

[IN THE LAHORE HIGH COURT, LAHORE]
TREET CORPORATION LTD.

Versus

FEDERATION OF PAKISTAN etc.

Present: Ayesha A.Malik, J.

W.P. Nos. 28287, 28917, 31639, 29398, 29404, 29408, 30625, 31964, 29402, 30070, 29473, 28920, 29712, 29707, 28356, 28354, 28355, 30617, 31629, 31429, 30060, 31390 of 2013 and 430, 2604, 634, 1401, 1196, 313, 2392, 500, 1941, 999, 3894, 5505, 5288, 5292, 5496, 4700, 5643 of 2014, decided on 7-3-2014.

Shahzad A. Elahi and Shoaib Rashid, Advocates, for the Petitioner.

Muhammad Zakria Sheikh, DAG with Nadeem Mahmood Mian, Standing Counsel, for the Respondent. No. 1/FOP.

Ch. Muhammad Zafar Iqbal, Mian Qamar ud Din Ahmad, Siraj Ahmad, and Muhammad Ilyas Khan, Advocates, for the Respondent No.2/FBR.

Sarfraz Ahmad Cheema, Mrs. Kausar Parveen, Tariq Saleem Sheikh and Mr. M. Zafar Iqbal Mian, Advocates, Nadeem Salah-ud-Din, Deputy Commissioner (Legal) Punjab Revenue Authority, for the Respondent. No. 3/CIR.

J U D G M E N T

[The Judgment of the Court was delivered by Ayesha A. Malik, J.] -Through this single judgment, the instant writ petition along with all the writ petitions detailed in Schedule-A are being decided as all the Petitioners have impugned the decision of the Respondents wherein they have denied adjustment of input tax under section 2(22A) of the Sales Tax Act, 1990 (STA) as amended by the Finance Act, 2013 to the Petitioners.

2. The grievance of all the Petitioners is that Respondent No. 2, Federal Board of Revenue has misinterpreted section 2(22A) of the STA whereby adjustment of input tax to the Provinces including the Provinces of Punjab and Sindh are not being allowed whereas the adjustment of input tax for the Islamabad Capital Territory and Baluchistan is being allowed.

3. Learned counsel for the Petitioners have argued that the Petitioners acquire services on which the sales tax is paid by them to the provincial governments such as Government of Punjab under Punjab Sales Tax on Services Act, 2012 and the Government of Sindh under the Sindh Sales Tax on Services Act, 2011. Learned counsel argued that in terms of section 2(14) of the STA provincial sales tax levied on services rendered or provided to a registered person constitutes input tax. Similarly, in terms of section 2(20)(c) of the STA provincial sales tax levied on services rendered or provided by a person falls within the definition of output tax. Provincial sales tax is defined under section 2(22A) of the STA. Learned counsel for the Petitioners have argued that the scheme of the law is that under section 7(1) of the STA a registered person is entitled to claim the adjustment of input tax for the purposes of its sales tax liability subject to section 8 of the STA. Section 8(1)(a) of the STA provides that all provincial sales

tax on services are adjustable as input tax except where the services used or to be used for any purpose other than for taxable supplies. Consequently all provincial sales tax on services are adjustable as input tax except where the services used are for purpose other than making taxable supplies. Section 2(22A) of the STA defines provincial sales tax to mean sales tax levied under provincial law for all the Provinces and sales tax levied in Islamabad Capital Territory through a notification in the official Gazette by the Federal Government. Learned counsel argued that section 2(22A) of the STA is being misinterpreted by the Respondent No.2 wherein they are of the opinion that the Federal Government through a notification will declare which provincial sales tax is relevant for the purposes of claiming input tax. Learned counsel further argued that this is an incorrect interpretation of the law as they have interpreted the said section to mean that it can only include those provincial sales tax, which have been duly notified in the official Gazette. Learned counsel argued that such an interpretation is against the scheme of the STA which clearly entitles a registered person to claim adjustment of input tax for the purposes of determination of his sales tax liability. Further argued that the provincial sales tax on services shall be determined by a provincial law and the provincial law does not require a declaration of a Federal Government through a notification deeming it to be a law for the purposes of input tax adjustment. Learned counsel argued that the Federal Government cannot control the applicability of a provincial law through a notification. Further argued that the Petitioners are entitled to the adjustment of input tax on the basis of the STA being a clear statutory right and the mandate of the law cannot be such that it would allow the Federal Government to control this right through a notification. It has been argued that although the vires of the section have been challenged, essentially the Petitioners are aggrieved on the interpretation given to section 2(22A) of the STA by the Respondent No.2.

4. Report and parawise comments have been filed by the Respondent No.2 in W.P.No.28917/2013, which have been adopted in all the writ petitions. In terms of the report and parawise comments filed by the Respondent No.2, section 7 of the STA provides for a procedure regarding the determination of a tax liability. Input tax on provincial services is admissible when the law permits it In terms of section 2(14) read with section 2(22A) of the STA, this means that input tax on provincial services are only

admissible and available to the Petitioners when notified by the Federal Government. The Federal Government has not issued any such notification for any of the Provinces. The input tax is being allowed for the Islamabad Capital Territory because it is a Federal Territory and for Baluchistan because it has not promulgated its provincial sales tax law. The Respondent No.2 has further explained that the Respondent No.2 has always collected sales tax on specified services under the STA and has allowed adjustment of input tax with respect to such sales tax. After the Eighteenth Amendment three Provinces with the exception of Baluchistan promulgated separate statutes for the levy of sales tax on services. These three Provinces have set up their own collecting authorities and therefore, for all intents and purposes the provincial sales tax is a separate tax collected by the different provincial authorities irrespective of the sales tax collected under the STA. It is for this reason that insertion of section 2(22A) of the STA was brought through the Finance Act, 2013 such that provincial sales tax can only be levied under provincial law if it is declared by the Federal Government through the notification that the provincial sales tax can be considered as input tax for the purposes of adjustment under section 7 of the STA. Learned counsel for the Respondent No.2 argued that since no provincial sales tax law has been notified by the Federal Government therefore, the Petitioners are not entitled to claim input tax adjustment under the STA. Learned counsel further explained that the Federal Government is in the process of developing arrangements with the Provinces whereby the mutual adjustment of input tax will be allowed. However, this shall be on the basis of an agreement with the Provinces. Learned counsel has also stated that to date on the basis of the interim order passed by this Court, the Respondents have accepted the manually filed sales tax returns from the Petitioners.

5. Report and parawise comments have also been filed by the Respondents No.4 and 5. It is their case that they are in full agreement with the contentions made by the Petitioners. They have explained that the STA enables the Federal Board of Revenue to collect sales tax on services and make adjustments in order to avoid multiple taxes. After the Eighteenth Amendment, the Federal Board of Revenue is no longer entitled to levy sales tax on services in the Provinces, hence each Province was to promulgate its own law and devise its own mechanism for the levy and collection of sales tax. So far only three Provinces Sindh, Punjab and Khyber

Pakhtoonkhwa have promulgated their own laws and have started collection of sales tax on services within the Provinces. The sales tax on service in the Province of Baluchistan has not commenced as they have not promulgated any law or set up any mechanism. Hence the Respondent No.2 is allowing the adjustment of input tax against the Province of Baluchistan. Similarly, there is no provincial law for the purposes of the Federal Capital Territory, hence the Respondent No.2 is allowing input tax adjustment in the Federal Capital Territory of Islamabad. They argued that this unilateral action by the Respondent No.2 is against the mandate of the law.

6. Heard the learned counsel for the parties and reviewed the record available on the file.

7. The basic dispute in all these petitions is with respect to the Federal Board of Revenue's (FBR's) interpretation of section 2(22A) of the STA. Section 2(22A) of the STA provides for the definition of provincial sales tax. The significance of this definition is that under section 7(1) of the STA a registered person is entitled to deduct input tax paid or payable during the tax period for the purposes of taxable supplies made or to be made by it from the output tax. The definition of input tax and output tax as provided in the STA means provincial sales tax levied on services rendered or provided by the person. The question arises *what is provincial sales tax*. Section 2(22A) of the STA reads as follows:-

“(22A) provincial sales tax means tax levied under provincial laws or laws relating to Islamabad Capital Territory, which are declared by the Federal Government, through notification in the official Gazette to be provincial sales tax for the purposes of input tax.”

The Respondent No.2 has denied the Petitioners input tax adjustment on the grounds that notwithstanding the promulgation of provincial sales tax law in three Provinces, they are not recognized as provincial sales law for the purposes of input tax adjustment by the Respondents. The Respondent No. 2 claims that it is for the Respondent No. 1 to decide which provincial tax is relevant for input tax adjustment, because section 2(22A) of the STA gives the Respondents No. 1 and 2 the discretion to decide which provincial sales tax should be allowed under section 7 of the STA for input tax adjustment.

8. I have heard the learned counsel for the Respondents at length and find that the manner in which the Respondent No.2 is interpreting section 2(22A) of the STA is totally contrary to the mandate of the law. The basic right of the Petitioners is provided for under section 7(1) of the STA wherein they are entitled to adjustment of input tax from their output tax for a given tax period. The STA has clearly defined input tax under section 2(14) of the STA and output tax under section 2(20)(c) of STA to mean provincial sales tax levied on services rendered or provided to the person. Section 2(22A) of the STA defines provincial sales tax to mean tax levied under provincial laws. This means provincial sales tax as promulgated in any or all of the Provinces. Section 2(22A) of the STA further defines that for the purposes of Islamabad Capital Territory, provincial sales tax will be that which is declared by the Federal Government to be a provincial sales tax for the purposes of input tax adjustment. This declaration in the official Gazette is required for the Islamabad Capital Territory, which is not a Province. The Respondents No.1 and 2 under the cover of section 2(22A) of the STA have assumed a discretionary power to decide which provincial sales tax should be allowed for input tax adjustment. The effect of this discretion is that the provisions of section 7 of STA become subject to the discretion of the Respondent No. 1. This clearly is not the scheme of the STA, which provides a specific right of adjustment to input tax. I am of the opinion that section 2(22A) of the STA cannot be used to deny the right of input tax adjustment by a declaration in the official Gazette. Furthermore admittedly there is no declaration in the official gazette yet adjustment is being allowed for the province of Baluchistan and for the Islamabad Capital Territory. This act of the Respondents shows that their understanding of section 2(22A) of the STA is that they have the ability to decide who should be granted input tax adjustment. Such an understanding is clearly against the specific provisions of the STA granting input tax adjustment.

9. In view of the aforesaid, these petitions are **allowed** and the Respondents are directed to accept the sales tax return of the Petitioners electronically or manually by allowing adjustment claimed by the Petitioners of provincial sales tax on services under provincial laws.