IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Mr. Justice Qazi Faez Isa
Mr. Justice Yahya Afridi
Mr. Justice Jamal Khan Mandokhail

Civil Appeal No. 1422 of 2019
(Against the judgment dated 20.08.2018 passed by the High Court of Balochistan, Quetta, in Sales Tax Appeal No. 01 of 2005)

The Commissioner, Inland Revenue, Karachi
... *Appellant*

Versus

M/s Attock Cement Pakistan Limited, Karachi
... *Respondent*

For the Appellant: Syed Mohsin Imam, ASC.

For the Respondent: Mr. Mansoor Ali Ghanghro, ASC.

Date of Hearing: 09.11.2022

JUDGMENT

Yahya Afridi, J.- The Commissioner, Inland Revenue, Karachi **('appellant-tax authority')** was granted leave to appeal by this Court, *vide* order dated 01.08.2019, against the judgment dated 20.08.2018 **('impugned judgment')** passed by the High Court of Balochistan in Sales Tax Appeal No. 01 of 2005 in the following terms:

> "The petitioner has impugned the judgment dated 20.8.2018, whereby the order passed by the Appellate Tribunal was maintained, directing refund of Rs.163,60,572 for the New Cement Grinding Mill machinery and another sum of Rs. 50,55,922 for the spare parts as goods within the contemplation of tax regime as enforced for the period 1996-97. Learned counsel states that such input tax cannot be conceded to the machinery and or spare parts which cannot be treated as goods within the contemplation of Sales Tax [Act]. Point noted calls for examination. Accordingly, leave is granted to consider the above point."

Claim of the Respondent-Company

2. M/s Attock Cement Pakistan Limited **('respondent-company')** filed, on 11.06.1997, two separate refund claims to the Assistant Collector

(Refund) Karachi, which as per section 66 of the Sales Tax Act, 1990 **('Sales Tax Act')** are to be filed within one year. In their first claim, the respondent-company sought the refund or, in the alternative, the adjustment of Rs.16,360,572 paid in the month of May-June 1996 as 'input tax' for the import of new cement grinding mill machinery **('new machinery')**. The reason for the belated filing of the claim was stated to be the 'misunderstanding' regarding the purport of section 10(2) of the Sales Tax Act. In the second claim, the respondent-company sought the refund or, in the alternative, the adjustment of Rs.5,055,922 paid as 'input tax' on the import of spare parts **('spare parts')** during the period from July 1996 to February 1997. As for the delay in filing this claim, the respondent-company pleaded its 'confusion', as to the adjustment of 'input tax' paid on spare parts of machinery under section 7(1) of the Sales Tax Act. Further, the respondent-company asserted that its right to adjustment of the 'input tax' had not been extinguished by the flux of time.

Decisions of the Adjudicatory Authorities and the High Court

3. The Assistant Collector (Refund) Sales Tax rejected the claims of the respondent-company *vide* his order dated 20.11.1997. What prevailed with the Assistant Collector (Refund) in rejecting the claim of the respondent-company was essentially that under section 8(1)(a) of the Sales Tax Act, the reclaim or deduction of the input tax could not be allowed as the supply of the good, that is, cement, made by the respondent-company had become exempt from being a taxable supply under the Finance Act, 1997. As to the commercial production of the new machinery, he concluded that despite repeated opportunities, the respondent-company did not produce any cogent material to prove the

same to have commenced till November 1997. However, he recorded that he personally visited the site on 09.09.1997, and there he was informed that the installation of the new machinery had been completed on 28.05.1997. The Collector (Appeals) dismissed the appeal of the respondent-company *vide* his order dated 14.04.1999 and maintained the findings of the Assistant Collector (Refund) Sales Tax.

4. Aggrieved thereof, the respondent-company filed an appeal before the Customs, Excise & Sales Tax Appellate Tribunal, Karachi **('Tribunal')**, which was accepted by the Tribunal *vide* its order dated 13.09.2004. The Tribunal concluded that the respondent-company, on payment of the 'input tax', acquired a right to adjust the same in the 'output tax', which could not be disallowed by the flux of time, and in particular, when the time restriction for claiming the same within '*the relevant tax period'* was only introduced through the Finance Act, 1998 by amending section 7(1) of the Sales Tax Act, and that this amendment could not be retrospectively applied to the case of the respondent-company. As to section 66 of the Sales Tax Act, the Tribunal held that the same was not applicable to the case of the respondent-company. The Tribunal held that the new machinery had commenced production of cement in May 1997, while the production and supply of 'pure slag' continued before and after the grant of exemption of sales tax on cement under the Sales Tax Act. These factual and legal findings of the Tribunal were maintained by the High Court in the impugned judgment dated 20.08.2018. Hence, the instant appeal by leave of this Court.

Submissions of the Learned Counsel of the Parties

5. Learned counsel for the appellant-tax authority emphasised that as the 'input tax' was not adjusted in the monthly returns filed by the respondent-company, the refund of the same could have only been claimed under section 66 of the Sales Tax Act, the conditions whereof were not fulfilled in this case. It was further argued that as cement was exempt from the sales tax, the respondent-company could neither seek adjustment/refund of the paid 'input tax' under section 7(1) read with section 10 of the Sales Tax Act, nor could it claim 'tax credit' under section 8(1) of the Sales Tax Act. As for the installation and production of the new machinery, the learned counsel relying on the findings recorded by the Assistant Collector (Refund) in the Order-in-Original, contended that the same had not taken place till November 1997.

6. In response, the learned counsel for the respondent-company relied on the factual finding of the Tribunal that the new machinery was not only installed but also continued supply of taxable slag during the period when the cement was exempted from payment of sales tax. It was further contended by him that there was no time-restriction on the adjustment of 'input tax', which was only inserted through the Finance Act, 1998, and thus, could not be applied retrospectively to the claim of the respondent-company. As for section 66 of the Sales Tax Act, he contended that the claim of refund was not made solely under this section.

Questions of Law

7. Neither party has, throughout the proceedings leading to the present appeal, contested that the new machinery or the spare parts

imported by the respondent-company did not come within the purview of the term 'goods' defined in section 2(12) of the Sales Tax Act. Further, the parties have been in consonance that 'input tax' paid on new machinery and spare parts at the time of import could be adjusted under section 7(1) of the Sales Tax Act read with section 10(1) thereof, and also that in certain cases, it may even lead to a claim for 'tax credit' under section 8 of the Sales Tax Act.

8. In essence, the dispute between the parties was regarding the time and manner of claiming the adjustment of 'input tax'. The appellant-tax authority asserted that the adjustment could be claimed in the same tax period and that too in the monthly returns, while the respondent-company affirmed it as a right enforceable beyond the tax period in which the input tax was paid. To effectively address the above core controversy, we need to first consider the following questions of law in the overall tax regime envisaged under the Sales Tax Act:

i. Whether the adjustment of 'input tax' from the 'output tax' provided under section 7(1) of the Sales Tax Act could be availed without any limitation of time.

ii. Whether section 66 of the Sales Tax Act was applicable in the facts of the present case, if so, whether the applications dated 11.06.1997 made by the respondent-company can be considered as refund applications under section 66 of the Sales Tax Act.

Tax Regime

9. The Sales Tax Act introduces an indirect tax to be levied, charged and collected on imported goods or on taxable supplies of goods, and the same is collected by the supplier on behalf of the Government, while the incidence of the tax is finally borne by the consumer of the imported goods or of the taxable supplies of the goods. The charging section 3 of the Sales Tax Act lays down the foundational parameters of the sales tax,

which are: firstly, the quantum of the tax is based on the value of the goods imported into Pakistan or the taxable supplies made in Pakistan by a registered person; secondly, the incidence of the tax is triggered or made chargeable when the goods are imported into Pakistan or when the registered person makes taxable supplies in the course or furtherance of any taxable activity carried out by him; and finally, the liability to pay the tax is on the person importing the goods in respect of the imported goods, or on the person making the supplies in respect of taxable supplies made in Pakistan.

Adjustment of 'Input Tax'

10. In order to cater for and facilitate the value addition of goods made during the supply chain of production, and to ease the burden of tax on the supplier, the legislature has introduced in the Sales Tax Act, the concept of 'input tax'[1] and 'output tax'[2], and then provided for the adjustment of the former at the time of paying the latter. 'Input tax' being the tax paid by the person receiving the supply of goods, while 'output tax' being the tax payable at the time of making the supply of the value-added goods. To facilitate the supplier, the legislature has provided a facility for the adjustment of the 'input tax' from the 'output tax' payable at the time of making the supply of the value-added goods. Thus, the 'input tax' paid by one supplier on receiving the goods would be the 'output tax' of the other, who is supplying the said goods, and the supplier on receiving the price of the goods supplied would after deducting the already paid 'input tax' from the 'output tax', deposit the balance in the treasury. This process would continue at each successive stage of the supply chain, until the final good is purchased by the final

[1] The Sales Tax Act 1990, s 2 (14).
[2] ibid, s 2 (20).

consumer, who would be finally burdened with the entire incidence of sales tax.

11. This Court has, in **Sheikhoo Sugar Mills v. Govt. of Pakistan**[3], while dilating upon adjustment of 'input tax' at the time of paying the 'output tax', as mandated under section 7 of the Sales Tax Act, opined that:

> We have examined section 7 of the Act carefully which appears to be beneficial provision of law in nature providing a facility to a registered person to adjust input tax at the time of making payment of output sales tax.

The above view was mirrored subsequently in other judgments of this Court as well.[4] The said judicial view of this Court on the adjustment of 'input tax' in the sales tax regime is shared across the border by the Supreme Court of India, as eloquently discussed in **Godrej and Boyce Mfg. v. Commissioner of Sales Tax**[5], and followed in a string of cases.[6]

12. In view of the above, we reiterate the view already declared by this Court that the same is a concession, and that too to be availed, as provided under section 7(1) of the Sales Tax Act.

Time Limit for adjustment of 'Input Tax'

13. Turning to the question of whether this concession of adjustment of 'input tax' from the 'output tax' provided under section 7(1) of the Sales Tax Act could be availed without any limitation of time, we consider it appropriate to reproduce hereunder, the relevant provision of law, which then read:

> **7. Determination of tax liability**. – (1) For the purpose of determining his tax liability in respect of taxable supplies made during a tax period, a registered person shall be entitled to deduct input tax paid for the purpose of taxable supplies made, or to be made, by him from the

[3] 2001 SCMR 1376.
[4] Collector of Customs, Sales Tax & Central Excise v M/S Sanghar Sugar Mills Ltd. PTCL 2007 CL. 565, Chiltan Ghee Mills, Quetta v Deputy Collector of Sales Tax (Refund), Customs House, Quetta 2016 SCMR 2183.
[5] AIR 1992 SC 2078.
[6] India Agencies (Regd.), Bangalore v Additional Commissioner of Commercial Taxes, Bangalore AIR 2005 SC 1594, Jayam and Co. v Assistant Commissioner AIR 2016 SC 4443, State of Karnataka v M.K. Agro Tech.(P) Ltd. (2017) 16 SCC 210, ALD Automotive Pvt. Ltd. v The Commercial Tax Officer AIR 2018 SC 5235.

> output tax that is due from him in respect of that tax period and to make such other adjustments as are specified in Section 9.
>
> (Emphasis supplied)

The above provision does not stipulate any condition or restriction of time for adjustment of the 'input tax' from the 'output tax' payable in respect of taxable supplies made in a tax period. The noted stipulation of time, that is, a tax period, is with regard to determining the tax liability of the 'output tax' on taxable supplies made by the tax payer during that period, and does not relate to the period of payment of 'input tax' on the taxable supplies received by him.

14. For complete understanding, section 7 of the Sales Tax Act cannot be read in isolation, and has to be read with the preceding provisions of section 6, which stipulates the time and manner of payment of the sales tax. Sub-section (1) of section 6 caters for goods imported into Pakistan, while sub-section (2), which is relevant to the issue in hand, provides for taxable supplies made in Pakistan during a tax period to be paid by the registered person, unless it is specified otherwise through a notification in the official gazette, at the time of filing of the return as provided for under Chapter V of the Sales Tax Act. This Chapter of the Sales Tax Act deals with different categories of returns envisaged under the Sales Tax Act. Returns of the kind related to the present controversy are provided for in section 26 of the Sales Tax Act, and to appreciate the provisions contained therein, we are to consider also the definition of the terms 'tax period' and 'due date' provided under the Sales Tax Act. For ease of reference, the said provisions as were prevalent at the relevant time are cited hereunder:

> **26. Monthly Return**
>
> (1) Every registered person making taxable supplies shall furnish not later than the due date a true and correct return in the prescribed form to a designated bank specified by the Board, indicating the purchase and

> the supplies made during a tax period, the tax due and paid and such other information, as may be prescribed:
>
> (2) If there is a change in the rate of tax during a tax period, a separate return in respect of each portion of tax period showing the application of different rates of tax shall be furnished.
>
> **Section 2(9)**
> **(9) "due date"** in relation to the furnishing of a return means the 20th day of the month following the end of the tax period, or such other date as the Federal Government may; by notification in the official Gazette, specify;
>
> **Section 2(43)**
> (**43) "tax period"** means a period of one month or such other period as the Federal Government may, by notification in the official Gazette, specify;

A careful conjunctive reading of the above provisions clarifies the position that the registered person is put under an obligation to submit a monthly return for the 'tax period', on the 'due date', that is, the 20th of the month following the end of the tax period, recording therein all purchases and supplies made during a 'tax period', the 'output tax' due, and the actual amount paid after adjustment of the 'input tax'.

15. Thus, at the relevant period there was no express obligation on the tax payer to avail the facility of adjustment of 'input tax' in the same tax period in which it was paid. We may also note here that this restriction was, however, for the first time introduced by inserting the words ***'during the tax period'*** after the words, "input tax paid", in section 7(1) *vide* the Finance Act, 1998. More amendments with regard to the time limit for availing the adjustment facility of 'input tax' followed later. Following *proviso* was added after subsection (1) of section 7 of the Sales Tax Act by the Finance Act, 2003:

> Provided that the taxpayer may adjust input tax paid on the purchases in the immediate three preceding tax periods from the output tax subject to the condition that the taxpayer specifies the reasons for such delayed input tax adjustment in the revised sales tax return for such period or in the return for the immediately succeeding tax period.

The word “three” in the above *proviso* was substituted by “twelve” by the Finance Act, 2005, and the same was substituted by the Finance Act, 2008, and it read:

> Provided that where a registered person did not deduct input tax within the relevant period, he may claim such tax in the return for any of the six succeeding tax periods.

Applications dated 11.06.1997 - section 66 of the Sale Tax Act

16. Given that there was no time limit prescribed for claiming adjustment of ‘input tax’, as provided under section 7(1) of the Sales Tax Act at the relevant time, the respondent-company could have adjusted the ‘input tax’ in the monthly return of the tax period in which it paid the same, or in the subsequent tax periods till the cement was exempted from payment of the sales tax through the Finance Act, 1997. However, the respondent-company did not adjust the ‘input tax’ in its monthly returns. The question would thus arise as to whether the respondent-company could seek its refund under the Sales Tax Act.

17. Sections 10 and 66 of the Sales Tax Act deal with refund of tax. The applicable provisions of the said sections, as were at the relevant time, read as under:

> **10. Refund of excess amount of input tax**
>
> (1) Subject to the provisions of sub-section (2), if in relation to a tax period the total deduction of input tax and other adjustments specified in section 9 exceed the amount of output tax, the excess amount outstanding at the end of that period shall be refunded to the registered person within ninety days of filing of tax return subject to such conditions as may be specified by the Board:
>
> Provided that the refund shall also be admissible to the registered person who, at the time of taking delivery of taxable plant and machinery, its components and spare parts is not making taxable supplies, subject to the condition that he shall, within the period specified by the Board by notification in the Official Gazette commence taxable supplies and complies with such other conditions as are specified therein.
>
> Provided further that the Board may, by notification in the Official Gazette, restrict or regulate the amount of refund claimed by a person as input tax credit to such extent and in such manner as it may specify therein.

> **66. Refund to be claimed within one year**
>
> No refund of tax claimed to have been paid or over paid through inadvertence, error or misconstruction shall be allowed, unless the claim is made within one year of the date of payment.

From reading the above provisions, it is clear that refund under section 10 of the Sales Tax Act deals with a situation where the amount of 'input tax' cannot be adjusted completely against the 'output tax' in a tax period; in such a situation, the excess amount of the paid 'input tax' is to be refunded to the registered person within ninety days of the filing of the tax return. However, this section is not attracted to the matter at hand, as the respondent-company had not adjusted the 'input tax' against the 'output tax' in any of its tax returns, as provided under section 7(1) *supra,* and has thus in fact overpaid the 'output tax'.

18. Section 66 of the Sale Tax Act, on the other hand, provides for refund of tax claimed to have been *'paid or over paid'* through *'inadvertence, error or misconstruction'* and prescribes a period of one year for preferring such claims. In the present case, the respondent-company, during the relevant period, was not obliged to pay 'output tax' equivalent to the amount of 'input tax' paid on imports, but it overlooked availing the facility of adjustment of the 'input tax' afforded under section 7(1) of the Sales Tax Act. This omission, as asserted by the respondent-company in its applications dated 12-6-1997, was due to 'confusion' and 'misunderstanding' on its part, and would thus come within the purview of the word 'inadvertence', envisaged under section 66 of the Sales Tax Act. In any event, there was no other reason for the respondent-company for not availing the benefit of the adjustment facility provided under the law and, instead, to saddle itself with a liability not required by law. The claim for refund of such a mistakenly paid tax was, therefore, maintainable under section 66 of the Sales Tax Act, provided it was made

within the prescribed period of limitation. It is true that the respondent-company, in its reply to the show cause notice issued for rejection of their refund claims, maintained that it had not made the said claims *precisely* under section 66 of the Sales Tax Act. However, any admission with respect to a law point is inconsequential, if it is otherwise wrong. The present case, which falls within the scope of section 66 of the Sales Tax Act, was to be dealt with under the said provision of law, notwithstanding no reference was made by the respondent-company in its applications dated 11-6-1997 to any specific provision of the Sale Tax Act or their stance taken in their reply to the show case notice, as to non-applicability of section 66 to their refund claims.

19. Our view as to the applicability of section 66 of the Sales Tax Act to the present case is further fortified by the fact that subsequent to the making of the refund claims by the appellant-company, section 66 was amended by the Finance Act, 1998 and the words, *"or refund on account of input adjustment not claimed within the relevant tax period,"* were specifically added therein, and the amended section thereafter read as follows:

> **66. Refund to be claimed within one year**
> No refund of tax claimed to have been paid or over paid through inadvertence, error or misconstruction or refund on account of input adjustment not claimed within the relevant tax period, shall be allowed, unless the claim is made within one year of the date of payment.
> (emphasis provided)

We may observe here that an amendment is generally made to bring about a change in the state of law; however, it is not so when the amendment is mere explanatory or clarificatory in nature. The amendment introduced in section 66 of the Sale Tax Act by the Finance Act, 1998, appears to us, to be clarificatory in nature, as it expressly mentioned the refund claims of input tax of which adjustment has not

been claimed within the relevant tax period, without making any change in other provisions of the Sale Tax Act on this matter. It, therefore, follows that the object was to clarify the existing legal position by way of addition rather than to change the law.

20. Viewed in this perspective, the claim of the respondent-company made in its applications dated 11-06-1997 makes out a case for refund of the 'over paid output tax', for the respondent-company 'inadvertently' did not adjust the 'input tax' in the 'output tax' in the tax returns filed after import of the new machinery and spare parts. This facility of making adjustment of the 'input tax' was available to the respondent-company till 1st July 1997, when the taxable supply of cement, was exempted from payment of sales tax by the Finance Act, 1997. Obviously, after the said exemption of cement from payment of sales tax, there was no question of payment of 'output tax', and hence 'input tax' paid could not have been adjusted by the respondent-company. The only remedy, thus, available to the respondent-company was to seek the refund of the excess amount of 'output tax' paid by the respondent-company, under section 66 of the Sales Tax Act.

21. The period of limitation prescribed for seeking the refund under section 66 was one year from the date of over-payment of tax that is, when 'output tax' was paid by the registered person without adjusting the 'input tax'. In the present case, the respondent-company would, therefore, be entitled under Section 66 of the Sale Tax Act to claim refund of an amount of the overpaid 'output tax', equivalent to the 'input tax' not adjusted in the monthly returns filed during the period of one year preceding 11-06-1997, that is, from 11.06.1996 till 10.06.1997.

Conclusion

22. For the reasons stated above, we find that the Tribunal and the High Court erred to the extent of not appreciating the correct purport of the applicable provisions of the Sales Tax Act, and though passed correct decisions but relied upon a wrong provision of law, which warrant correction by this Court. Accordingly, the present appeal of the appellant-tax authority is partly allowed. However, the respondent-company would be entitled to the refund of the 'input tax' paid by it at the time of importing the new machinery and the spare parts under section 66 of the Sale Tax Act, which was not adjusted in its tax returns filed for the period of one year, that is, from 11.06.1996 till 10.06.1997 (both days inclusive).

Judge

Judge

Judge

Announced in Open Court on January, 2023

Judge

Islamabad
Approved for reporting
Arif