

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD

APPEAL NO. AT-123/2015

M/s Allied Rental Modaraba Appellant

Versus

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

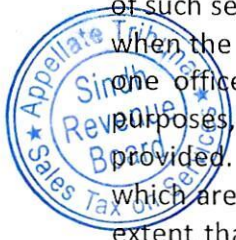
Ms. Asra Rauf, FCA and
Mr. Farhan Mohib, ACA For the Appellant

Ms. Lubna Najmi, AC, Mr. Tarique Ali, AC and
Ms. Umi Rubab, Assistant Commissioner, SRB Karachi For the Respondents

Date of hearing 20.02.2018
Date of Order 06.03.2018

ORDER

Razia Sultana Taher: This appeal has been filed by the appellant challenging the order in appeal No.16/2014 dated 25.02.2014 passed by the Commissioner (Appeals). The said order of Commissioner (Appeals) in the latter part of the paragraph 97 at page 53 (there is no paragraph numbered as 98 and the subsequent paragraph bears No.99) reads as "Therefore, any services initiated, rendered and consumed outside Sindh, the services tax liable for providing such services should not be collected by SRB as it belongs to the tax collection authority under whose jurisdiction such services fall. The learned counsel of the appellant was asked to provide the list of the clients to whom they are providing services outside Sindh. They submitted the list of such service recipients who are non-resident and receiving services outside Sindh, thereupon when the learned counsel was asked that how all the financial transaction are taking place from one office at Karachi. They responded that this is because of the financial and accounting purposes, whereas, they have established offices outside Sindh where from the services are provided. In view of the above, this office holds that, the SRB is authorized to collect SSToS which are initiated and rendered in Sindh, therefore, the para-8 of the ONO is amended to the extent that in the first instance M/s Allied Rental Modaraba shall be liable to pay the due tax amounts for the services which are initiated and rendered in Sindh and that amount as per the record provided during the hearing procedure rests upto Rs.76,488,117/- and the tax @ 16% for this amount shall be Rs.12,238,098/- and the AC-SRB is directed to recover the amount of Rs.12,238,098/- without imposing penalties and default surcharge. Moreover, the amount of services initiated and rendered outside Sindh amounting to Rs.83,715,648/-.



I hereby set aside the same with the direction that the Commissioner-I himself shall look into all the agreements signed for providing such services and thence only the further necessary action can be initiated as per law but at this point in time the recovery of the amounts of the services initiated and rendered outside Sindh cannot be undertaken as the AC-SRB could not establish these amounts as the amounts liable to be paid with the Government of Sindh head of account "B-02384".

2. In short, the facts of the case as stated in the order in original are that during the course of desk audit it was revealed that the appellant are engaged in providing / rendering taxable services in respect of Modaraba and Musharika Financing falling under tariff heading 9813.3900 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as SSToS Act, 2011). Further stating that Financial Statement showed that the services amounting to Rs.160,203,765/- as 'operation and maintenance income been provided and the appellant had filed 'Null' return for the tax period from July 2011 to June 2012. That appellant was liable for short paid amount of Sindh Sales Tax under Section 47(1A) of the SSToS Act, 2011. The concerned Assistant Commissioner in the order in original No.160 of 2013 dated 12th July, 2013 observed and concluded that the appellant is engaged in providing / rendering taxable services falling under tariff heading 9809.0000 'Contractual Execution of Works or Furnishing Supplies' of the Second Schedule and made reference to SRB Notification No.SRB-3-4/3/2011 dated 26th August, 2011 read with Notification No.SRB-3-4-9/2011 dated 6th October, 2011 and established liability of Sales tax amounting to Rs.25,632,602/- along with default surcharge and imposed penalty of Rs.1,281,630/- under clause 3 of Section 43 of the SSToS Act, 2011.

3. The said order of the Assessing Officer was challenged by way of filing of appeal before the Commissioner (Appeals) SRB. The learned Commissioner (Appeals) directed the Assistant Commissioner to recover an amount of Rs.12,238,098/- without imposing penalties and default surcharge. The details of the order in appeal are highlighted in paragraph 1 of this appeal order.

4. During the course of hearing the appellant's counsel Ms. Asra submitted that since the initial SCN dated 15.03.2013 was illegal all proceeding on that basis are illegal and the same was rightly annulled by Commissioner (Appeals). The show cause notice dated May 2013 was issued under tariff heading 9809.0000 and under section 47(1A). The definition came in Act in July 2014 since then the appellant are paying the same. Ms. Asra Rauf states that the show cause notice issued under section 47(1A) dated 15.03.2013 was defective, that income was received from operation and maintenance which falls under tariff heading 9822.2000 of the Second Schedule to the SSToS Act, 2011 i.e. Maintenance or cleaning. The same was not then taxable. The respondent department thereafter issued another show cause notice in continuation dated 20.05.2013 and classified the services as falling under tariff heading 9809.0000 'Contractual Execution of Work and Furnishing supplies'. The appellant counsel submitted that the appellant provides maintenance and cleaning services to their clients even after sales of the item. The same involves maintenance of heavy machinery and cleaning of equipment owned by the customers. It is not a major overhauling. The appellant got registered in July 2014 under tariff heading 9822.2000 of the Second Schedule to the SSToS Act, 2011 since it became taxable. It was brought from 1st Schedule to 2nd Schedule in July 2014. The appellant has submitted copy of agreement 'operation and maintenance contract' dated 11.07.2012 to 31.05.2013. That

Section 47 (1A) has been wrongly applied and the show cause notice is defective. It is not a case of section 47(1A) of the SSToS Act, 2011, the proceeding prescribed as per the section can only be invoked in the case of collusion, abetment, deliberate attempt, misstatement, fraud, forgery or false or fake documents. The counsel drew attention to the Commissioner (Appeals) order in appeal pages 47-48 paragraph 88, invocation of section 47(1A) was annulled as this office had found the appellant was not guilty of committing any of the reasons prescribed under section 47(1A) and the Commissioner (Appeals) classified under tariff heading 98.13 at paragraph 92. Both 98.13 and 9809.0000 are subject to tax @ 16%. According to the direction given by the Commissioner (Appeals), the amount in the order in appeal was enhanced as against the amount given in the show cause notices dated 15.03.2013 and 20.05.2013 but no notice was given to the appellant for enhancement. The counsel submitted copy of Appellate Tribunal's order in M/s APM Terminal Pakistan Ltd. V/s Assistant Commissioner in Appeal No.17/2013. She argued that again at paragraphs 93 to 94, the Commissioner (Appeals) stated that tariff heading 9809.0000 is relevant and directed the assessing officer to reassess the quantum of services on the basis of each contract and determine the taxability in the light of SRO SRB-3-4/9/2011 dated 6th October 2011.

5. Ms. Asra the appellant's counsel in counter reply to ground No.1 submitted that the Commissioner (Appeals) order is bad in law as stated by the Assistant Commissioner because as the services of Modaraba & Musharika are exempt under Rule 30(2) of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as SSToS Rules, 2011), she added that the ground infact supports the appellant in ground No.5 of the appeal. The appellant has contested the taxability under heading 98.13. Commissioner (Appeals) adjudicated that Section 47(1A) is not applicable – reference to paragraph 88 of Order in Appeal and the Commissioner (Appeals) could not have given adverse finding after having accepted that section 47(1A) was misapplied and the AC respondent has wrongly argued the said ground.

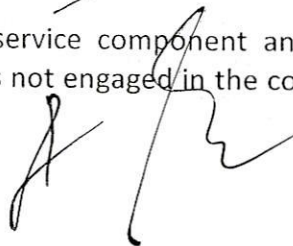
The learned appellant's counsel submitted that as regards two show cause notices being issued to the appellant, under first show cause notice, the services is shown as falling under tariff heading 9813.3900 and in subsequent SCN dated May 2013, the respondent classified under tariff heading 9809.0000. The case law submitted by the AC during the hearing is not relevant to the facts of the case because the 2nd SCN was fixing the new date of hearing. Whereas in the present case before the Tribunal, the SCN issued addressed different tariff headings for the taxability of the receipt of the appellant. The counsel contended that Commissioner (Appeals) held the 'services of operation and maintenance' of the appellant as classifiable under tariff heading 98.13 services, reference invited to paragraphs 89-90 of the order in appeal. In the present appeal, the appellant contests the action of the Commissioner (Appeals) who enhanced the levy of SST on all activities of the appellant beyond the show cause notice and without adopting the proper process of law as given in section 59(3) of SSToS Act, 2011. The powers have been incorrectly exercised by the Commissioner (Appeals) as this issue was not confronted during appeal proceedings.

The learned counsel submitted that the Commissioner (Appeals) during proceedings of appeal had required submission of documents Form 29, Memorandum and Articles of Association, the AC considers that the said documents if provided during the proceedings would have assisted in

concluding the nature of taxability of the services. These documents are not applicable in the case of modaraba company which was also intimated during the case before the Tribunal.

6. The main document in the case of modarabas company is the Prospectus, the same was provided during the proceedings and is also accepted by Commissioner (Appeals) in order in appeal at page 49, paragraph 89 (last part). Further submitted that for ascertaining the nature of the services and the location at which the services were provided, the relevant copies of Operation and Maintenance Agreements were provided to the Commissioner (Appeals) and then concerned Assistant Commissioner. A break up of services given in Sindh and outside Sindh was also provided. This is a case where the appellant is a listed company in Stock Exchange and the information is available with the SECP, Stock Exchange website, company website and the Financial Statement of this listed company also gave the location of the business conducted at various parts of the country. The appellant's counsel stated that under the law modaraba is not required to have memorandum and articles of association and relevant law on the said point would be submitted. She added that Commissioner (Appeals) has not appreciated that operation and maintenance income of the appellant falls under tariff heading 9822.2000. The AC in his arguments made grounds which were not submitted led the department to not be able to ascertain the nature of actual services rendered. Ms. Asra submitted that the appellant has always contended that its services fall under tariff heading 9822.2000 and this has been communicated to the department since its registration in July 2011 but this particular service was exempted and was included in the 2nd Schedule effective from 1st July, 2014 from this date of taxability of the service the appellant has discharged its tax liability. It is also substantiated from the fact that after the addition of entry maintenance and cleaning 9822.2000 in the 2nd Schedule through Sindh Finance Act, 2014, a notice was issued by the AC (unit-8) SRB dated 03.06.2015 requiring the company to get registration under the said tariff heading. The said notice was responded vide letter dated 12.06.2015 and copy of the letter is submitted which shows that they are charging SST on the maintenance and cleaning after the insertion of tariff heading 9822.2000 in Second Schedule to the SSToS Act, 2011. Here we see that the AC in his arguments has not commented on the correspondence and maintained the earlier position and has also incorrectly commented that the appellant is involved in repair work of the equipment and thus the entry of cleaning and maintenance falling under tariff heading 9822.2000 is not applicable. The nature of the appellant work involves the routine operation and maintenance of the equipments owned by the clients. The entry 9809.0000 is also not applicable in view of the earlier arguments made before this Tribunal and decision on the interpretation of the said entry submitted during the earlier proceedings in the case of APM Terminal Pak (Pvt.) Ltd. by the Appellate Tribunal SRB. The learned appellant's counsel submitted that the appellant had filed 'Nul' returns since July 2011 in view of the stance that the service is not taxable therefore, as an alternate ground it was argued that if it is held by the Tribunal that the service is taxable for this period, then the relevant input may be directed to be allowed and the SST liability be also directed to be recovered as a tax fraction as provided under section 2(93A) of the SSToS Act, 2011.

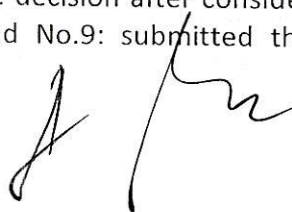
In the case of appellant there is only a service component and the provision of goods / component is missing hence the appellant is not engaged in the contractual execution of work,



individually the contract value as provided during the proceeding does not exceed Rs.10 million and the value of each service contract is less than Rs.10 million.

7. The respondent represented by Assistant Commissioner submitted that Commissioner (Appeals) was not vested with the powers to remand the case for further inquiry to an officer of SRB and referred to sub section 2 of section 59 and section 58(5) of the Act and further stated that the Commissioner (Appeals) can exercise powers under sub-section 5 of Section (58) of the SSToS Act, 2011 but could not remand the case for denovo consideration as provided under sub-section 2 of Section 59 of the Act. That the appellant has stated that Section 47(1A) had been misapplied whereas the said section had been rightly applied because the department had checked from the Financial Statement and the agreements submitted by the appellant which showed that the appellant are engaged in providing services under tariff heading 9809.0000 of the Second Schedule to the SSToS Act, 2011 'Contractual Execution and Furnishing Supplies'. The definition of Contractual work is given in parawise comments it includes nomenclature of the words 'repairs & maintenance and the assets got to be transferred back to client when the work done. The argument presented by the appellant that such services are taxable under tariff heading 9822.0000 is baseless for the reasons such head defines only the cleaning standards not the repairing work which they have been rendering to the clients, thus the aforesaid services are taxable as falling under tariff heading 9809.0000 of the Second Schedule. In reply to the grounds taken at No.3, the respondent explained that the letter of the office dated 20.05.2013 was a continuation to the show cause notice dated 15.03.2013, wherein the appellant was confronted that they are providing contractual execution services and cited the judgment of the Honorable Supreme Court in PLD 2006 Supreme Court 209, AC Airport Lahore v/s Messers Tripple-M (Pvt.) Ltd.

Taking the argument of the respondent as regards grounds Nos.4 & 5: The Assistant Commissioner submitted that Commissioner (Appeals) had rightly ordered in paragraph 89 of Order in Appeal that services fall under Second Schedule are taxable, no enhancement was made by Commissioner (Appeals) in other activities of the appellant. In response to ground Nos.6 & 7: the respondent's representative stated that the Form 29 is given by SECP when a company is registered. The Commissioner (Appeals) sought Form-29 from the appellant, the appellant failed to provide copy of memorandum / articles of association, these documents are relevant to the case because Form-29 narrates the actual address of the appellant. The address identifies the locations / place of the appellant where the services are rendered. Besides Memorandum and Articles of Association define the scope of the business of the company beyond this limit the company cannot operate and the article of association provides additional function of accounts / audit of the company. The said documents having not been submitted raised such grounds as the actual nature of the services, i.e. contractual execution of services would have been justified. The respondent submitted that in reply to ground No.8, the appellant had contended that Commissioner (Appeals) had lapsed the notification No.SRB-3-4/4/2011 dated 6th October 2011 and notification No.SRB-3-4/3/2011 dated 11th August, 2011 in interpreting the provisions written therein but Assistant Commissioner submitted that Commissioner (Appeals) had ordered the decision after considering the provisions in aforesaid notifications. As for response in ground No.9: submitted that the services of contractual



execution are taxable since July 2011 if the appellant had paid Sindh Sales Tax then could have claimed input tax, in the subject tax periods. It is also written in their contract that the modaraba shall be responsible for providing installation of heavy machinery and operation and maintenance of the same. The appellant have said that Commissioner (Appeals) has erred in interpreting the exemption under notification No.SRB-3-4/3/2011 dated 26th August, 2011. The exemption is allowed if the total value of the contract does not exceed Rs.50 million in a financial year and the component of services does not exceed Rs.10 million. In this case the total value exceeds Rs.10 million.

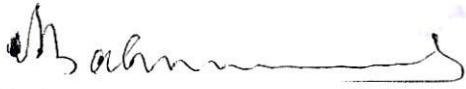
8. We have heard the learned representatives of both sides. The appellant's counsel submitted that the show cause notice had been issued under section 47(1A) of the SSToS Act, 2011 and the respondent classified the services rendered by the appellant as falling under 9813.3900 and subsequently under tariff heading 9809.0000 of the Second Schedule to SSToS Act, 2011 whereas the appellant had provided the services of 'operation and maintenance' falling under tariff heading 9822.2000. The said service was not then taxable. The appellant registered with SRB in July, 2014 when it became taxable under tariff heading 9822.2000. It is seen that Commissioner (Appeals) had annulled the invocation of Section 47(1A) of the SSToS Act, 2011 against the appellant but upheld the classification of the services as falling under tariff heading 9809.0000. Furthermore in the latter portion of paragraph 98 of the order in appeal set aside the services rendered outside Sindh with directives to the Commissioner-I that he shall look into all the Agreements but the respondent department has challenged the directives of the Commissioner (Appeals) that he had no authority. The appellant has also, challenged that Commissioner (Appeals) had enhanced the amount in the order in appeal as against the amount in the show cause notice, but have not provided the details of the enhancement of the said amount (if any). Taking the arguments of the appellant that the respondent issued two show cause notices, it is seen that the subsequent letter No.SRB-Com-I/AC-V/MOD/Allied Rental/6224/2011 dated 20th May, 2013 begins with 'In continuation to the show cause notice No.SRB-Com-I/AC-V/MOD/AlliedRental/ 5359/2011 dated 15.01.2013' it thus shows that it is in continuation to the show cause notice but here the services rendered have been classified as falling under tariff heading 9809.0000 of the Second Schedule to the SSToS Act, 2011. Furthermore, it also appears from the directives of Commissioner (Appeals) to Commissioner-I that the assessing officer had not done the homework properly and the task of taking proper and complete details remained unfinished and escaped at the level of the assessing officer.

The respondent submitted no explanation on the version of the appellant's counsel that appellant got registered with SRB in July 2014 and the Assistant Commissioner (Unit-8) had issued letter No.SRB-Com-I/AC-unit-08/MC/2015/1763 dated 3rd June, 2015 to the appellant where the subject reads as "payment of Sindh Sales tax on maintenance or cleaning services (tariff heading 9822.0000) under Sindh Sales Tax on Services Act, 2011". Thus it remains that the core issue involved in this appeal is the proper classification of the services rendered / provided by the appellant. The forums below have not determined the exact nature and thereafter classification of the service on substantive ground and taken refuge as falling under tariff heading 9809.0000 of the Second Schedule to the SSToS Act, 2011.

9. In view of the aforesaid discussions, we feel it is necessary to provide proper opportunity to the appellant to produce all relevant and detailed documents upon which he has placed reliance and the respondent to examine the same. We therefore, in exercise of powers vested in the Tribunal as provided under clause (b) of subsection (5) of section 62 of the SSToS Act, 2011 set aside the orders by the Assistant Commissioner SRB and the Commissioner (Appeals) and remand the case to the concerned Assistant Commissioner to determine the nature of service and determine the proper classification of service provided or rendered by the appellant after providing due opportunity of hearing to the appellant. The exercise will be completed within sixty days from the date of receipt of this order.

10. The appeal is disposed of.

11. The order in appeal case No.AT-123/2015 disposes of Appeal case No.35/2014 as there remains no cause of action.



(Muhammad Ashfaq Balouch)
JUDICIAL MEMBER



(Razia Sultana Taher)
TECHNICAL MEMBER

Karachi

Dated:06.03.2018

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.

Certified to be True Copy



REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD