

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.4355 of 2021
MOL Pakistan Oil and Gas Company
Versus
The Federal Board of Revenue and others

Dates of Hearing:	17.05.2022 and 16.11.2022.
Petitioner by:	M/s Shehryar Kasuri and Muhammad Humzah, Advocates.
Respondents by:	Mr. Manzoor Hussain, Advocate for respondents No.1 to 4 / F.B.R. Mr. Amjad Hussain Zada, Second Secretary (ST.OPS-I), F.B.R.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition the petitioner, MOL Pakistan Oil and Gas Company, impugns the letter dated 31.05.2021, whereby the petitioner's application for condonation of delay under Section 74 of the Sales Tax Act, 1990 ("the 1990 Act") to the extent of filing revised sales tax returns to incorporate carry forward amounting to Rs.1,807,599,241/- on account of Provincial sales tax on services, was turned down by the Federal Board of Revenue ("F.B.R.").

2. Section 2(14)(d) of the 1990 Act provides that "*input tax*" in relation to a registered person, means Provincial sales tax levied on services rendered or provided to the person. Section 2(22A) of the said Act provides that "*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 purpose of input tax. Section 2(22A) was inserted in the 1990 Act through the Finance Act, 2008.

3. With regard to the said Section 2(22A), the Revenue Division had taken the position that unless the Federal Government notifies a tax levied under a Provincial law as a Provincial sales tax, a taxpayer cannot take adjustment of such tax as input tax against its output tax for the purposes of calculating its final tax liability under the 1990 Act. A number of petitioners had

challenged the amendment in the 1990 Act through writ petitions filed before the Hon'ble Lahore High Court. These writ petitions were decided through judgment reported as Treet Corporation Vs. Federation of Pakistan (2014 PTD 1285). Through the said judgment, the F.B.R. was directed to allow adjustment of input tax paid under the Provincial tax laws. Intra Court appeal against the said judgment is still pending.

4. After the judgment of the Hon'ble Lahore High Court in the case of Treet Corporation Vs. Federation of Pakistan, this Court vide judgment dated 26.07.2019 passed in writ petition No.1228/2016 titled "Hub Power Company Limited Vs. Federation of Pakistan," held as follows:-

"11. The purpose of legislature in terms of the provisions pointed hereinabove is to grant the input tax adjustment in respect of any sales tax paid on services received..... The Hon'ble Lahore High Court in its judgment reported as 2014 PTD 1285 observed that the Act of 1990 provides specific right of adjustment of input tax and Section 2(22) of the said Act cannot be used to deny the right of input tax adjustment by a declaration in the official gazette. It was also observed that despite there being no declaration in the official gazette adjustment was being allowed to the Province of Balochistan and Islamabad Capital Territory. In the light of the said judgment, declaration in the official gazette is merely a formality and failure to comply with that would not defeat the rights of the petitioner to claim the adjustment of the input tax.

12. In view of the above referred position, the petitioner could claim entitlement of input tax adjustment even under the Act of 2015 before the notification dated 02.09.2016. The failure on the part of the respondents to modify the notification bearing S.R.O.No.12(I)/2014 dated 26.03.2014 cannot defeat the petitioner's rights....."

5. The petitioner is a non-resident company engaged in the business of exploration and production of petroleum products in Pakistan since the year 1999. The petitioner's business operations are mostly carried out in the Province of Khyber Pakhtunkhwa ("K.P.K."). The petitioner, being the recipient of services, claims to have discharged its liabilities of paying sales tax on services to the Provincial Government of K.P.K. in accordance with the provisions of the K.P.K. Finance Act, 2013, which was in force during the period relevant for the adjudication of the instant petition.

6. Since July 2013, the F.B.R. had structured its web portal in such a manner that a claim for input tax adjustment in respect of sales tax paid on services through electronic sales tax returns was inadmissible. The petitioner had filed manual sales tax returns but no adjudication had taken place regarding the petitioner's entitlement for claiming input tax adjustment. The petitioner filed writ petition No.636/2014 before the Hon'ble Lahore High Court which was disposed of vide order dated 16.09.2019 in the following terms:-

"7. Be that as it may, this writ petition as well as connected writ petitions are disposed of by directing the Large Taxpayer Unit, Islamabad to pass decision on petitioner's application in terms of the law laid down in Treet Corporation Limited through Company Secretary and others v. Federation of Pakistan through Ministry of Finance and others 2014 PTD 1285 as well as Notification dated 27.02.2014 issued by the Federal Board of Revenue....."

7. During the pendency of the said writ petition No.636/2014 before the Hon'ble Lahore High Court, on 27.11.2018, the petitioner had filed revised sales tax returns for March - 2018 with a claim of input tax amounting to Rs.319,812,561/-. Earlier the petitioner had filed application for refund for each tax period from February 2015 to December 2017. On 25.05.2018, a consolidated refund application had been filed by the petitioner for the unadjusted excess input tax. This claim for refund had not been processed. Due to the lengthy and tedious administrative procedure involved in processing the refund application, the petitioner decided to instead revise its sales tax returns submitted for the tax period from April 2018 to December 2018 so that the input tax claimed during tax period from February 2015 to December 2017 is treated as credit to be carried forward. The position taken by the petitioner was that the revision of its sales tax returns would render futile its claim for refund for the tax period from February 2015 to December 2017. Since in terms of Section 26(3) of the 1990 Act revised sales tax returns are to be filed within 120 days of filing of the sales tax returns, the petitioner applied to the F.B.R. vide letter dated 15.02.2019 for condonation of delay in filing the revised sales tax returns under Section 74 of the said Act.

8. The Commissioner Inland Revenue filed intra court appeal No.105/2019 against the above mentioned order dated 16.09.2019 passed by the Hon'ble Lahore High Court in writ petition No.636/2014 titled "M/s MOL Pakistan Oil and Gas Vs. Federation of Pakistan." Vide letter dated 19.12.2019, the F.B.R. informed the petitioner that due to the pendency of intra court appeal No.105/2019 before the Hon'ble Lahore High Court, its request for filing revised income tax returns for the period prior to July 2016 for which input tax attributable to Provincial sales tax on services amounting to Rs.1,806 million was not actionable. As regards the matter regarding admissibility of input tax attributable to Provincial sales tax on services amounting to Rs.1,343 million for the period from July 2016 onwards, the petitioner was required to approach Unit-16 of the Large Taxpayer Unit for proper verification and further processing.

9. The said I.C.A.No.105/2019 was decided vide order dated 07.09.2020 wherein it was observed that the fate of the tax adjusted in the said case will be subject to the final outcome of appeals against the judgment in Treet Corporation's case.

10. Vide letter dated 11.09.2020, the F.B.R. had condoned the time limit for filing revised sales tax returns under Section 74 of the 1990 Act to incorporate carry forward amounting to Rs.1,372,141,637/- but not Rs.1,807,599,241/- on account of Provincial sales tax on services, which had been the subject matter of I.C.A.No.105/2019. The petitioner's consultant vide letter dated 14.01.2021 requested the F.B.R. to issue necessary directions for filing revised sales tax returns with respect to the remaining amount of Rs.1,807,599,241/- on the basis of the decision in the said I.C.A. The Commissioner Inland Revenue through letter dated 23.04.2021 proposed that the petitioner's request for condonation of delay in filing the revised sales tax returns be rejected. In the said letter, the position taken by the Commissioner Inland Revenue was that in light of SRO 814(I) of 2016, input tax can be adjusted only for the period with effect from 01.07.2016 in respect of the Province of K.P.K. The F.B.R. eventually vide impugned letter dated 31.05.2021 rejected the petitioner's application dated 14.01.2021. Hence, this petition.

11. The petitioner's case is that during the period between 2014 and March 2018, the petitioner's claim for the adjustment of the input tax paid on services under the Provincial law swelled to Rs.3,624 million, and that this resulted in a total carry forward / refundable amount of Rs.3,179 million. The petitioner filed an application seeking refund of the said amount mentioned in the return for the tax period 04/2018. Since this claim for refund was not processed, the petitioner sought permission from the F.B.R. to revise its sales tax returns for the tax periods 04/2018 onwards in terms of Section 26 of the 1990 Act in order to re-instate a sum of Rs.3,179 million as carry forward amount in its sales tax returns. Vide letter dated 19.12.2019, the Commissioner Inland Revenue directed the petitioner to get its claim verified to the extent of Rs.1,343 million. Furthermore, the petitioner was informed that on completion of the verification process, the case for revision of tax returns would be decided in accordance with the law. For the balance amount of Rs.1,806 million for the period prior to July 2016, the petitioner was informed that the same had been held in abeyance due to the pendency of I.C.A.No.105/2019 filed by the Commissioner Inland Revenue against the order dated 16.09.2019 passed by the Hon'ble Lahore High Court on a writ petition filed by the petitioner. Subsequently, on completion of the verification process, the Commissioner Inland Revenue vide letter dated 16.01.2020 recommended the petitioner's case for the revision of its sales tax returns in terms of Section 26(3) of the 1990 Act and sought condonation of delay under Section 74 of the said Act from the F.B.R. The F.B.R. vide order dated 11.09.2020 allowed the petitioner's application dated 15.02.2019 and condoned the time limit for filing revised sales tax returns. I.C.A.No.105/2019 was disposed of by the Hon'ble Lahore High Court vide order dated 07.09.2020. This caused the petitioner to file an application dated 14.01.2021 through its tax consultant before the F.B.R. seeking reinstatement of the carry forward of the balance amount of Rs.1,807 million. Vide order dated 31.05.2021, the F.B.R. rejected the petitioner's said application on account of it being time barred. The petitioner asserts that the said application could not have been dismissed since the

petitioner had been already allowed revision of its returns vide order dated 11.09.2020.

12. The respondent's case is that although the Hon'ble Lahore High Court had decided writ petition titled "Treet Corporation Vs. Federation of Pakistan" (*supra*) by directing the F.B.R. to accept sales tax returns of the petitioner electronically or manually by allowing adjustment claim by the petitioner of the Provincial sales tax on services under the Provincial law, but the judgment had been challenged by the Commissioner Inland Revenue in an intra Court appeal. It is also asserted that the permission sought by the petitioner from the F.B.R. through the Commissioner Inland Revenue to revise its sales tax returns for the tax period April 2018 onwards was refused vide letter dated 31.05.2021 as time barred and the application for condonation of delay was also turned down; that I.C.A.No.105/2019 titled "Commissioner Inland Revenue Vs. M/s MOL Pakistan" has been decided in terms that the fate of the tax adjusted shall be subject to the final outcome of the appeals in the case of Treet Corporation (*supra*). It was also asserted that vide letter dated 16.01.2020, the Commissioner Inland Revenue recommended the petitioner's case for revision of the sales tax returns in terms of Section 26(3) of the 1990 Act and sought condonation of delay under Section 74 of the said Act. Indeed, vide letter dated 11.09.2020, the time limit for filing revised sales tax returns was condoned on the petitioner's application dated 15.02.2019. The F.B.R. had rejected the petitioner's request to reinstate the amount of Rs.1,807 million as carry forward in its sales tax returns as time barred. The respondent prayed for the writ petition to be dismissed.

13. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 02 to 12 above and need not be recapitulated.

14. The F.B.R., vide letter dated 31.05.2021, confirmed that the delay in filing revised income tax returns incorporating carry forward amounting to Rs.1,372,141,637/- had been condoned but not the amount of Rs.1,807,599,241/- on account of the Provincial

sales tax on services for the period prior to 01.07.2016. Now, Section 2(22A) of the 1990 Act defines “*Provincial sales tax*” as tax levied under Provincial laws or laws relating to the 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. It appears that the notification contemplated by Section 2(22A) of the 1990 Act was issued with respect to the Province of K.P.K. on 02.09.2016 which was made effective from 01.07.2016. The F.B.R., while rejecting the petitioner’s application for condonation of delay in filing the revised sales tax returns, incorporating the carry forward of Rs.1,807,599,241/- as input tax on account of Provincial sales tax on services for the period prior to 01.07.2016, appears not to have been cognizant of the law laid down by the judgment dated 26.07.2019 passed by this Court in writ petition No.1228/2016, titled “Hub Power Company Limited Vs. Federation of Pakistan.” Paragraphs 9 to 13 of the said judgment are reproduced herein below for ease of reference:-

“9. Under Section 7, an adjustment of the input tax can be asked for while calculating the liability qua output tax; in this behalf, under Section 2(14) ibid provincial sales tax levied on services rendered or provided to the person is acknowledged as input tax. Moreover, the provincial sales tax is defined in Section 2(22A). The Government of the Pakistan, Ministry of Finance, Economic Affairs, Statistics and Revenue (Revenue Division) vide notification No.S.R.O.212(I)/2014 dated 26.03.2014 notified and declared that the tax levied under the Ordinance of 2000 to be provincial sales tax for purpose of input tax under the Act of 1990. The said notification took effect from 01.07.2013. The notification dated 26.03.2014 was rescinded on 30.06.2016. On 02.09.2016 another notification bearing No.S.R.O.814(I)/2016 was issued whereby it was declared that the Act of 2015 is the law for the purposes of input tax. The said notification took effect from 01.07.2016.

10. The Ordinance of 2000 was replaced with the Act of 2015 on 03.07.2015 and became the law of the Province with respect to sales tax on services. The Federal Government however, did not accordingly repeal the Act of 1990 and/or notification dated 26.03.2014 and only did so on 02.09.2014.

11. The purpose of legislature in terms of the provision pointed hereinabove is to grant the input tax adjustment in respect of any sales tax paid on services received. The impugned letters refusing the adjustment are without cogent reasons as under the same only a technical

objection is being raised i.e. failure in the notification to mention the Act of 2015. The Hon'ble Lahore High Court in its judgment reported as 2014 PTD 1285 observed that the Act of 1990 provides specific right of adjustment of input tax and Section 2(22) of the said Act cannot be used to deny the right of input tax adjustment by a declaration in the official gazette. It was also observed that despite there being no declaration in the official gazette adjustment was being allowed to the Province of Baluchistan and Islamabad Capital territory. In light of the said judgment, declaration in the official gazette is mere a formality and failure to comply with that would not defeat the rights of the petitioner to claim the adjustment of the input tax.

12. In view of the above referred position, the petitioner could claim entitlement of input tax adjustment even under the Act of 2015 before the notification dated 02.09.2016. The failure on the part of the respondents to modify the notification bearing S.R.O. No.12(I)/2014 dated 26.03.2014 cannot defeat the petitioner's rights.

13. For the foregoing reasons, the instant petition is allowed and the refusal on the part of the respondents to deny input tax adjustment against the sales tax on services paid under the Act of 2015 is declared to be without lawful authority."

15. The F.B.R., while rejecting the petitioner's application for reinstatement of carry forward amounting to Rs.1,807,599,241/- as input tax on account of Provincial sales tax on services for the period prior to 01.07.2016, did not appreciate that the petitioner's letter dated 14.01.2021 was not an application for condonation of delay. The petitioner's application for condonation of delay was submitted on 15.02.2019 which had been partially allowed by the F.B.R. vide letter dated 11.09.2020. The rationale for bifurcating the period prior to and after 01.07.2016 no longer holds good in view of the law laid down in the aforementioned judgment dated 26.07.2019 passed by this Court in writ petition No.1228/2016, titled "Hub Power Company Limited Vs. Federation of Pakistan."

16. In view of the above, the instant writ petition is disposed of in terms that the F.B.R. shall reconsider and decide the petitioner's application for filing sales tax revised returns for the tax period from April 2018 to October 2020 (with regard to reinstatement of carry forward amounting to Rs.1,807,599,241/- as input tax on account of Provincial sales tax on services for the period prior to 01.07.2016) in the light of the law laid down in the judgment dated 26.07.2019 passed by this Court in writ petition No.1228/2016, titled "Hub Power Company Limited Vs. Federation

of Pakistan.” Needless to mention that the decision of the F.B.R. shall be subject to the final outcome of the intra court appeal filed by the Commissioner Inland Revenue against the judgment of the Hon'ble Lahore High Court in the case of Treet Corporation (supra).

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN OPEN COURT ON 09.12.2022.

JUDGE

*Sanaulfat**

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