BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD, ATKARACHI

DB-I

APPEAL NO. AT-32/2022

M/s Karachi International Container Terminal
Limited, (NTN: 080358-5)
Administration Building, Berth No. 28-30,
Dockyard Road, West Wharf, Karachi..... Appellant

Versus

The Assistant Commissioner (Unit-32),
Sindh Revenue Board, (SRB)
2nd Floor, Shaheen Complex,
M.R. Kiyani Road, Karachi .....Respondent

Date of filing of Appeal: 19.04.2022
Date of hearing: 06.06.2022
Date of Order: 09.09.2022

Mr. Wajahatullah, ACA and Mr. Hamid Iqbal, ITP for the appellant.

Mr. Awais Raza, AC-(Unit-32), SRB Karachi for respondent.

Appellate Tribunal Sindh Revenue Board Sales Tax & Services

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. 38/2022 dated 13.04.2022 passed by the Commissioner (Appeals) in Appeal No. 156/2016 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 296/2016 dated 02.05.2016 passed by Mr. Kaleemullah Siddiqui, Assistant Commissioner, (Unit-16) SRB Karachi.

02. The brief facts as in the OIO were that the appellant was registered with SRB as service provider in the taxable service category of terminal operator under the Tariff Heading 9819.9090 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereafter referred to as the Act).

03. It was alleged in the OIO that during the course of reconciliation of purchases with the taxable services provided or rendered by the appellant it was observed that the appellant had claimed/adjusted input tax amounting to Rs.3,341,390/- which was not admissible under sub-clause (d) of clause (iia) of Rule 22A of Sindh Sales Tax on Services Rules, 2011 (hereinafter, referred to as the Rules).

04. The appellant was served with a Show Cause Notice (SCN) dated 26.02.2016 to explain as to how the services received or good purchased from M/s Johan (Private) limited (having SNTN 0814904-6) and M/S Arabian Sea Enterprises Limited (having SNTN# 0700949-6) were utilized in providing/rendering the taxable services of terminal operator in the light of Rule 22 and 22A (iia) (d) of the Rules. It was told to explain as to why process of recovery of Rs.3,341,390/- should not be initiated under section 23(1) and section 47(1A) of the Act. Furthermore the appellant was also called upon to explain as to why penalties as prescribed under Serial No. 3, 6(d), 11 and 12 of section 43 of the Act should not be imposed for violating the statutory provisions of the Act. However besides repeated opportunities no compliance was made nor the required details could be filed.

05. The Assessing Officer (AO) passed OIO determining the SST at Rs.Rs.3,341,390/- on account of inadmissible input during the tax period of August-2011 to July-2015 and ordered recovery under section 23(1) of read with section 47(1A) of the Act alongwith payment of default surcharge under section 44 of the Act.. The AO also imposed penalty of Rs. 570,000/= under Serial No. 3 of Table under section 43 of the Act and Rs.167, 069/= under Serial No. 11 of the Table under section 43 of the Act.

06. The appellant challenged the said OIO by way of filing of appeal under section 57 (1) of the Act before Commissioner (Appeals), SRB who maintained the order but partially reduced the penalties. The relevant portion of Order in Appeal (OIA) is reproduced as under:-

> *"...7. Therefore, in view of foregoing facts and legal provisions, the ineluctable conclusion to be drawn is that the right to claim input tax adjustment under section 15 has been made subject to Rule 22A of the Rules, 2011. Any entitlement under section 15 will be based on thorough screening from Rule 22A of the Rules 2011 and relevant provisions amended over the year. Bottled water and hotel services were acquired and are used for personal consumption or for entertainment purpose: hence they are not eligible for input tax adjustment. Several judgments from superior courts are available in this context. Reliance is placed on Ittehad Chemical Ltd , Lahore VS Customs ,Excise and Sales Tax Appellate Tribunal ,Lahore (2005 PTD 2067).*
>
> *"no registered person could claim or deduct input tax paid on goods, which were not the direct constituent and integral part of taxable goods, products, manufacture or supplies."*
>
> *"8. In juxtaposition to the above-noted, the charge against inadmissible input tax adjustments made during December, 2011 to July, 2015 by the appellant, in violation of section 15 of the Act, 2011 read with Rule 21, 22 and 22A (iia)(d) of the Rules, 2011 is stand proved."*
>
> *"9. As regarding the imposition of penalties by AC-16, I have considered those, sympathetically, in line with points of facts and law. I decided this point as follows:*
>
> *i. Penalty under serial No.3 section 43 ibid is upheld (5% of default tax) as being justifiable because the charge of inadmissible input tax is proved against the Appellant, in violation of the statutory terms and conditions.*
> *ii. Penalty under serial No.11 section 43 ibid is declined as being repetitive, excessive.*
>
> *"10. As such Appellant shall pay a penalty of Rs.167,069/- (5% of default tax) only, in addition to principal amount of Rs.3,341,390/- and the*

Appellate Tribunal Sindh Revenue Board Sales Tax on Services

statutory default surcharge under section 44 of the Act, 2011. The appeal stands disposed off accordingly".

Resultantly the appeal was filed by the appeal before the Tribunal.

07. The learned representative of the appellant submitted as under:

i. The tax periods involved were from August, 2011 to July, 2015. The input tax of Rs. Rs.2,729,198/-.was claimed during this period on procuring hotel services for foreign experts visiting the appellant and Rs. 612,192/- was claimed on purchasing of mineral water for office use, which was disallowed on the basis of sub-clause (d) of clause (iia) of rule 22A of the Rules.

ii. Rule, 22A was inserted in the Rules vide Notification Dated 07.09.2011 without approval of Government of Sindh and thus the same is of no legal consequence and could not be used to disallow input tax adjustment. Such fact was already decided by this Tribunal in case of Pakistan Mobile Communication Limited, Appeal No. AT-25/2016 vide order dated 20.04.2020.

iii. The Notification dated 07.09.2022 has no retrospective application since the same was never published in Sindh Gazette and could not be invoked to disallow input tax claimed by the appellant.

iv. The input was claimed for providing taxable services of terminal operators Tariff Heading 9819.9090, thus the same has direct nexus with providing taxable services.

v. The management of the appellant is Chinese, thus the hotel accommodation was provided to them.

vi. The restriction for personal consumption was added to old sub-clause (d) of clause (iia) of Rule 22A vide Notification dated 1st July, 2015 having no retrospective effect.

vii. The water was not covered under the definition of food or beverages and the Commissioner (Appeals) had erroneously relied upon the definition provided by Pakistan Standards and Quality Control Authority (PSQCA).

viii. The restriction relating to personal consumption of directors, shareholders, partners, employees or guests was inserted under sub-clause (d) of clause (iia) of the Rule vide Notification dated 1st July, 2015.

ix. That there was no restriction on claiming input tax adjustment on acquiring hotel services during the relevant tax period.

x. The Commissioner (Appeals) wrongly relied upon the judgment reported as 2005 PTD, 2067 (A judgment of DB of Lahore High Court) for disallowing input tax without considering the fact that during the relevant tax periods there was no valid law/SRO/Notification in the field disallowing input tax adjustment provided under section 15 of the Act.

xi. That Section 84(2) of the Act does not provide any validation or protection to the acts performed without seeking approval of Government of Sindh as provided under section 72 of the Act.

xii. That sub-section (2) of section 84 of the Act does not validate the error in issuing Notification dated 07.09.2013 adding Rule 22A in the Rules which has no retrospective application. Reliance has been placed on a unreported judgment dated 01.04.2022 of Baluchistan Sales Tax on Services Appellate Tribunal in C. M. Pak Limited versus Baluchistan Revenue Authority, Sales Tax Appeal No. 10/2022 wherein it was held as under.

> *"12. Admittedly the appellants had acquired a vested right under section 10(4) and 16(1) of the BSTS Act, 2015 (as were available on statute prior to promulgation of Amendment Act, 2019 to claim entire input tax adjustment without any ceiling or limit. The vested right could not, therefore, be taken away by merely on the strength of deeming clause of Amendment Act of 2019. Giving retrospective effect to the amended provision to section 16B (I) (k) and section 16B(I) (l) of the BSTS Act, 2015 would certainly be completely destructive of the right vested in the appellants".*

08. The AC, SRB submitted as under:-

i. That the appellant was a provider of taxable service of terminal operator and was registered with SRB under Tariff Heading 9819.9090. The appellant as per sub-clause (d) of clause (iia) of Rule 22A inserted vide Notification dated 7th September, 2011 was not entitled to claim input tax

adjustment on acquiring hotel services and purchase of water for office use.

ii. The appellant was entitled to claim input tax adjustment on only those goods and services which have direct nexus with providing taxable service of terminal operator.

iii. Sub-rule 1 of rule 22 of the Rules clearly provided that input could only be claimed on goods or services directly used or consumed in providing or rendering taxable services.

iv. That Sub-clause (d) of clause (iia) of Rule 22A of the Rules, clearly prohibited claiming input tax adjustment on acquiring hotel services and purchase of water.

v. The hotel services were covered under the word entertainment used in the sub-clause (d) of clause (iia) of Rule 22A of the Rules.

vi. The bottled drinking water fell under the definition of food thus the Commissioner (Appeals) had rightly relied upon the definition provided by PSQCA.

vii. The Commissioner (Appeals) had rightly relied upon the judgment reported as Etihad Chemicals versus Customs, Excise and Sales Tax Appellate Tribunal, Lahore 2005 PTD, 2067 wherein it was held that the tax payer could not deduct input tax paid on goods and services which were not the direct constituent and integral part of the taxable services.

viii. The purchase of water and acquiring hotel services had no direct nexus with the taxable services of terminal operator.

ix. That the non publication of Notification dated 07.09.2011 was protected under clause (60A) of section 2 of the Act inserted on 18.07.2017 with retrospective effect.

x. Section 84(2) of the Act had validated and protected the notifications issued without the approval of the Government with retrospective effect.

xi. The SRB had acquired ex-Post Facto approval of the Notification dated 07.09.2011 from the Sindh Cabinet on 25.02.2019. Moreover the validation clause inserted in the Act vide Section 84(2) of the Act was to cure the defect.

09. The learned representative of the appellant in rebuttal submitted that the definition of food was taken from the website of PSQCA and was

used without confronting the same to the appellant. Moreover such definition was for a specific purpose in a specific law and could not be used in other law.

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

11. The instant case relates to claiming of input tax adjustment by the appellant on acquiring hotel services and purchase of bottled drinking water for office use. The input tax adjustment was disallowed on the strength of sub-clause (d) of clause (iia) of Rule 22A of the Rules, which was inserted in the Rules vide Notification dated 07.09.2011.

12. The following points require detailed discussion and consideration:-

i. Whether Rule 22A of the Rules was validly inserted in the Rules?
ii. Whether during the tax periods from August, 2011 to July, 2015 there was any prohibition or restriction in the Act or the Rules on claiming input tax adjustment on acquiring hotel services and purchase of bottled drinking water?
iii. Whether the input tax claimed by the appellant on acquiring hotel services and purchase of bottled drinking water was rightly disallowed?

13. The first point is "Whether Rule 22A of the Rules was validly inserted in the Rules"?, the discussion on first point mainly covers the second and third point and is interrelated. Discussions on first point is as under:-

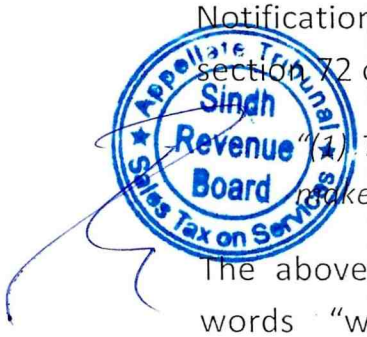
a) The contention of the appellant was two fold that rule 22A of the Rules was added in the Rules vide Notification dated 07.09.2011 without the approval from the Government of Sindh. Secondly the said Notification was also not published in the official Gazette, which is a condition precedent for implementation of the same as provided in the Clause 19A of the General Clauses Act, 1956.

Appellate Tribunal Sindh Revenue Board Sales Tax on Services

b) It was not disputed by the respondent that the said rule 22A was inserted in the Rules without the approval of Government of Sindh and the same was also not published in the Sindh Gazette. The respondent has taken shelter under sub-section (60A) of Section 2 of the Act. Such notification in the official gazette was inserted in section 2 of the Act on 18.07.2016 and sub-section (2) of section 84 (validation) of the Act was inserted in the Act on 05.07.2019.

c) The Act was enacted as Value Addition Tax (VAT) which provide for collection of service tax in value addition mode. Thus, the sales tax is to be collected at each stage of value addition and the amount of input tax paid is adjustable against the output tax payable at the next stage of supply of service. The principle of input tax adjustment is fundamental to the scheme of the levy of service tax as provided under section 15 of the Act which provide for adjustment without which the SST could not be collected under VAT mode.

d) That the Rules were framed under section 72 (Power to make rules) of the Act effective from 01.07.2011. When the Rules, were framed Rule 22A was not the part of the Rules and was inserted vide Notification dated 07.09.2011. However when Notification dated 07.09.2011 was issued, sub-section (1) of section 72 of the Act reads as under:-



"(1) The Board may, with the approval of the Government, make rules for carrying out the purpose of this Act".

The above provision was amended on 07.07.2014 and the words "with the approval of the Government" were substituted with the words "by notification in the official Gazette". The said amendment apparently has no retrospective effect.

e) The original section 15 (Adjustment) of the Act under which the adjustment of input tax adjustment was admissible read as under:-

> *"The Board may, subject to such conditions and restrictions as it may prescribe and 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 sale tax paid on or in respect of any taxable services or class of taxable services provided by them".*

The said provision was firstly amended which was effective from 07.07.2014 and it read as under:-

> *"The Board may, by notification in the Official Gazette and subject to such conditions and restrictions as it may prescribe and 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".*

It is evident from the above that the words "by notification in the Official Gazette" were added and the words "with the approval of the Government" were deleted. The said amendment has no retrospective application and will be applicable on all rules framed after that date and all rules framed before the above amendment without approval of the Government has no legal effect.

f) The issuance of Notification without approval of Government of Sindh has no legal value and cannot be acted upon. The SRB claimed that it had got Ex-Post Facto approval from the cabinet on 25.02.2019. The said approval was through an executive order and thus cannot be applied retrospectively particularly in view of the fact that through said Notification the appellant

was deprived from claiming input tax adjustment as provided under section 15 of the Act.

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

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

h) At the time of issuance of impugned Notification dated 07.09.2011, section 15 and 72 of the Act expressly required approval of the Sindh Government before issuance of Notification. After amendment of 2014 the condition of publication of notification in the Official Gazette was not complied with as no such Gazette was produced.

i) It is therefore clear from the above discussion that up to 6th July, 2014 the powers available with SRB were to place conditions and restriction in respect of adjustment of sales tax paid with the approval of the Government and not otherwise. The SRB after 7th July, 2014 could frame rules without the approval of the Government but the said notification was required to be published in the Official Gazette, which was not done in the instant case. The SRB in placing the conditions and restrictions on claiming input tax adjustment had acted under delegation of powers and could only exercise those powers which were specifically conferred on it. The Notification dated 07.09.2011 was issued without the approval of the Government of Sindh and such fact was confirmed from the Minutes of Cabinet Meeting dated 25.02.2019 through which

the Notification dated 07.09.2011 was granted ex-post facto approval.

j) The Notification was not published in the official gazette as no such copy was produced before us. Section 19A of the General Clauses Act, 1956 applicable to province of Sindh provides that Rules and Orders, etc. should be published. In the original section 15 of the Act there was no condition of publication in the Official Gazette, therefore the provision of Section 19-A of General Clause Act, 1956 was applicable. It was held in the reported judgment in the case of Ummatullah Versus Province of Sind. PLD 2010 Karachi, 236 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).*

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

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

In the reported case of Chief Administrator Auqaf versus Mst. Amna Bibi, 2008 SCMR 1717 it has been held as under:-

> *"8....."It has been laid down by the superior Courts that a notification which curtails or extends rights of citizens will*

take effect from date of its publication in Gazette and not from any prior date.

k) In the instant case the Notification 07.09.2011 has curtailed the right of the appellant to claim input tax adjustment and the same cannot be implemented unless issued with the approval of the Government and published in the Official Gazette. The AC has referred to sub-section (60A) of section 2 of the Act and submitted that the Notifications would take effect from the date specified therein notwithstanding the date on which such notification was published in Official Gazette. The said sub-section (60A) of Section 2 of the Act was inserted on 18th July, 2016 with retrospective effect. However even if the said provision was inserted with retrospective effect it would not affect the vested right acquired by the party. In this matter the tax periods involved were from August-2011 to July-2015 during which the input tax adjustment was claimed. In the instant case the SCN was issued on 26.02.2016 and sub-section (60A) of section 2 of the Act was inserted on 18.07.2016 when the input tax adjustment was already claimed and adjusted. Furthermore due to defect in the Rules the right to claim adjustment was accrued and became a vested right. Even otherwise the case was to be decided on the basis of law prevailing on the date of initiating the proceedings and not on the basis of amended law. In the reported case of Mian Rafiuddin versus Chief Settlement & Rehabilitation Commissioner, PLD 1971 SC 252,it was held as under:-

"It is well settled that when the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action wag begun and not the law that existed at the date of the judgment or order. This is, however, subject to the exception that the new law shall apply if it is a mere rule of procedure or if it has been applied retrospectively to pending proceedings. This rule, as stated in Craies on Statute Law, Sixth Edition, page 400 is as follows:-

"It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. But there is an exception to this rule, namely, where enactments merely affect procedure, and do not extend to rights of action."

Moreover it is a settled principle of law that things are required to be done strictly according to law, or it should not be done at all. In the instant case section 15 of the Act provides that the SRB may place conditions and restrictions on the registered person to claim adjustments, deductions and refunds with the approval from the Government. Admittedly no such approval was obtained. 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".

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

m) The AC also contended that the non-approval from Government of Sindh was validated by insertion of sub-section

(2) to section 84 of the Act which was inserted on 5th July, 2019, which provides as under:-

> *"(2) All 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, 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.*

n) 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 could only re-validate already issued notifications and orders which are issued and notified in exercise of the powers conferred upon Government or with the approval of the Government under the Act. However before the commencement of the Sindh Finance Act, 2019 and by a deeming clause validated all issued and notified notifications in exercise of those powers and with the approval of Government, as the case may be. 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'**. (Emphasis supplied)

o) In our opinion, the interpretation of the concerned AC could be accepted only if the defect in issuance of Notification dated 07.09.2011 had been cured by the legislature. This could be done by issuance of 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.

p) To cure the defect in the Notification dated 07.09.2011 section 15A (input tax credit not allowed) was inserted in the Act effective from 18th July, 2016 and sub-clause (iv) of clause (g) of sub-section (1) of section 15 provide as under:-.

> "(iv) food, beverages and consumption on entertainment, meetings, or seminars or for the consumption of the registered person or his Directors, shareholders, partners, employees or guest".

q) Similarly rule 22A of the Rules was entirely substituted by Notification dated 28.06.2016 effective from 1st July, 2016. Moreover in the new Rules clause (d) of sub rule (iia) of Rule 22A of Rules, 2011 was omitted.

r) In view of the above discussions the amendment made in section 15 and 72 (1) of the Act have no retrospective effect. Furthermore during the tax periods August, 2011 to July, 2015 there was no valid law or rule to disallow the input tax adjustment claimed by the appellant on acquiring hotel services and purchase of bottled drinking water. Thus the Notification dated 07.09.2011 could not be invoked to disallow the input tax adjustment claimed by the appellant during such periods.

Appellate Tribunal Sindh Revenue Board Sales Tax on Services

14. The second point (ii) as mentioned at page 7 supra is "Whether during the tax periods from August, 2011 to July, 2015 there was any prohibition or restriction in the Act or the Rules, 2011 on claiming input tax adjustment on acquiring hotel services and purchase of bottled drinking water?" The detailed discussion on this issue has been made while discussing point (i) from page 6 to 13 supra which amply covers point (ii) also. Therefore we hold that during the tax periods from August, 2011 to

July, 2015 there was no prohibition or restriction in the Act or the Rules on claiming input tax adjustment on acquiring hotel services and purchase of bottled drinking water.

15. The third point as mentioned at page 7 supra is "Whether the input tax claimed by the appellant on acquiring hotel services and purchase of bottled drinking water was rightly disallowed?"

The detailed discussion on this issue has been made while discussing point (i) from page 6 to 13 supra which amply covers point (iii) also. Therefore we hold that during the tax periods from August, 2011 to July, 2015 the input tax claimed by the appellant on acquiring hotel services and purchase of bottled drinking water was erroneously disallowed without any support of law and rules .

16. In view of the above discussions this appeal is allowed and the OIO and OIA are setaside. The copy of this order may be provided to the learned representatives of the parties.

(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER

(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi:
Dated:09.09.2022

Certified to be True Copy

REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Copy Supplied for compliance:

1) The Appellant through Authorized Representative.
2) The Assistant Commissioner, (Unit-32), SRB, for compliance

Order issued on 09/09/2022
Registrar

Copy for information to:-

3) The Commissioner (Appeals), SRB, Karachi.
4) Office Copy.
5) Guard File.

Order Dispatched on 09/09/2022
Registrar