IN THE HIGH COURT OF SINDH, KARACHI

Spl. STRA No.2500 of 2015

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

BEFORE: Irfan Saadat Khan,
Rashida Asad,JJ

Commissioner IR, Zone-IV,
Appellant. : through Mr.Kafeel Ahmed Abbasi, Advocate.

Vs.

M/s. Hamdam Paper Corporation
(Pvt) Ltd., Karachi,
Respondent : through Mr. Aqeel Ahmed Khan, Advocate.

Date of hearing : 11.08.2022

Date of decision : 22.08.2022

JUDGEMENT

Irfan Saadat Khan,J. The captioned Sales Tax Reference Application (STRA) was admitted for regular hearing vide order dated 12.3.2000 to consider the following questions of law.

> "i) Whether on fact and circumstances of the case learned ATIR was justified to allow adjustment of more than 90% of input against output in all consecutive twelve months despite noncompliance to section 8B(2)(i) which requires furnishing of statutory auditor's certificate.
>
> ii) Whether on facts and circumstances of the case the sub section (2) & (3) of section 8B gives the manner and time frame for adjustment or refund of the amount not allowed for adjustment under sub section (1) of section 8. Whether the tribunal as well as the CIR (A) is empowered to ignore the systems and procedures designed under the law in any circumstances?"

2. Briefly stated the facts of the case are that the Respondent was served with the show cause notice to pay a sum of Rs.11,035,206/- out of total output tax of Rs.110,352,061/- under

Section 8B of the Sales Tax Act, 1990 (hereinafter referred to as the Act) as according to the Department the Respondent was not excluded from the purview of the said Section, as provided under SRO 647(1)2007 dated 27.06.2007. In response to the said notice, the Respondent filed a reply to the concerned Deputy Commissioner (hereinafter referred to as the DC) agitating that though they have claimed input tax to the extent of 90% of the output tax, however, the same is permissible under Section 8B of the Act, and the balance amount, if any, was available to them by way of adjustment or refund as the case may be, hence they have not committed any default and the action is illegal, which needs to be vacated. The concerned DC considered the said reply of the Respondent however, did not agree with the same and vide order dated 08.03.2012, bearing assessment order No.3/92/2012, directed the Respondent to pay sales tax amounting to Rs.11,586,966/-, alongwith default surcharge under Section 11(2), 34 and 36(1) of the Act. The Department also imposed penalty upon the Respondent under the provision of Section 33 of the Act.

3. Being aggrieved with the said order, an appeal was preferred before the concerned Commissioner (Appeals) [hereinafter referred to as CIR (A)] who heard the matter and thereafter vide order dated 15.5.2012 observed that since no revenue loss has been caused to the exchequer by the adjustment made by the Respondent, therefore, disapproved the action of the DC in invoking the provision of Section 8B of the Act. The concerned CIR (A) however affirmed the order of the DC to the extent of imposition of default surcharge and penalty.

4. Being aggrieved with the said order an appeal thereafter was preferred by the Department before the Appellate Tribunal Inland Revenue (ATIR), who also vide order dated 30.6.2015 in STA No.144/KB/2012, affirmed the order of the CIR (A) with regard to input adjustment. The ATIR however affirmed the order of the CIR (A) so far as the applicability of default surcharge and penalty is concerned. It was then the present STRA has been filed by the Department by raising the above referred questions of law.

5. Mr. Kafeel Ahmed Abbasi, has appeared on behalf of the Department and stated that if the provision of Section 8B of the Sales Tax Act, 1990 is examined, it would be noted that the Respondent was entitled to adjustment of input tax to the extent of 90% only, whereas the Respondent has adjusted input tax to the extent of 100%, which is violation of the above referred provision of law. The learned counsel then read out the said provision of law and stated that the parameters of the said section, since have not been complied with, therefore, the Respondent was not entitled for adjustment of 100% input tax against the output tax. The learned counsel further stated that since the law is quite clear on the said issue, therefore, the Respondent may be directed to adjust 90% of the input tax only against the output tax and to pay the remaining amount, as clearly mentioned in the assessment order passed by the DC dated 08.3.2012. He stated that the observation of the CIR (A) and ATIR are incorrect as the law clearly restricts the claim of input tax therefore, allowing the Respondent 100% adjustment of tax was beyond the mandate of Section 8B of the Act. He therefore, finally stated that since wrong adjustment has been claimed by the Respondent therefore the order of the CIR (A) and ATIR may be set

aside and that of DC may be restored by answering the above two referred questions in negative i.e. in favour of the Department and against the Respondent.

6. Mr. Aqeel Ahmed Khan, has appeared on behalf of the Respondent and, at the very outset, stated that the issue raised in the instant STRA stands squarely covered by the two decisions given by the Lahore High Court in the cases of

i. *Commissioner Inland Revenue, Multan ..Vs.. Messrs Hafeez Ghee and General Mills (Pvt.) Ltd., Multan* (**2020 PTD 2025**)

ii. *The Commissioner Inland Revenue ..Vs.. Merrs Ferrous Engineering Industry* (**2021 PTD 1270**).

While elaborating his view point the learned counsel stated that no doubt the Respondent was entitled for 90% adjustment of the tax and that in the instant matter the Respondent has adjusted 100% input against output tax but the said action has not caused any loss to the exchequer, as according to him if 90% input tax is adjusted, as provided under Section 8B of the Act, the remaining 10% would be carried forward and a refund situation would arise.

7. According to him the action of the Respondent could only be considered to be a procedural lapse and no malafide could be attributed against them in this regard. According to the learned counsel the respondent has not gained anything as if they have adjusted 90% input tax against the output tax the remaining unadjusted tax amount would be carried forward and refund of the unadjusted input tax would be created. The learned counsel submitted that since no loss to the exchequer was caused by the action of the Respondent thus they cannot be penalized. He stated that in the two decisions of the Lahore High Court the said issue

has been decided in favour of the respondent. The learned counsel stated that since default surcharge and penalty, for this procedural lapse, have already been imposed by the Department and their being no loss to the exchequer, as rightly observed by the CIR (A) & ATIR, therefore, the above referred two questions are firstly not arising out of the order of the ATIR and secondly if these are treated to be arising out of order of the Tribunal then the same may be answered in affirmative i.e. in favour of the Respondent and against the Department.

8. We have heard both the learned counsel at considerable length and have perused the record as well as the decisions relied upon by the learned counsel for the respondent.

9. Before proceeding any further, we deem it appropriate to reproduce provision of section 8B of the Sales Tax Act, 1990, which reads as under:-

> 8B. Adjustable input tax.– (1) Notwithstanding anything contained in this Act, in relation to a tax period, a registered person [2][other than public limited companies listed on Pakistan Stock Exchange] shall not be allowed to adjust input tax in excess of ninety per cent of the output tax for that tax period:
>
> Provided that the restriction on the adjustment of input tax in excess of ninety percent of the output tax, shall not apply in case of fixed assets or Capital goods:]
>
> Provided further that the Board may, by notification in the official Gazette, exclude any person or class of persons from the purview of subsection (1).
>
> (2) A registered person, subject to sub-section (1), may be allowed adjustment [or refund] of input tax not allowed under sub-section (1) subject to the following conditions, namely:–
>
> (i) in the case of registered persons, whose accounts are subject to audit under the Companies Ordinance, 1984, upon furnishing a statement along with annual audited accounts,

> duly certified by the auditors, showing value additions less than the limit prescribed under sub-section (1) above; or
>
> (ii) in case of other registered persons, subject to the conditions and restrictions as may be specified by the Board by notification in the official Gazette.
>
> (3) The adjustment or refund of input tax mentioned in subsections (2), if any, shall be made on yearly basis in the second month following the end of the financial year of the registered person.
>
> (4) Notwithstanding anything contained in sub-sections (1) and (2), the Board may, by notification in the official Gazette, prescribe any other limit of input tax adjustment for any person or class of persons.
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> [(4A) Notwithstanding anything contained in sub-sections (1), (2) and (3), input tax allowed in case of locally manufactured electric vehicles subject to reduced rate of tax under the Eighth Schedule shall be limited to the extent of amount of output tax and no refund or carry forward of excess input tax shall be allowed.]
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> (5) Any auditor found guilty of misconduct in furnishing the certificate mentioned in sub-section (2) shall be referred to the Council for disciplinary action under section 20D of Chartered Accountants, Ordinance, 1961 (X of 1961).]
>
> [(6) In case a Tier-1 retailer does not integrate his retail outlet in the manner as prescribed under sub-section (9A) of section 3, during a tax period or part thereof, the adjustable input tax for whole of that tax period shall be reduced by [60%.]

10. Perusal of Section 8B of the Act reveals that in a tax period a registered person is only entitled to adjust input tax not exceeding 90% of the output tax of that period; meaning thereby that the balance 10% of the unadjusted input tax would be carried forward to the next tax period and if not adjusted to another tax period and at the end of the financial year a final determination of the tax would be made and in case of unadjusted input tax against output tax a refund would arise to the taxpayer. If the facts of the above case are examined the respondent had adjusted 100% of the input

tax against the output tax, which was not permissible under Section 8B of the Act. However, the point which needs to be considered and looked into is what could be the effect of such lapse on the part of the taxpayer. The reading of Section 8 of the Act reveals that it deals with the adjustment of input tax of a registered person. If both these sections are read in juxtaposition, it would reveal that the law framers are clear in their mind with regard to non-availability of input tax against output tax in excess of 90% tax. However, it may also be noted that in case of non-adjustment of 10% of the excess amount in a tax period of a registered person the same unadjusted amount is carried forward till its final adjustment and at the end of the financial year a refund situation would arise in favour of the registered person if the input tax remains unadjusted against the output tax.

11. Mr. Aqeel Ahmed Khan, while arguing the matter has candidly conceded that the Respondent was entitled to adjust 90% only, who in fact have adjusted 100% of the amount however on the other hand stated in doing so no loss to the exchequer has been caused as if 90% input tax has been adjusted in a tax period and the remaining amount has been carried forward at the end of the financial year refund would arise.

12. On examination of Section 8B of the Act, though the above proposition of law categorically restricts adjustment to the extent of 90% only, on the other hand grants certain exclusions also. The CIR (A) and the ATIR while dealing with the matter have categorically observed that the action of the Respondent in making adjustment has not caused any loss to the exchequer and moreover the Department has failed to point out that otherwise the

registered person was not entitled for adjustment of the input tax of the remaining 10% amount in case of 90% adjustment as the Respondent, being a registered taxpayer, was legally entitled in case of non-adjustment of the excess amount to adjust the same at the end of the financial year, which demonstrates that even in the case of 100% adjustment by the respondent at the end of the financial year the position would have remained the same as in such situation there would not have been a refund arisen in favour of the Respondent.

13. We agree with the contention raised by Mr. Aqeel Ahmed Khan that such lapse on the part of the Respondent could be termed as technical / procedural mistake as by doing such act no gain was obtained by them as had there been adjustment of 90% only a right of refund of the Respondent would arise at the end of the financial year, which clearly denotes that the exchequer has got its due share by way of adjustment either in case of 90% adjustment in that very tax period or in case of 100% tax adjustment resulting a refund at the end of the financial year in favour of the taxpayer in case of carry forward of the tax adjustment for the relevant tax periods. In a somewhat similar situation Lahore High Court in the decisions referred supra and in the decision given in the case of *Commissioner Inland Revenue ..Vs.. M/s. Malik Enterprise* (**2021 PTD 945**) has observed that by way of 90% adjustment no loss of revenue has been caused and therefore decided the matter in favour of the Respondent. In the instant matter also the CIR (A) and the ATIR both have reached to the conclusion that no loss of revenue since have been caused therefore, have rejected the stance of the Department.

14. We therefore, keeping in view what has been discussed above and the decisions of the Lahore High Court have come to the conclusion that the ATIR has passed the order which does not require any interference on our part. We therefore, uphold the same by reframing the question and answering the same in affirmative i.e. in favour of the Respondent and against the Department.

> "Whether under the facts and circumstances of the case the ATIR was justified in observing that adjustment of more than 90% of the input tax against output tax as provided under Section 8B of the Act has not caused any revenue loss to the exchequer and was a mere procedural lapse on the part of the Respondent".

15. The instant STRA stands disposed of in the above terms.

16. Let a copy of the order be sent to the concerned Registrar for doing the needful in accordance with law.

JUDGE

JUDGE

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