

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD

APPEAL NO. AT-39/2014

M/s Apna TV Channel (Pvt.) Ltd. Appellant

Versus

1/ Commissioner (Appeals), SRB, Karachi
2/ Assistant Commissioner-III, SRB, Karachi Respondents

Mr. Ghazanfar Siddiqui, For the Appellant

Mr. Aamir Ali, Deputy Commissioner, SRB, Karachi and
Mr. Zain Manzoor, Assistant Commissioner, SRB, Karachi For the Respondents

Date of hearing 02.04.2018
Date of Order 21.05.2018

ORDER

Razia Sultana Taher: This appeal has been filed by the appellant challenging the order in appeal No.12/2014 dated 12th February, 2014 passed by the Commissioner (Appeals) in appeal No.56/2012 dated 10.06.2013 confirming the order in original No. 75 of 2013 dated 8th May, 2013 passed by the Assistant Commissioner, SRB.

2. In short, the facts of the case as stated in the order in original are that the appellant are providing and rendering taxable services of advertisement falling under tariff heading 9802.1000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as SSToS Act, 2011). The desk audit revealed that the appellant did not deposit the Sindh Sales tax and allowed the same to be withheld by un-authorized person by declaring them as holder of Dummy NTN:9999997-8 (taxpayer without proper NTN). Provision of services of advertisement to persons not covered by Rule 1(2)(f) of Sindh Sales Tax Special Procedure (Withholding) Rules, 2011, the appellant should have paid an amount of Rs.1,452,341/- alongwith default surcharge and penalties. Next, Sales tax was not charged and not paid – treated by appellant as exempt services. No exemption under Sr. No.2 of Notification No.SRB.Leg(1)/2011 dated 01.07.2011 as it does not cover service recipients. The Annexure II showed the transaction amounting to Rs.3,328,083/- where sales tax amounting to Rs.532,493/- had not been paid by the appellant, the same stands recoverable alongwith default surcharge and penalties.

The Annexure III showed transactions wherein sales tax amounting to Rs.2,157,375/- had not been paid but details of transaction appeared / shown in monthly sales tax return, the same

stood recoverable alongwith penalties and default surcharge. Against heading Sales tax charged but not paid. Here again the Annex IV showed transactions where declared value of services amounting to Rs.666,666/- shown in monthly sales tax returns was provided but sales tax amounting to Rs.106,607/- was not paid.

Thus the same stands recoverable alongwith default surcharge and penalties.

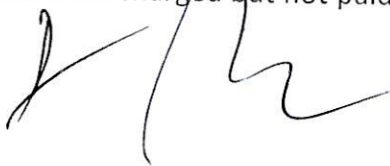
3. The appellant was ordered to pay Sindh Sales tax amounting to Rs.4,248,876/- as per details given in the preceding paragraphs under subsection 1(A) of Section 47 of the Sindh Sales Tax on Services Act, 2011 alongwith default surcharge under Section 44 (to be calculated at the time of payment) of the SSToS Act, 2011 and penalty of Rs.212,444/- under clause (a) in column (2) against Sr. No.3 in column (1) of the table under section 43 of the SSToS Act, 2011.

4. The said order of the assessing officer was challenged by way of filing of appeal before the Commissioner (Appeals) who dismissed the appeal and upheld the order in original.

5. During the course of hearing, the learned appellant's advocate submitted that the case be remanded for the reasons, that the amount needs to be reconciled, there are four allegations on which there is over lapping at the appeal stage before the Commissioner (Appeals), as the appellant had not initially submitted any documents to the department but now at the Appellate forums some documents have been submitted and the remaining would also be obtained, thirdly there still remains verification of invoices with the sales tax returns. The advocate continued that the department leveled allegation that Sindh Sales Tax was allowed to be withheld by persons not authorized to do so and an amount in Annex-I shown as Rs.1,452,341/- out of which the appellant paid Rs.328,372/- vide CPR No.S1-20160104-0158-1006944 dated 04.01.2016. An amount of Rs.671,969/- has been withheld by Government of Sindh, the relevant certificates of tax deductions to the said effect would also be submitted. Sales tax have been paid on an amount of Rs.452,000/- meant for advertisement of Benazir Income Support Programme by Government of Pakistan, the certificate to the said effect would also be submitted during the next date of hearing.

Regarding next issue – under Annex-II, appellant treated the services rendered as being exempt because the same was given to Director General Public Relation (DGPR) Government of Pakistan. The amount of Rs.532,493/- was not charged by the appellant as the same was treated as 'exempt services'. The Punjab Revenue Authority had clarified to Time & Space company Lahore that sales tax on 'Health, Education Awareness advertisement called Health awareness sponsored by the Federal and Provincial Government for Health & Education are not liable to Punjab sales tax. The sales tax involved is Rs.412,853/- and Rs.119,640/- and submitted that documentary substantive evidence would be submitted in respect of all three companies. Added that Privatization Commission had claimed exemption as per their Ordinance.

The learned advocate continued that in reference to Annexure III, the appellant treated the advertisement as being exempt and thus did not pay Rs.2,157,375/-. This is an advertisement of US Aid and Unicef and stated that SRB allowed exemption Vide Circular No.4/2013 dated 19.03.2013. For annexure IV sales tax has been charged but not paid Rs.106,607/- it pertains to



DGPR and GOS (advertisement of Government of Sindh on land recovery revenue message) and DGPR message pertains to public awareness campaign.

The appellant's advocate argued that on Ground No.1, the services were provided and given to Government of Sindh, Benazir Income Support Program. As per law GOS, FBR, BISP were to withhold Sindh Sales tax on advertisement services and the Government department have withheld the tax. In here two departments of government are involved i.e. Sindh government Information & Archive Department and Benazir Income Support Programme. The appellant's counsel submitted in respect to Annex-II, Sr. No.1 to 12 are exempt services, at Sr. No.4 to 12 have been given exempt services. They fall in the category of grant in aid agreement. Notification No.SRB-LEG(1)/2011 dated 01.07.2011, Sr. No.2, advertisement financed out of funds of grant in aid agreement, (the appellant submitted an incomplete photocopy of letter). Regarding Sr. No.1 to 3 stated that it is exempt, i.e. Aurat Foundation, Green Star, DGPR as public service messages are given and are not classified in advertisement and Sindh sales tax is on advertisement services, the same do not involve publicity but it is only a public service message.

6. The learned advocate in reply to Annexure IV submitted that "Notwithstanding the above argument if at all, it is subject to SST, the responsibility to withhold and deposit SST rest with the recipient in terms of Rule 3(4) of Withholding Special Procedure Rules, 2011. The appellant was directed to submit the relevant invoices with copies to the respondent. The appellant continued that in Annexure III: Sr. No.1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 15, 16, 28, 29, 30, 35, 36, 38 pertains to DGPR Punjab, Sr. No: 17, 18, 20, 22, 24, 25, 27, 32, 34, 37, 39-47 to UN, Sr. No:8, 9 to Government of Sindh, Sr. No.26 pertains to Shell, Sr. No: 23 pertains to group M in Pakistan, Sr. No.21 Privatization Commission.

According to appellant, the argument for DGPR are same, as given in Annex II of the ONO. In respect to UNICEF, the appellant gave a copy of invoice stating that it is exempt as it is a grant in aid agreement. In respect to Sr. No.8 & 9 the appellant submitted it is a public service message from Government of Sindh. Again in respect to Shell and Group M, the appellant explained that no advertisement services were given but production house service was given and the same became taxable in July 2014.

The appellant continued that no default surcharge and penalty are leviable in the case as SST was not levied, there seemed no reason and were convinced, that it is not subject SST thus there is no malafide intention, and the same does not establish Mens rea.

The appellant's counsel submitted that the arguments are completed except on two points contending that advertisement services were provided to M/s Group M and M/s Shell Pakistan Ltd. these advertisement services were given in respect to the campaign in the Malls whereby, the persons were dressed as 'Clown' and had held the product for advertisement services, this particular mode of advertisement service was not subject to SST. In the invoice submitted the word used was 'production bill', the advocate states that he is rectifying his previous statement made before this Tribunal wherein he thought that the appellant is a production House, in fact

the appellant is not a production House nor renders such service, the service of placing the clown in the Mall displaying goods for advertisement purpose is a production bill.

7. The respondent representative submitted that out of four annexures, only one annexure is subject to reconciliation i.e. reconciliation involves ascertainment of sales tax with respect to annexure A. That three departments are disputed - Benazir Income Support Programme and two other departments of GOS i.e. Information & Archive and Land Recovery Manager. Thus information have been sought from BISP and for verification of two other departments of Government of Sindh, copies of cheques have been sought, to substantiate the version of the appellant. The departmental representative argued that appellant was required to submit reconciliation evidence only to the extent of annexure-I of the ONO which consist of Rs.7 lac. Whereas, the major portion relates to legality of the exemption claimed by the appellant and the same does not require any reconciliation, the amount involved is around Rs.3 million (Rs.3,328,023/-). The appellant has not provided any Grant in Aid agreement in relation to the claim of exemption.

In subsequent hearings, the respondent raised objection to the filing of further grounds by the appellant in the second half of 2017 as the appeal hearing had commenced in the year 2015 and added that if no new issues have emerged then the revised grounds may not be accepted.

The departmental representative stated in response to Annexure I, that Sindh Sales Tax Special Procedure (Withholding) Rules 2011 applies only to persons who are withholding agent as specified in the Withholding Rules, here the Government of Sindh is not a Withholding Agent in terms of Rule 1 sub-rule 2 clause f of Withholding Rules 2011. Even in the deeming provision under section 24(3) of the SSToS Act, 2011, the service recipient are referred for section 3 subsection (2). Therefore the deeming clause 24(3) read with section 3(2) does not apply, as the service provider is a registered person and is providing taxable services as in section 3(1). Further, the provisio to the clause 71 of section 2 denies the benefits available to a registered person. – which means that the person (GOS) deemed to be registered but not actually registered are not entitled to any benefit available to registered persons (withholding agent). Further, under section 8, service provider (Apna TV) is jointly and severally liable for any unpaid tax. Therefore the registered person (Apna TV) is liable to pay the tax under section 9(1) read with section 3(1) of the SSToS Act, 2011.

8. The respondent explained that in response to the entry at Sr. No.I – Aurat Foundation – the services are taxable advertisement services – as the public service message is in itself an advertisement – any reference to profit is not relevant as section 4(1)(a) of the SSToS Act, 2011 covers all economic activities whether undertaken for profit or not, therefore a public service message is taxable in terms of section 3(1) read with section 4(1)(a) of the SSToS Act, 2011. In relation to DGPR, the appellant termed it as a public service message, the appellant has also submitted that the liability is on service recipient in this regard, the argument submitted in relation to annexure I may be taken. The reference made to Article 165 of the Constitution of Pakistan and case of Independent Media in this regard, the respondent placed reliance on Supreme Court judgment Civil Appeal No: 417 of 2009 emphasis on para 22 –

From the judgment it is clear that the government cannot be given a premium of its position and must be treated at par with private sector and simply cannot be exempted by the dint of being a government. The Article 165 discusses tax on property or income whereas the SST is a transaction tax therefore the services provided to DGPR are taxable. The respondent submitted copy of Punjab Revenue Authority 2nd Schedule - which shows at 2(a) and 2(c) has specifically excluded the public service message which is otherwise taxable but there is no such exclusion or exemption in SSToS Act, 2011. The argument for Sr. No.3, is same as Sr.1 - Annex II may be taken ie. (birth control advertisement). Regarding Sr. No.4 to 10 – Mir Khalil ur Rehman (MKRF) No such agreements have been provided which prove that the funds were provided under grant in aid agreement. The Honorable Appellate Tribunal in AT-46/2014 has already concluded that services provided by MKRF – at Sr. No.11 & 12 are taxable.

So far as the US Aid is concerned, the US Aid have applied to the Chairman, Sindh Revenue Board for exemption which has not been granted. The respondent submitted copy of US Aid Letter addressed to Chairman Sindh Revenue Board to substantiate / shows that exemption is not available to US Aid. The respondent added that the agreement between US Aid and Government of Pakistan does not cover the exemption of SST, as SST being the provincial subject matter can only be exempted by the Province of Sindh under Article 142(C) of the Constitution of Pakistan. The province has powers to levy a tax on provision of services and a federal agreement does not serve the purpose of exemption of SST. Drew attention to US Aid Pakistan letter 19.01.2017 addressed to Chairman SRB, where the EAD, ECO affairs Division advised the US Aid to approach the provincial government for exemption. Even in the agreement, if the tax is levied and paid contrary to the provisions of the agreement, US Aid may required GOP to refund the amount of tax clause e of Section B 4.

The response of respondent in respect to Annexure III, DGPR, Government of Sindh Privatization Commission, the arguments for the respective parties already given in Annex I and III may be taken. For United Nation, Group M and Shell, the respondent submitted for Shell there is no evidence that services are of production, so much so that even in the invoice description is packaged deal. The appellant declared the services in the statutory return as required under section 30 of the SSToS Act, 2011 whereas, there is no requirement for disclosure of non taxable services and for Group M: The respondent added that services provided to Group M are in relation to advertisement and not on production cited para 14 in AT-38/2014. As for United Nation, there is no such agreement under grant in aid nor any pecific exemption has been granted to UN by Government of Sindh, SRB. The SRB has already clarified and drew attention to SRB/TP/3/2015/120378 dated 15.12.2015. Taking Annexure IV: the argument for Annex II Sr. No.2 may be taken.

The departmental representative stated that the appellant provided services to Aurat Foundation, Green star Social Marketing, DG Health Government of Punjab / Sindh, Mir Khalil ur Rehman, Privatization Commission, DGPR and have declared these services as exempted and called them as 'public message services'. There is no such exemption in Sindh Sales Tax on Services Act, 2011 available to the advertisement services, these services were properly invoiced by the TV channel and the minutes were properly charged by the TV at the market price thus economic activity has taken place under section 4 of the SSToS Act, 2011. So far as US

Aid and UNICEF, respondent drew attention to both letters wherein the two parties have applied for exemption on the advertisement services to the SRB. So far no such exemption have been given to the appellant. On this basis, the exemption claim be disallowed and the appellant be directed to make payment of SST. The respondent cited copy of order of judgment of Appellate Tribunal in AT-80/2014 dated 19.10.2017 M/s Independent Media Corporation v/s Commissioner (Appeals). In respect to Default surcharge and Penalty: For default surcharge the language in section 44 of the SSToS Act, 2011 it is clear that default surcharge is applicable whether the default is willful or otherwise and there is no need to prove mens rea. The case law cited DG Khan Cement is not applicable as Sales Tax Act, 1990 law, under section 34 is different from section 44 of the SSToS Act, 2011. Penalty imposed for offence No.3 of Section 43 has rightly been imposed as the due amount has not been deposited in government revenue.

9. We have heard the learned representatives of both the sides and perused the record made available before us.

Before proceeding we would like to place on record that the appellant's representative last attended hearing on 29.11.2017 thereafter remained absent. The appeal case cannot be kept pending indefinitely and we are thus left with no options but to proceed on merits on the basis of available record.

The appellant had initially shown withholding to dummy NTN, 9999997-8 of Rs.1,452,341/- but subsequently during the course of reconciliation clarified the service recipient as FBR, BISP and GOS. The respondent confirmed that in respect to FBR, the appellant had paid an amount of Rs.328,372/- vide CPR No.S1-201601404-0158-1006944 dated 04-Jan-2016 – for the tax period 06/2012. Further in respect to Benazir Income Support Program and Government of Sindh, the appellant's version is that an amount of Rs.452,000/- and Rs.671,969/- have been withheld by the two service recipients but have not provided any proof of payment. Furthermore, under the then Sindh Sales Tax (Special Procedure) Withholding Rules, 2011 the liability of payment shifts from service provider to those service recipients who fall under the definition of withholding agent for purpose of advertisement services as defined under clause (f) of subrule 2 of Rule 1 of the Withholding Rules, 2011. The said clause is reproduced for ready reference as under; "recipient of service of advertisement, who are registered for the Federal Sales tax on goods or for Sindh Sales Tax on Services".

In absence the responsibility to make the payment of Sindh Sales tax rested with the services provider. Additionally, the appellant has also not substantiated the version with any documentary evidence, in absence of which the mere statement cannot be taken as acceptable.

10. In respect to Annex-II – appellant declared the services as exempt – Sindh Sales tax calculated comes to Rs.532,493/- No such exemption is provided under the SSToS Act, 2011. The appellant have shown the following service recipients namely MKRF, US Aid, Aurat Foundation, Green Star Social Marketing, DG Health Punjab and the appellant have held that services rendered to the above named are exempt from sales tax. The appellant's stance is that services received by MKRF and US Aid are under grant in aid agreement. The appellant have not provided any grant in aid document / agreement. In respect to MKRF submitted a one page

photocopy of DFID Department for International Development dated 17.01.2012, wherein it is stated that the proposal for media campaign submitted by Mir Khalil Ur Rehman Foundation has been approved by DFID Pakistan as an Accountable grant. The appellant has not submitted any agreement and final proposal document. The one page photocopy in itself is an insufficient document to claim any exemption and the appellant has not explained as to how and why MKRF is entitled to exemption, when no documents have been provided or submitted despite the fact that the appellant has claimed self exemption. In the exemption notification SRB-Leg(1)/2011 dated 1st July, 2011 – at Sr. No.2 – reads as Advertisement financed out of funds provided under grant in aid agreements – respective subheadings of heading 98.02. The appellant neither explained nor substantiated as to how the advertisement pertaining to M/s MKRF fall in the category of advertisement financed out of funds provided under grants in aid agreement. Next, the appellant in respect to M/s US Aid has claimed exemption in respect to services of advertisement stating that it is grant in aid vide notification No.SRB-Leg(1)/2011 dated 01.07.2011. We see that no proper agreement from US Aid has been placed on record which would show that the services have been rendered under grant in aid and are exempt. The respondent on the other side has placed on record, copy of letter addressed to Chairman, Sindh Revenue Board dated January 2017 wherein, it is written that “the Economic Affairs Division (EAD) has advised US Aid to reach out to the relevant provincial tax authorities to establish a system that will allow smooth processing of exemption requests for provincial level taxes imposed on US Aid financed activities”. As reported by the Assistant Commissioner that the Sindh Revenue Board has so far not taken any action on the said request made to the Chairman Sindh Revenue Board. Thus, in view of the foregoing we cannot hold that the services as claimed by the appellant are exempt.

11. The contention of the appellant that services rendered to Aurat Foundation, Green Star Social Marketing, DG Health Punjab are exempt from Sales tax for the reason that the advertisement are in the nature of public service message. The respondent placed reliance on the judgment of the Honorable Appellate Tribunal in AT-80/2014 dated 19.10.2017 at paragraph 9.6, wherein it is stated that “No exemption is available to the public service messages advertised on TV channels. For all purposes the said public services messages are advertisements telecast against consideration and are liable to tax. The appellant has also telecast the advertisement against consideration and has charged tax from 5% to 16% and is liable to deposit tax. Furthermore, the appellant has no authority to claim exemptions on behalf of some other party who is liable to pay tax. The pleas of exemption vide Boards Notification referred above is not available to appellant. The appellant being service provider is liable to charge sales tax which was charged and received by the appellant and the appellant is liable to deposit the same with SRB under section 16 of the Act.”

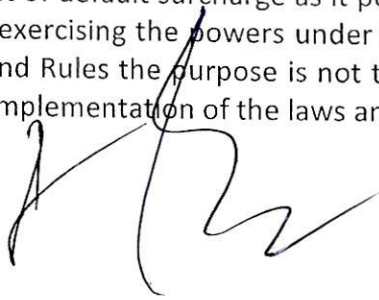
The appellant's emphasis on the contents of the advertisement that it was a public service message and not promoting any product. The advertisement is aired on the appellant's channel TV to say that advertisement services are not rendered / provided has remained inexplicable on the part of the appellant, no doubt time slot is sold but sold to render advertisement services as falling under tariff heading 98.02. The tariff sub heading 9802.1000 reads as 'advertisement on TV, which means that the advertisement services have been provided by the appellant. The

legislature is not short of words and to attribute meanings to words / phrases not intended is not justifiable. The appellant has used a phrase but not defined a public service message and why a public service message is not an 'advertisement' as consideration for displaying the same has been paid. There is no provision in the Act or Rules that the taxability of 'advertisement services' is made subject to the contents of the advertisement. It is not out of context to add that during the subsequent tax period the appellant declared the advertisement services to DGPR Punjab as taxable. The respondent has placed on record printed copy of sales tax on services returns for tax period June 2016 and January 2017 wherein the appellant M/s Apna TV Channel (Pvt.) Ltd. have shown that Sindh Sales tax is charged to DGPR Punjab and the same are shown in the SST returns submitted by the appellant with SRB and placed on record of the file, the SSToS Act, 2011 has remained same and it thus shows that the appellant have taken a turn from their own previous stance. The respondent's contention is duly substantiated with documentary evidence on record.

12. Here we draw attention to Punjab Sales Tax on Services Act, 2012 Schedule II at Sr. No.2 Advertisement on television and radio excluding advertisements.....(c) conveying a public service message if telecast on television by the world wide fund for nature (WWF) a United Nations Children Fund (UNICEF). It will be seen that even the Government of Punjab is not exempt and it is a specific exclusion whereas, there is no such exclusion given in the SSToS Act, 2011.


Thus in respect to Annex II the outstanding amount of Sindh Sales tax is Rs.532,624/-. In respect to Annex III and IV the recipients are Ministry of Health, Director Health, UNICEF, Privatization Commission. An amount of Rs.48,000/- shown as reconciled in respect of recipient named Group M as the invoice is related to Production Bill which was not taxable prior to July, 2014. No exemption is provided to public service message and proper economic activity occurred by issuing invoices and charging amount for advertisement. Before concluding the point we like to cite a few examples which will further show / explain that it comes squarely under 'Advertisement' and give an insight that it is not the 'contents' but 'purpose of communicating' as shown on different TV channels namely Geo News channel advertisement wherein 'it calls for serious action against harassment of women at work places' at the 'left hand corner of the screen' the word 'advertisement' is displayed. Given by the government of Punjab.

13. In view of the foregoing discussions, we do not find any reason to interfere with the order in original and order in appeal but only to the extent of the amount having been reconciled. However, if the appellant deposits the Sindh sales tax amount of Rs.3,872,504/- within thirty days of the receipt of this order extreme leniency will be shown as special case, penalties would not be required to be paid by the appellant and in so far as the amount of default surcharge is concerned, we recommend that SRB may kindly consider exempting at least fifty percent (50%) of the amount of default surcharge as it pertains to the initial stages of coming into force of the new law by exercising the powers under Section 45 of the SSToS Act, 2011. In implementation of the Act and Rules the purpose is not to create hardship but at the same time ensure proper and timely implementation of the laws and rules framed thereunder.



14. Thus, the impugned order in appeal is partly modified to the above extent only as detailed in the preceding paragraphs.

15. The appeal is disposed of in the above terms.


(Muhammad Ashfaq Balouch)
JUDICIAL MEMBER


(Razia Sultana Taher)
TECHNICAL MEMBER

Karachi

Dated:22.05.2018

Certified to be True Copy

Copies supplied for compliance:-

1. The Appellant through authorized Representative.
2. The Assistant Commissioner (Unit-), SRB, Karachi.

Copy for information to :-

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


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD