinafter referred to as the Rules), the Bills of Lading and the House Bills of Lading issued by a Freight Forwarding Agent was to be charged at specific rate of Rs.500/=. Where-as, the other services being provided or rendered by a Freight Forwarding Agent was to be charged to tax at 13% of the value including the fee, commission, remuneration or charges for such services.

03. It was alleged in the OIO that during the scrutiny of the Annexure-A & Annexure-B of the SST returns filed for the tax periods from December-2016 to December-2017 (13 tax periods) it was revealed that the appellant adjusted input tax amounting to Rs.709,159,823/- (Rs.447,574,464/- pertaining to Annexure-A, and Rs.261,585,359/- pertaining to Annexure-B) against the services received from various vendors (details attached as Flag-I & II) were not exclusively used in providing or rendering taxable services, and were thus inadmissible under the provisions of section 15A (a) & (j) of the Act.

04. A Show-Cause Notice (SCN) dated 04.01.2029 was served upon the appellant calling it to explain as to why the SST amounting to Rs.709,159,823/- should not be assessed under section 23 of the Act alongwith default surcharge under section 44 of the Act. The appellant was further called upon to explain as to why the penalties prescribed at serial no. 3, 6(d) and 11 of the Table under section 43 of the Act should not be imposed for contravention of section 15A (a) & (j) of the Act read with the then applicable rules 22 (2) & 22A (viii) of the Rules.

05. The appellant during the course of hearing proceedings before the Assessing Officer (AO), submitted that it was engaged in supply of imported coal to Sahiwal Coal Power Point, and being registered service provider, it had declared and charged output tax which was duly incorporated in the returns filed



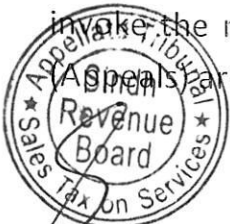
[Handwritten signature]

by it under the law. The appellant further stated that the charges framed against it were in relation to the input tax credit of Rs.709,159,823/-, during tax periods from Dec-2016 to Dec-2017, against input tax invoices received from M/s Port Qasim Authority, M/s Cargo Safety Services, M/s Shanghai Marine Diesel Engine Research Institute, M/s Huaneng Fuyun Port & Shipping (Pvt.) Limited, Muhammad Saleem, Masoom Khan, Nawab Khan, Muhammad Moin Siddiquie and Taxpayers without proper NTN, and the input tax credit was claimed on the basis of valid SST invoices received from the registered and operative service providers.

6. It was also alleged in the OIO that appellant had failed to appear for the last four consecutive hearings fixed on 10.06.2019, 26.06.2019, 01.10.2019 and 28.10.2019. However, the appellant filed written reply on 01.10.2019 and 28.10.2019 in which it was submitted that the subject SCN was time barred under section 23(3) of the Act hence, further proceedings in the matter had no legal veracity.

7. The AO passed OIO and determined the SST at Rs.709,159,823/- under section 23(1) of the Act alongwith payment of default surcharge, to be calculated at the time of payment, in terms of section 44 of the Act. The AO also imposed penalties of Rs.35,457,991/-, Rs.709,159,823/- and Rs.35,457,991/- respectively prescribed under serial No. 3, 6(d) and 11 of the Table under section 43 of the Act.

8. The appellant challenged the OIO before Commissioner (Appeals) by way of filing of appeal who while setting aside the OIO allowed the department to re-
invoke the matter by way of fresh SCN. The findings recorded by Commissioner (Appeals) are as under:-



"29. In view of the foregoing discussion, although, on merits of the case, respondent department has a good prima facie case against the Appellant; however, due to the fatal lacunae/ lapses of law and facts occurring both in the impugned SCN and the impugned OIO passed thereon, I am unable to sustain both. Accordingly, I set aside the impugned OIO in toto without any cost to the Appellant. Respondent Department shall, however, be at

liberty to re-invoke this matter, as per law, through a fresh show-cause notice, that should be properly rooted in appurtenant law and the relevant facts of the matter, and to pass an applicable Order thereon, after affording adequate opportunity of hearing to the respondent (instant Appellant) in line with the precepts of natural justice and fair play”.

Resultantly this appeal has been filed by the appellant / tax payer before this Tribunal.

9. Mian Muhammad Saleem the learned advocate for the appellant apart from other arguments submitted as under:-

- a) That in para 29 of the impugned OIA the learned Commissioner (Appeals-I) exceeded his judicial jurisdiction while allowing the department to issue fresh SCN. He further submitted that the law specifically restrained/prohibited Commissioner (Appeals) from remanding the case for denovo trial and the permission by Commissioner (Appeals) to department for issuance of fresh SCN amounting to remanding the case for denovo trial.
- b) That the appellant while performing the function of freight forwarding agent does not issue bills of lading or house bills of lading and instead issues tax invoices to its clients whereas the issuance of the bills of lading is the job of shipping agent. He further submitted that the appellant is providing services to only one client namely M/s Huaneng Shandong Ruyi Pakistan Private Limited (HSRP) (Sahiwal Coal Power Plant). He further submitted that the input tax adjustment was claimed on the basis of tax invoices issued by registered persons and the tax was duly deposited with SRB. He further submitted that and the issuance of Bill of Lading or House Bill of Lading is the job of Shipping Agent which it performed on behalf of its clients.



10. Mr. Ghulam Murtaza Shar the learned AC-SRB for respondent submitted as under:-

M/S

[Signature]
Page 4 of 14

- a) That the issuance of fresh notice does not amount to denovo trial and the Commissioner (Appeals) was vested with the power to allow the department to issue fresh SCN and for that reason the department has not challenged the OIA before this Tribunal. He further submitted that since the appellant was registered as Freight Forwarder it cannot claim input tax adjustment as the said service is chargeable to SST at the fixed rate of Rs.500/= per bill of lading as provided under rule No.39 of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules).
- b) That during the tax periods involved in this appeal the appellant showed input tax at Rs.709,159,823/= against output tax at Rs.193,438,807/= which was well over the amount of output tax and this disproportionate adjustment of input tax is attributed to construction/development of Coal Terminal, Berths 3 and 4 at Port Qasim. He stated that the appellant received services from various service providers but has provided freight forwarding services to only one client namely M/s Huaneng Shandong Ruyi Pakistan but the appellant had claimed input tax adjustment against receipt of construction services and other services including imports on the pretext of the coal handling development and such adjustment was rightly disallowed under the provisions of section 15A of the Act.

11. Mian Saleem, Advocate in reply briefly submitted the working of appellant and stated that for providing the taxable services of freight forwarder the import of machinery and development of berths 3 & 4 were necessary. Moreover the SST paid for acquiring such services and goods could be adjusted under section 15 of the Act read with sub-section (52) of section 2 of the Act and no bar was available under the Act. He further submitted that in the reported case of Pakistan International Freight Forwarder Association versus Province of Sindh and others, 2017 PTD page 01 a DB of honorable High Court of Sindh had held that the provisions of the Act relating to Freight Forwarders, (sub-section (47) of section 2 of the Act, Tariff Heading 9805.3000 (Freight Forwarding Agents) were declared



ultra vires to the Constitution. This bars the respondent from collection of SST since the SCN was issued on 04.01.2019 that is after the decision of the High Court of Sindh.

12. The AC in reply further contended that the SRB had filed appeal before the Honorable Supreme Court of Pakistan which while issuing notices has suspended the operation of the judgment of the High Court and since the appellant got voluntarily registration on 01.12.2016 and it was paying the SST before the judgment was passed it was required to continue to pay the same.

13. We have heard the learned representative of the parties and perused the record made available before us and have considered the written submissions of the parties and the various Reconciliation Reports prepared by the learned AC.

14. This appeal relates to input tax adjustment which was claimed by the appellant. However the same was disallowed by the department on the pretext that since the appellant was a registered Freight Forwarder it was liable to pay fixed SST of Rs.500/= per bill of lading or house bill of lading.

15. The AO assessed SST at Rs.709,159,823/=. On filing an appeal, the Commissioner (Appeals) while upholding that the claim of input tax adjustment as invalid in law, had held that disallowance/recovery was as per law thus he allowed the appeal filed by the appellant due to defect in the SCN as well as in OIO and allowed the department to issue fresh SCN. Following points require consideration.

i) Whether the Commissioner (Appeals) was vested with the power under law to permit the department to issue fresh SCN?



Whether the appellant had rightly claimed the input tax adjustment while providing the services of freight forwarding agent which were wrongly disallowed by the department?

Handwritten signature or mark

Handwritten signature

16. The first point is i) Whether the Commissioner appeal was vested with the power under law to permit the department to issue fresh SCN? This point is discussed as under:-

i) The learned advocate of the appellant contended that the issuance of fresh SCN was against the specific provision of law and amounted to denovo trial and referred to sub section (2) of Section 59 of the Act. This sub-section requires that the Commissioner (Appeals) may make such further inquiry himself during pendency of the appeal provided he shall not remand the case for denovo consideration. In this section the word "shall" was used with word "not" which made the provision mandatory. In the book Understanding Statutes, Edition 2008 by S. M. Zafar at page 275 it was mentioned as under:-

"Negative words give a statute an imperative effect. Negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statute imperative".

ii) The permission to issue fresh SCN amounted to denovo trial as after issuing of the fresh SCN the AO would again adjudicate upon the same matter and will pass fresh OIO. The term "denovo trial" is defined in the Black's Law Dictionary, Tenth Edition at Page 1737 as under:-

"a new trial on the entire case-that is, on both questions of fact and issues of law-conducted as if there had been no trial in the first instance".

iii) The Commissioner (Appeals) is permitted under sub-section (2) of Section 59 of the Act to make such further enquiry as may be necessary provided that he shall not remand the case for denovo consideration. It is therefore evident that if law has prohibited from doing something it cannot be done at all even under exercise of lawful jurisdiction. Since the law specifically prohibited Commissioner (Appeals) from remanding the case for denovo consideration thus such powers were not available with him and the Commissioner (Appeals) had committed an illegality in this regard. In the reported



M. D.

[Signature]
Page 7 of 14

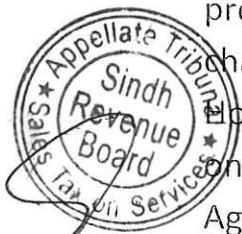
case of Ummatullah Versus Province of Sindh, PLD 2010 K 236 it was held as under:-

"It is a settled principle of law that what cannot be done directly cannot be done or allowed to be done indirectly. It is also trite principle of law; what is not possessed can neither be conferred nor delegated."


- iv) The Commissioner (Appeals) was apparently not vested with the power to remand the case for denovo consideration thus he could not allow the Department to issue fresh SCN after curing the defects as pointed out in the SCN and OIO.
- v) In view of the above discussions we hold that the Commissioner (Appeals) was not vested with the power to allow issuance of fresh SCN.

17. The second point is ii) "Whether the appellant had rightly claimed the input tax adjustment while providing the services of freight forwarding agent which were wrongly disallowed by the department?" This point is discussed as under:-

- i) The appellant got voluntarily registration with SRB on 27th October, 2016 under the service category of "Freight Forwarding Agent" under Tariff Heading 9805.3000 of the Second Schedule to the Act. The same was chargeable to Sindh Sales Tax (SST) under section 8 of the Act at the statutory tax rate with effect from 1st July, 2011. The contention of the department was that the appellant in terms of the provisions of sub-rule (3) of Rule 32 of the Rules, was required to charge and pay SST at a specific rate of Rs.500/= per Bill of Lading or House Bill of Lading issued by a Freight Forwarding Agent. However on the other services provided or rendered by a Freight Forwarding Agent tax shall be charged at 13% of the value including the fee, commission, remuneration or charges for such services. In the instant case sub-rule (3) of Rule 32 of the Rules was not applicable, instead sub-rule (3) of rule 39 of the Rules was applicable which dealt with the Freight Forwarding Agents, and it reads as under:-



M.S.

 Page 8 of 14

(3) The Bills of Lading and House Bills of Lading issued by a freight forwarding agent shall be charged to tax at a specific rate of Rs.500/= per Bill of Lading or House Bill of Lading. Other services provided or rendered by a freight forwarding agent shall be charged to tax at 13% of the value including the fee, commission, remuneration or charges for such services'.

- ii) The contention of the Advocate for the appellant is that it did not issue Bill of Lading or House Bill of Lading and instead issued tax invoices after charging SST @ of 13% and the issuance of Bill of Lading or House Bill of Lading was the job of Shipping Agents which it performed on behalf of its clients. Bill of Lading or House or House Bill of Lading was not defined in the Act. The definition of Bill of Lading and House Bill of Lading is provided by Google as under:-

A detailed list of a ship's cargo in the form of a receipt given by the master of the ship to the person consigning the goods. A bill of lading (BL or BoL) is a legal document issued by a carrier to a shipper that details the type, quantity, and destination of the goods being carried. A bill of lading also serves as a shipment receipt when the carrier delivers the goods at a predetermined destination.

The House Bill of Lading was defined by Google as under:-

House Bill of Lading is a formal acknowledgment that the carrier has received the consignment for shipment post-inspection. It is an assurance that the consignment damage-free and is ready to be shipped to the consignee. Any damage incurred during the shipping becomes the liability of the carrier. A House Bill of Lading (HBL) is issued by an NVOCC operator, or a Freight Forwarder to their customers. A Master Bill of Lading (MBL) is issued by the Shipping Line (Carrier) to the NVOCC Operator, or Freight Forwarder.

The difference between Bill of Lading and House Bill of Lading is that A House Bill of Lading (HBL) is issued by an NVOCC operator, or a Freight Forwarder to their customers, whereas a Bill of Lading BOL is issued by the



M. S.

[Signature]
Page 9 of 14

Shipping Line (Carrier) to the NVOCC Operator, or Freight Forwarder. (NVOCC means Non Vessel Owning Common Carrier)

- iii) It is evident from the above definition that the issuance of Bill of Lading is necessary for carrying the goods on a ship or vessel, and it is the job of a ship/air carrier or its agent on behalf of a shipper. As per the work/job description of the appellant it was facilitating unloading of coal from ships, transfer of coal through conveyer belt to ware house or train yard, storing the coal and dispatching the coal through goods trains. However while performing its function the appellant was not required to issue bill of lading. The issuance of Bill of Lading was the job of a shipping agent for carrying goods on a ship or vessel and is covered under sub-section (80) of section 2 of the Act, which read as under:-

“(80) “shipping agent” means a person licensed as a shipping agent under the Customs Act, 1969 (Act No. IV of 1969), or the rules made thereunder, who provides or renders any service in relation to entrance or clearance of a conveyance at a customs port and a customs station, as defined in clauses (j) and (k) of section 2 of the Customs Act, 1969, and files import or export manifest and issues line or carrier bill of lading, for or on behalf of an airline or shipping line or any other conveyance, (Emphasis supplied) and includes non-vessel operating common carriers, slot carriers, charterers, international freight forwarders and consolidators, rendering services in relation to import and export of cargo, independently or as subsidiary of an airline, shipping line, slot carrier, charterer, and non-vessel operating common carrier;



- iv) It is evident from the above definition of the shipping agents that the issuance of line or carrier bill of lading, for or on behalf of an airline or shipping line or any other conveyance is the job of shipping agent. The appellant was neither a shipping agent nor acted as such while performing function of freight forwarder. Moreover a license was required from the Customs Authorities for acting as an shipping

[Handwritten signature]

[Handwritten signature]
Page 10 of 14

agent under the provisions of Customs Act, 1969 or the rules made thereunder. However it was not the case of the respondent that the appellant possessed such license. The definition of freight forwarding agent as per Google is as under:-

"A forwarding agent, also known as a freight forwarder, is an individual or a company that specializes in organizing transports for individuals or corporations. Basically, the forwarding agent is responsible for arranging the movement of goods from a point to another. A freight forwarder is responsible for the transportation of goods between one destination and another. They act as an intermediary between the shipper and transportation services, liaising with various carriers to negotiate on price and decide on the most economical, reliable and fastest route".

In common parlance also the issuance of Bill of Lading is not the job of the appellant and its prime job is to arrange movement of goods from one place to other. The definition of freight forwarding agent as provided under sub-section (47) of Section 2 the Act reads as under:-

(47) "freight forwarding agent" means a person who provides or renders or makes arrangement for his principals or client, the services, for fee or charges or commission or remuneration, for some or all of the services being provided by the shipping agents, clearing agents, stevedores, ship chandlers, port operators, terminal operators, surveyors, persons providing ship management services, warehousing services or container provision services or cover or guarantee in respect of imports or exports of goods, independently or in partnership or in arrangement with any such service provider or Tenderer; (Emphasis supplied)

- v) It is evident from the above definition that the freight forwarding agents may also provide some or all of the services provided by shipping agents and others. While perusing sub-rule (3) of rule 39 of the Rules it appears that a freight forwarding agent on issuance of Bill of Lading or House Bill of Lading was required to charge and pay

M. D.

SST at the rate of Rs.500/= per Bill of Lading or House Bill of Lading. However the contention of Department in the SCN and OIO was that since the freight forwarding agent had also provided or rendered other taxable services, and issued tax invoices thus it was required to charge tax at 13% of the value including the fee, commission or remuneration or charges for such other services.

- vi) The appellant was apparently paying SST at the statutory rate since its registration i.e. 01.12.2016 without any objection from the department till the issuance of SCN on 04.01.2019. The case of the department revolved on the presumption that the appellant being freight forwarding agent was required to charge and pay SST at the fixed rate of Rs.500/= per Bill of Lading and House Bill of Lading and was not allowed to claim input tax adjustment. However the AO has failed to consider the fact that the appellant being freight forwarding agent could neither issue Bill of Lading or House Bill of Lading nor could provide the services of a shipping agent and was thus not liable to pay SST at the fixed rate of Rs.500/=.
- vii) The AO while disallowing input tax also failed to consider section 15A of the Act inserted vide Sindh Finance Act, 2017 effective from 14th July, 2017 which provided adjustment of input tax adjustment on certain goods and services which shall be adjustable against the output tax in twelve equal monthly installments. This provision commences with the words "Notwithstanding anything contained in this Act" and thus takes precedence over proviso to section 15 of the Act which 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 financial year" inserted in the Act vide Sindh Finance Act, 2016 effective from 18th July, 2016.
- viii) In view of the above discussions it is held that the appellant being a registered freight forwarding agent was not issuing Bill of Lading or House Bill of Lading and was thus required to pay SST at the




applicable statutory rate. It is further held that the appellant being freight forwarding agent had provided various other taxable services and was liable to pay SST at applicable statutory rate therefore it was entitled to claim input tax adjustment as provided under section 15 of the Act subject to the provisions of section 15A and 15B of the Act.

18. It is pertinent to mention that the appellant though voluntarily registered with SRB as freight forwarding agent but was providing services of unloading coal, warehousing and transportation of the same. All these services are of different nature, ^{and} are liable to SST at applicable statutory rates. The appellant has also claimed that it was not issuing Bill of Lading or House Bill of Lading and was not liable to pay SST at fixed rate of Rs.500/=. The SST could not be levied on the basis of registration alone or on the assumption and presumption of the department that since the appellant was registered as freight forwarding agent it was required to pay SST as fixed rate. The SST was to be levied on the basis of actual services provided or rendered by the appellant. The department was unable to properly establish that while providing services of freight forwarding agent the appellant was issuing Bill of Lading or House Bill of Lading. The contention of the appellant is therefore, required to be properly examined at the level of AO.

19. In view of the above discussions we set aside both the OIO and OIA and remand the case to the AO to first determine the actual nature of service/services provided or rendered by the appellant and to decide whether the appellant was entitled to claim input tax adjustment or not and then to levy SST according to law. The AO while deciding the fate of input tax claimed by the appellant needs to consider the proviso of section 15, section 15A and 15B of the Act. However the appellant is directed to continue paying SST as before till the matter is decided at the departmental level.

The appeal is disposed of accordingly. The copies of this order may be provided to the learned representatives of the parties.


(Imtiaz Ahmed Barakzai)


(Justice® Nadeem Azhar Siddiqi)

TECHNICAL MEMBER

CHAIRMAN

Karachi:

Dated: 20.09.2021

Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
- 2) The Assistant Commissioner, SRB, for compliance

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

Order issued on 08/10/2021

Registrar

Order Dispatched on 08/10/2021

Registrar