

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD

Appeal No.AT-65/2014

M/s Sukkur Beverages (Pvt.) Ltd. Appellant

VERSUS

1/ Commissioner (Appeals), SRB, Karachi and
2/ Assistant Commissioner, SRB, Sukkur Respondents

Mr. Shahzad Nizam, Advocate and
Mr. Nabil Ahmed Khan, Advocate For the Appellant

Mr. Irfan Ahmed Sohu, Assistant Commissioner, SRB, and
Mr. Siddique Soomro, Assistant Commissioner, SRB, Sukkur For the Respondents

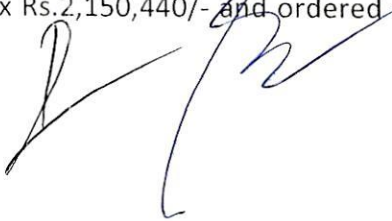
Date of hearing 17.04.2018
Date of Order 23.04.2018

ORDER

Ms. Razia Sultana Taher: This appeal has been filed by the appellant challenging the order in appeal No.81/2014 dated 19th June, 2014 passed by the Commissioner (Appeals) in appeal No.90/2013-14 dated 21.02.2014 confirming the Order-in-Original No. 11 of 2014 dated 30.01.2014 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 withholding agent in terms of Sindh Sales Tax Special Procedure (Withholding) Rules, 2011 and required to deduct the amount of sales tax mentioned in the invoice issued by the service provider from the payment due to service provider and make payment to SRB and also required to enroll with SRB as Withholding Agent and make payment of taxes so withheld. The appellant in their income tax return 2011-2012 declared that they paid Rs.95,141,842/- involving Sindh Sales tax Rs.15,222,694.00 for advertisement services received but they failed to withhold and deposit sales tax on such services. A show cause notice was issued to explain why the Sindh Sales Tax amounting to Rs.15,222,694.00 should not be recovered from M/s Sukkur Beverages (Pvt.) Ltd. Sukkur.

3. The concerned Assistant Commissioner in the order in original No.11/2014 dated 30.01.2014 observed and concluded that after having gone through the submissions verbal and written and reconciliation of record, the appellant were liable to Sindh Sales tax and per subrule (2) Rule 1 and subrule (4) of Rule 3 of Sindh Sales Tax Special Procedure (Withholding) Rules, 2011 (hereinafter referred to as SST Sp. Procedure Rules, 2011) liable to withhold and pay / deposit an amount of Sindh Sales Tax Rs.2,150,440/- and ordered for recovery of the sales tax



Rs.2,150,440/- under Section 47 of the SSToS Act, 2011 along with default surcharge (to be calculated at the time of payment) under section 44 of the SSToS Act, 2011 and imposed penalty of Rs.107,522/- under section 43(3) of 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 advocate of the appellant submitted that Income tax returns cannot be made basis to charge Sindh sales tax. The show cause notice was based on receiving advertisement services but no advertisement were received, that in the order in original it has been alleged that Sukkur Beverages has in fact received advertisement amounting to Rs.13,440,250/- which involve Sindh Sales tax amount of Rs.2,150,440/- . The advocate argued that even if it is assumed that the calculation of tax was sum of goods mentioned in paragraph 5 of the order even then the amount does not come to Rs.13,440,250/-. Furthermore, heavy reliance has been placed on tariff heading 98.02 of advertisement without mentioning sub-heading, it is not a speaking order. The advocate submitted that mentioning of publicity material, it is not services but goods and the same is not taxable under the SSToS Act, 2011.

The advocate drew attention to the contents of the show cause notice, submitting that allegation against the appellant is that the same are withholding agent and from the income tax returns it is alleged that the appellant received advertisement services. The show cause notice and order in original invokes Sindh Sales Tax Special Procedure (Withholding) Rules, 2011 - Rule 1(f), sub-rule 2 of Rule 2 tariff heading 98.02. He further submitted that there was no reconciliation on the part of the appellant and no reasons have been given for reduction of the amount from Rs.95,141,842/- to Rs.13,440,250/- and stressed that the show cause notice issued is based on income tax returns. The advocate cited two reported judgment 2004 PTD 901 and 2003 PTD 1477.

as per the income tax.....sales tax on such services comes to Rs.15,222,694". The advocate in order to support the argument drew attention to Return of Total Income Tax to Sr. No. 54 wherein amount for advertisement is shown Rs.98,141,842/- and against this amount the respondent issued show cause notice to appellant and an amount of Rs.15,222,694/- was initially asked by SRB to pay Sindh Sales tax. Documents were exchanged between the parties. the appellant explained that this amount is not for advertisement services it includes publicity / promotion and again cited paragraph 2 of the order in original wherein, the appellant had given the breakdown of Rs.95 million, showing them as products and not services. The show cause notice does not mention the period of Sindh sales tax and the amount of Sindh sales tax. At last paragraph of order in original, the amount of Sindh Sales tax is shown but the appellant has not been made a party to the reconciliation and no basis have been shown for the amount of Rs.13,440,250/- the order in appeal is also silent on the crucial point penalty imposed in order in original and upheld in order in appeal. The income tax return cannot be utilized by SRB to tax under SST law. Advertisement have different heads and no sub-heading has been shown in the show cause notice and it is only shown as falling under tariff heading 98.02. No details is given in the order in original where from the amount of Sindh Sales tax was reduced to Rs.2,150,440/-.

The appellant cited case laws 2004 PTD 901 Karachi High Court. The income tax returns were used to levy Sindh Sales Tax on Services on the basis of income return – The advocate referred to page 73 of appeal to Commissioner which reads at para

8(1). (i) *The Customs, Excise & Sales Tax Appellate Tribunal, Islamabad Bench-II, Islamabad, in Z.U. Enterprises, Daska vs. Collector, Sales Tax, Gujranwala (Sales Tax Appeal No.398/2000 decided on 01.11.2011, held;*

“... but this does not authorize the department to use the data or information and figures supplied by the businessmen in their Income Tax Returns to be made the basis for assessment of sales tax liability. The Tribunal has already adjudged this issue (vide judgment dated 08.02.2010 rendered in Appeal No.35/IB/99 in the case of Awan Sports Industries (Pvt.) Ltd.”.

And further submitted that Article 10(A) of the Constitution was infringed as order in original is not clear, not fairly written and no fair trial was given to the Appellant while determining tax liability from income tax returns.

6. The respondent in parawise comments submitted that appellant was issued show cause for non withholding of Sindh Sales tax required to be deducted for the service provider who provides services to the appellant under Sindh Sales Tax Special Procedure (Withholding) Rules, 2011. The stance taken by the appellant that they have not received advertisement services under tariff heading 98.02 and not liable to deduct and pay tax on the same, on the contrary the details provided by the appellant confirms so. An amount of Rs.86,820,290/- has been excluded in order in original, the amount being the value of goods (deep freezers and visis coolers) received from Cool Industries. The appellant admitted having purchased mega sign board and other items including wages which were used for advertisement of the company brand are covered under the definition of advertisement services. The respondent submitted that the payments deducted and deposited at the rate of 6% clearly shows that the same have been paid for services received by the appellant. That during the said period the appellant declared goods and services under section 165 of the Income Tax Ordinance and failed to provide some invoices for reconciliation. The respondent in written reply submitted that registration made with FBR in itself that does not justify that appellant violates withholding rules and further added that show cause notice and order in original are not based on Income tax but the entries made in the income tax return used for assessment of service tax which the appellant failed to deduct and pay with SRB, and demand created from the services received by the company. The letter of the appellant dated 31.12.2013 shows the tax calculation, the tax amount was reconciled by the concerned officer after scrutiny of the record provided by the appellant. The respondent reiterated that the appellant failed to deduct and pay tax under the Sindh sales tax on receiving advertisement services falling under tariff heading 98.02 and the advertisement services so received are taxable as per the definition of advertisement under Section 2(2) and the show cause notice issued under section 47 of the SSToS Act, 2011 can be used for recovery of tax either from the service provider or from the service recipients who are liable to pay Sindh Sales tax but failed to pay the same.

7. The respondent continued that the liability of the appellant had been created under Rule 1(f) of the Withholding Rules 2011, the show cause notice is based on the services

received by the appellant and not on deduction of 3.5% or 6% of Income tax deduction. The rate of 3.5% shows the deduction made against the goods and the rate 6% shows the deduction made against the services received by the company. The invoices submitted by the appellant shows that they have received taxable services and provided all records except some invoices like the amount paid to the labour etc or advertisement. The company purchased signboards to display advertisement so that they will receive advertisement services but failed to explain the position to the respondent. The appellant provided record to the adjudication officer who reconciled the amount and to confront the appellant seemed not required.

The respondent stated that appellant has misinterpreted the Withholding Rules, 2011, Rule 2(f) treated a withholding agent for the recipient of advertisement services either the company registered with FBR or SRB. The appellant have to register with SRB under the category of the brand name "Dew" and have paid Royalty charges to Franchisor hence the appellant is a service provider and withholding agent. The paragraph 2 of the show cause notice mentions the tax period and the taxable services of advertisement are also evident from the invoices provided by the appellant. The appellant have failed to follow the procedure of Sindh Sales Tax Special Procedure Withholding Rules, 2011 and have to act as withholding agent. The tax has not been levied on the basis of income tax or any accounting record. The details of invoices provided by the appellant showed that they have received advertisement services. The case pertains to the period 2011-2012 and the same is mentioned in the show cause notice and order in original.

8. We have heard the learned advocate of the appellant and perused the record made available before us. Before proceeding, we would like to place on record that the respondent has mostly remained absent, sending adjournment applications and it has also been observed that the Assistant Commissioner representing the department in the instant case have not shown any interest and no arguments except for the parawise comments have been forwarded by the respondent and the appeal case has remained pending since April, 2016. We are thus left with no option but to proceed on merit on the basis of available record.

The learned advocate of the appellant presented the argument stating that the show cause notice only gives the tariff heading 98.02 and no further sub classification has been followed and that the respondent has taken the amount of advertisement from the Return of total income / Statement Of Final Taxation under the Income Tax Ordinance, 2001 (for company). The said amount appears at Serial No.54 against the head items it is shown as Advertisement / publicity / promotion and the amount against the item appears as Rs.95,141,842/- for the tax year ending 30.06.2012. The said amount of Rs.95,141,842/- is given in the show cause notice thereafter it stands reduced to Rs.13,440,250/- in the order in original. The appellant denies any reconciliation of the amount with the respondent but from the record it is observed that the appellant at one stage admitted to providing the data to the respondent. The appellant argued that the show cause notice does not give the tax period and the tax amount. Perusal of the show cause notice shows that although the amount of Rs.15,222,694/- appears as Sindh Sales tax but the period is written as per the income tax return 2011-12, it thus answers to the argument of the appellant that the respondent has firstly not given the period under the SSToS Act, 2011 and that no data other than the income tax return is available to the respondent and that the calculation of sales tax receiving the advertisement services has been taken from the income tax return. The next contention of the appellant that reconciliation having been

reached by the respondent without taking the appellant on board, the same is also apparent from the parawise comments on record of the respondent. Furthermore, there is no basis to show as to where from the amount of Sindh Sales tax was taken or reduced to Rs.2,150,440/-. As seen the documents on record pertains only to Income tax. The show cause notice and order in original do not detail / discuss contents of the invoices, if any. We observe that on pages 99 and 101 of the paper book the appellant has drawn a statement which shows that an amount of Sindh Sales tax can only be imposed upto Rs.198,159/- this gives some insight to the fact that some reconciliation may have been in process between the parties but the same has remained unexplained due to denial on the part of the appellant and absence on the part of the respondent. In here, it was required of the respondent to determine what exact services have been received by the appellant and not simply restricting that the appellant paid 6% as tax on services.

9. In view of the above discussions we feel compelled that the assessing officer / respondent re-examine the case with complete classification duly clarified and substantiated. Both parties are directed to reconcile the amount and in support produce relevant and complete documents. We therefore, in exercise of powers vested in the Tribunal as provided under (b) of subsection (5) of Section 62 of the SSToS Act, 2011 set aside the order by the Assistant Commissioner, SRB and the Commissioner (Appeals) and remand the case to the concerned Assistant Commissioner to confront the relevant documents to the appellant, determine the classification and the amount of the Sindh sales tax payable, after providing full opportunity of hearing to the appellant and pass a speaking order. The exercise will be completed within 60 days from the date of receipt of this order.

10. The appeal is disposed of.



(Muhammad Ashfaq Balouch)
JUDICIAL MEMBER



(Razia Sultana Taher)
TECHNICAL MEMBER

Karachi

Dated:23.04.2018

Copies supplied for compliance:-

1. The Appellant through authorized Representative.
 2. The Assistant Commissioner, SRB, Sukkur.
- Copy for information to :-
- 3) The Commissioner (Appeals), SRB, Karachi.
 - 4) The Deputy Commissioner (Legal), SRB, Karachi.
 - 5) Office Copy.
 - 6) Guard File.

Certified to be True Copy



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