

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD
AT KARACHI

DOUBLE BENCH

APPEAL NO. AT-09/2021

M/s Huawei Technologies Pakistan (Pvt.) Ltd.
12th Floor, Saudi Pak Towers,
Jinnah Avenue, Blue Area, Islamabad.....Appellant

Versus

1. Assistant Commissioner (Unit-03),
2. Commissioner (Appeals),
Sindh Revenue Board,
M. R. Kiyani Road, KarachiRespondents

Date of filing of Appeal 29.01.2021
Date of hearing 21.04.2021
Date of Order 07.06.2021

Mr. Saud-ul-Hasan, Advocate along with Mr. Junaid Siddiqui, CIMA for appellant.

Mr. Manzoor Ahmed, AC-SRB and Ms. Uzma Ghory, 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.05/2021 dated 13.01.2021 passed by the Commissioner (Appeals) in Appeal NO. 11/2020 filed by the Appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 826/2019

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dated 20.12.2019 passed by the Ms. Ambreen Fatima, Assistant Commissioner, (Unit-03), Sindh Revenue Board (SRB), Karachi.

02. It was stated in the OIO that the appellant was registered with Sindh Revenue Board under service category of 'Services provided or rendered by persons engaged in contractual execution of Works or furnishing supplies' falling under Tariff Heading 9809.0000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred as Act). This was chargeable to Sindh Sales Tax (SST) at standard rate of tax and the appellant was liable to charge, collect and pay the same to SRB under sections 3, 8, 9 and 17 of the Act read with Sindh Sales tax on Services Rules, 2011 (hereinafter referred as Rules).

03. It was alleged in the OIA that on examination of monthly SST returns filed by the appellant with SRB for the tax periods from January-2016 to June-2016 (six tax periods), it transpired that the appellant had claimed and adjusted inadmissible input tax amounting to Rs.10,032,377/-. This input tax was claimed against the purchases made on account of repair and maintenance services which were taxable @ 10% vide Notification No. SRB-3-4/8/2013 dated 01-07-2013 and the same were inadmissible under section 15A of the Act. The details of transactions are given as:-

S. No	Description	Value of Services	SST claimed as input
01	Maintenance and Cleaning	Rs.71,659,837/-	Rs.10,032,377/-

The appellant was served with Show-Cause Notice (SCN) dated 06/12/2018 asking it to explain as to why SST on the revenue of Rs.10,032,377/- should not be assessed and recovered from it under section 23 and 47 of the Act alongwith default surcharge under section 44 of the Act. The appellant was also asked to explain as to why penalty as provided under serial No. 2 (for not submitting the true and correct SST returns), Serial No. 6(d) (for adjustment of inadmissible input tax credit) and Serial No. 11 (for violation of statutory provisions of Act & rules and notification issued thereunder) of the Table under section



43 of the Act should not be imposed for violation of sections 3, 5, 7, 8, 9, 15, 15A, 17 and 30 of the Act.

05. The appellant filed written reply dated 28.02.2021 challenging the Notification dated 01.07.2013 by which the SST on certain services was chargeable to reduced rate on the ground that no tax periods were mentioned in the notification and that section 23 and 47 could not be invoked simultaneously. The invocation of section 15A was also challenged on the ground that the same was inserted in the Act vide Sindh Finance Act, 2016 effective from dated 18.07.2016 and was not applicable for the period prior to 01.07.2016. It was also stated that the service providers of the appellant charged SST at standard rate and the appellant had rightly claimed input tax.

06. The Assessing Officer (AO) passed OIO directing the appellant to deposit the SST of Rs.10,032,377 along with the default surcharge. The AO also imposed penalty of Rs. 50,000/= under Serial No. 6(d) of the Table under section 43 of the Act for violation of the provisions of section 15A read with Rule 22A of the Rules and also imposed a penalty of Rs.501,618/- (five *per cent* of the tax payable) under Serial No. 11 of the Table under section 43 of the Act for violation of Notification bearing No.SRB-3-4/8/2013 dated 01.07.2013.

07. Mr. Saudul Hasan, the learned advocate for the appellant submitted as under:-



The input tax for the tax periods January-2016 to June-2016 was disallowed invoking section 15A of the Act in the SCN which was inserted vide Sindh Finance Act, 2016 effective from 18.07.2016 and clause (jj) to sub-section (1) of section 15A of the Act (which was invoked in the OIO) was added vide Sindh Finance Act, 2017 effective from 14.07.2017 having no retrospective effect and both the provisions could not be applied to the periods prior to July-2016.

M. S.

ii) The service provider of the appellant charged SST at the statutory rate and no loss was caused to the exchequer.

iii) In the SCN rule 22-A of the Rules was not mentioned and no adjudication could be made on the basis of a ground not mentioned in the SCN.

iv) The OIO was time barred as the reason assigned for extension of time was not plausible and could not be made basis of a valid extension.

v) To cover the time barred period the OIO was signed back dated. However it was issued on 14.01.2021 i.e. 24 days after signing of the OIO.

08. Mr. Manzoor Ahmed the learned AC-SRB submitted as under:-

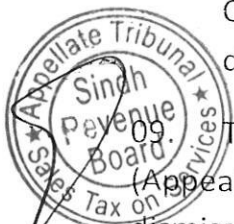
i) The provisions of section 15A are procedural and could be applied retrospectively.

ii) The non-mentioning of sub-rule (viiiia) of rule 22A of the Rules did not have any material effect as the intention and purpose of issuing SCN was clear and sufficient for the appellant to prepare for its defence.

iii) Mere charging of SST by the service provider at the standard rate does not permit the appellant to claim input tax on the service falling under reduced rate in violation of Notification.

iv) The OIO was issued within time and the period for passing OIO was extended lawfully and with valid reasons. Moreover 23 days time was still left on the date of passing OIO.

The respondent challenged the OIO before the Commissioner (Appeals) by way of filing of the appeal. The Commissioner (Appeals) dismissed the appeal mainly on the ground that the objection of the appellant with regard to applicability of section 15A of the Act was baseless and that the same was very much enforced in the shape of rule 22A of the Rules. It was also held that the issuance of Notification of reduced rate was a special dispensation under which the tax payers



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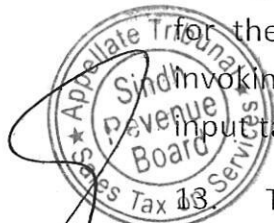
were allowed to charge, collect and pay tax at a reduced rate and it was a *quid pro quo* arrangement under which the Government sacrificed a part of its tax while the tax payer gave away its right to claim input tax adjustment to which it was entitled. Resultantly appeal was filed by the appellant.

10. We have heard the learned representatives of the parties and perused the record made available before us.

11. The controversy between the parties was that appellant claimed input tax adjustment on purchase of repair and maintenance services during the tax periods from January-2016 to June-2016. The department disallowed the same on the pretext that the services which were liable to reduced tax rate were not qualified for adjustment of input tax invoking section 15A of the Act. The contention of the appellant was that Section 15A was added to the Act vide Sindh Finance Act, 2016 effective from 18th July, 2016 and was not applicable to the tax periods prior to July-2016 and sub-section (jj) of sub-section (1) of section 15A was added vide Sindh Finance Act, 2017 effective from 14th July, 2017 and rule 22A of the Rules and sub-section (jj) was not mentioned in the SCN and thus could not be adjudicated upon.

12. In the SCN only section 15A of the Act was invoked without any reference to sub-section (jj) of sub-section (1) of section 15A of the Act and sub-rule (viiiia) of rule 22A of the Rules. It is correct proposition of law that section 15A of the Act was inserted on 18.07.2016 having no retrospective effect and input tax adjustment claimed by the appellant for the tax periods January-2016 to June-2016 could not be denied invoking the provisions of laws which were not in existence when the input tax adjustment was claimed.

The SST on service was enacted as Value Added Tax (VAT) and claiming input tax adjustment was a statutory right provided under section 15 of the Act. Apparently the input tax adjustment is the essence of the tax enacted in VAT mode and without such adjustment the tax simply ceases to be a value added tax. Section 15 of the Act is a beneficial provision which entitles a taxpayer to deduct input tax, from



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output tax. However, the said provision provided that the SRB-Board through a notification in the official Gazette subject to such conditions and restrictions allow registered persons to claim adjustments or deductions. The refusal to allow input tax adjustment should be within the purview of section 15 of the Act and not otherwise. Moreover it was imperative that the notification specifying conditions and restrictions should be published in the Official Gazette.

14. The sub-section (jj) of section 15A of the Act was added to the Act vide Sindh Finance Act, 2017 effective from 14.07.2017. This sub-section does not have any retrospective effect and therefore the same could not be invoked to disallow input tax adjustment claimed for the tax periods prior to July-2017. Moreover the provision of sub-section (jj) of section 15A of the Act and sub-rule (viiiia) of rule 22A of the Rules were not invoked in the SCN and very only invoked while passing OIO. The law is very clear on this point that a ground not taken in the SCN could not be adjudicated upon at the stage of adjudication (OIO). Both the forums below have ignored this settled principal of law and fell in error.

15. The authority issuing a SCN has to make out the case under which provision of law the case falls and has to incorporate therein the grounds and reasons very clearly and explicitly. In the SCN the appellant was called upon to show-cause why the evaded amount of SST may not be assessed and recovered under the provisions of section 23 and 47 of the Act without specifying the relevant sub-sections. However only section 23 was invoked in the OIO without invoking the relevant provisions of the sub-section. It is now well established point of law that the ground not mentioned in the SCN could not be adjudicated while passing such order. In the reported case of Collector Central Excise and Land Customs versus Raham Din, 1987 SCMR 1840 it was held as under:-

"Order of adjudication being ultimately based on a ground which was not mentioned in the SCN, was palpably illegal on face of it".

Furthermore rule 22A of the Rules was inserted in the Rules vide Notification dated 07.11.2011 and remained in field till 30.06.2016.

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Thereafter it was substituted vide Notification dated 28.06.2016 which was effective from 01.07.2016.


16. The original section 15 of the Act provided that "The Board may, subject to such conditions and restrictions as it may be prescribe with the approval of the Government, allow registered persons to claim adjustments or deductions, including refunds arising as a result thereof, in respect of the sales tax paid on or in respect of any taxable services or class of taxable services provided by them". The said section was amended vide Sindh Finance Act, 2014 effective from 07.07.2014 and provided that "The Board may, by notification in the official Gazette and subject to such conditions and restrictions as it may be prescribed and allow registered persons to claim adjustments or deductions, including refunds arising as a result thereof, in respect of the sales tax paid on or in respect of any taxable services or class of taxable services provided by them". Rule 22A of the Rules was not inserted in the Rules with the approval of the Government nor was published in the Official Gazette during the relevant tax periods January-2016 to June-2016. In our earlier decision rendered in the case of Pakistan Mobile Communications Private Limited versus Commissioner (Appeals), SRB, Appeal No. AT-25/2016 we had held as under:-

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

It is also now settled principal of law that a thing require to be done under law is to be done in the manner as provided in law. In the reported case of Assistant Collector Customs versus M/s Khyber Electric Lamps, 2001 SCMR 838 it has been held as under:-

"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".



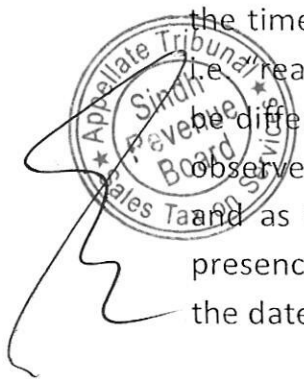

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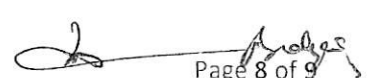
18. It is pertinent to point out that it is evident from the OIO that the SRB had received SST at statutory rate of 14% without any objection and reservation. However, when the input was claimed the same was disallowed on the ground that the services acquired by the appellant fell under the reduced tax regime and did not qualify for adjustment of input tax. The disallowance of SST to the appellant amounted to double jeopardy as on the one hand the SST was paid at statutory rate and on the other hand the input was disallowed and the appellant was directed to pay the same again.

19. The insertion of rule 22A in the Rules was made without the approval of the Government and subsequently the same was not published in the Official Gazette and could not be acted upon and the right available to the appellant under section 15 of the Act could not be denied.

20. The appellant has challenged that the OIO was time barred on two counts, firstly that the extension of time was without reason and secondly that the OIO was passed on subsequent date but the same was signed back dated to cover up the delay. The AO extended time on 01.11.2019 for passing of the OIO. The reason assigned for extension of time was to reconcile all the record available with the AO for passing a speaking order. Sub-section (3) of section 23 of the Act provide that the officer of the SRB may, for the reasons to be recorded in writing extend the time not exceeding sixty days. The law only provided one condition "the reasons to be recorded in writing". The reasons in every case may be different and no hard and fast rule could be prescribed. We can only observe that the officers of SRB should be careful while extending time and as far as practicable the order of extension should be passed in presence of the parties to avoid any doubt and suspicion with regard to the date of its passing.

21. In the instant case the SCN was issued on 06.12.2018 and the OIO was passed on 20.12.2019. The total days consumed by the AO in finalizing of OIO were more than one year. We can only observe that the



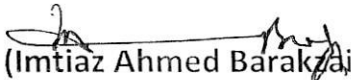

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officers of SRB should be careful in dealing with the time bound proceedings, and should complete the same well within time.

22. The appellant also challenged that the OIO was passed on a subsequent date but signed back dated to cover up the delay. There is some force in the arguments but it is difficult to hold enquiry into this aspect. Apparently the OIO was dated 20.12.2019 but the same as per the Tracking Report of the MOP Courier was dispatched on 14.01.2021 after unexplained and inordinate delay of twenty four days which rightly create doubt and suspicion that the OIO was signed back dated to cover up the delay. However we are unable to record any definite findings.

23. In view of the above findings that Section 15A of the Act and sub-section (jj) of Section 15A of the Act were not applicable during the tax periods involved. Moreover insertion of rule 22A of the Rules was made without approval of the Government and subsequently the same was not published in the official Gazette and thus could not be acted upon. Therefore the OIO and OIA are set aside and the appeal is allowed.

24. The copy of the order may be provided to the learned representatives of the parties.


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER


(Justice[®] Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi:
Dated: 07.06.2021


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

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.

Order issued on 17/06/2021

Order Dispatched on 17/06/2021