

(Guard file)

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-1

APPEAL NO. AT-16/2016

M/s Asif & Company.....Appellant

Versus

Chairman, SRB, Karachi.....Respondent

Date of hearing: 04.12.2018 and 10.01.2019

Date of Order: 23.01.2019

Mr. Amjad Javed Hashmi Advocate and Mr. Yousuf Ali Advocate for appellant

Mr. Sanjay Kumar, AC-SRB for Respondent

ORDER

Justice (R) Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order-in-revision No.1 of 2016 dated 27.01.2016 passed by the SRB Board, in a revision under section 56 of the Sindh Sales Tax on Services Act, 2011 annulling the order-in-revision No. 1 of 2015 passed by Commissioner-II (Ms. Naheed Azhar), SRB, Karachi.



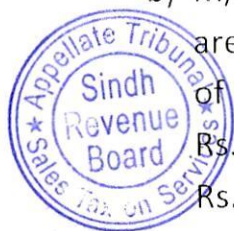
In short, the facts of the case as stated in Order-in-Original are that the appellant is registered with SRB and is providing or rendering taxable services of contractual execution/construction falling under Tariff heading No. 9809.0000 and 9824.0000 of the Second Schedule of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act), which are chargeable to sales tax under section 3 of Sindh Sales Tax on Services Act, 2011, at 16% w.e.f. 1st July, 2011.

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2. It was alleged in the order-in-original that the scrutiny of tax profile of appellant revealed following violation of the Sindh Sales Tax on Services Act, 2011.

a) M/s Asif & Co. did not file sales tax returns for the period July, 2011 to June, 2013, despite the fact that they were engaged in providing taxable services of construction/contractual execution of work during the tax periods noted supra, which is clear violation of their liability under the Sindh Sales Tax on Service Act, 2011 identifying these services under specific tariff heading 9809.0000 subject to Sindh Sales Tax @ 16% since July 2011 read with sub section (1) & (2) of Section (3) of Sindh Sales Tax on Services Act, 2011. Whereas the income tax withholding statement filed by M/s CM Pak, M/s Huawei Technologies Pvt. Ltd, M/s Relcom Pakistan Pvt. Ltd., Pakistan Telecommunication Co. Pvt. Ltd, M/s Zhongxing Telecom Pakistan Pvt. Ltd., M/s Augree Pakistan Pvt. Ltd, M/s Karachi Memon Co-operative Housing Society Ltd, M/s National Telecom Corporation, M/s Asia Integrated technologies Solution Pvt. Ltd, M/s NERA Telecommunication Pvt. Ltd and office of the DCO Khairpur etc. revealed that they received the taxable services from appellant during the tax year 2012 & 2013. Whereas, as per income tax returns of the tax year 2012 and 2013 filed with FBR appellant had provided the taxable services of construction/contractual execution valuing to Rs.254771185/- & Rs.140,240,012/- totaling to Rs.395,011,197/-.

b) M/s Asif & Co. by way of not getting registration despite the fact they are liable to be registered as defined in sub-section (71) of Section 2 of the Act, 2011 and non-filing of returns/not declaring services of Rs.395,011,197/- have not paid/short paid the sales tax amounting to Rs.63,201,791/- which is still outstanding and not paid by the M/s Asif & Co. against the taxable services for the tax periods July 2011 to June 2013 which is in violation of section 2(71), 3, 4, 5, 8, 9, 17, 24 & 30 of Sindh Sales Tax on Services Act, 2011 and rules made thereunder.



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3. The appellants were called upon to show cause as to why the tax liabilities for Rs.63,201,791/- may not be assessed and recovered under section 23 and 47(1A) of the Sindh Sales Tax on Services Act, 2011 in addition to the liability of default surcharge under section 44 of the said Act-2011 and penalties under section 43 of the Act.
4. The appellant filed written reply dated 06.04.2015 in which it was stated that alleged services of Rs.395,001,197/= were majorly performed in Baluchistan which falls outside the domain of Sindh. It was further stated that the appellant performed construction services as a civil contractor which is exempt from levy of sales tax. The appellant further states that effective from 26 February, 2014 it was registered with SRB since it has started performing services in Sindh.
5. The Assessing Officer after hearing the Appellant passed the order-in-original levying sales tax amounting to Rs.39,007,016/= against the value of services provided in Sindh amounting to Rs.243,793,848/= along with default surcharge (to be calculated at the time of payment) and imposed penalty of Rs.1,950,351/=.
6. The appellant instead of filing appeal under section 57 of the Act challenged the order-in-original by way of filing Revision No.1 of 2015 before the Commissioner II- SRB under section 55 of the Act, who allowed the Revision and cancelled the order-in-original treating it arbitrary, harsh and against the principle of natural justice.
7. The SRB-Board under section 56 of the Act took notice of the order-in-revision in Board Meeting No.05/2015 dated 29th October, 2015 and vide Agenda No.10 decided that Chairman should issue a show cause notice to the appellant. In pursuance of decision of Board show cause notice dated 10th November, 2015 was issued to the appellant under the signature of the then Chairman, SRB. The appellant submitted written reply dated 23rd December, 2015 and challenged that the show cause notice is without jurisdiction, arbitrary, malafide, issued in exercise of powers in excess of jurisdiction, since it travelled beyond



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the scope and reach of section 56, the construction work/services undertook in Baluchistan fell outside the territory of Sindh, and construction of Shaheed Benazir Bhutto Park was undertaken at Khairpur in 2009, prior to promulgation of Act, 2011. Not finding the explanation to its show-cause notice satisfactory and for the reason recorded on the revision order under section n56 of the Act Board setaside the revision order of the Commissioner-II passed under section 55 of the Act, thus restoring the order in original passed by the AC. Hence this appeal before us.

8. The learned advocate for the appellant also challenged the jurisdiction of the Board and has taken other legal points which were decided by this Tribunal vide earlier order dated 24.11.2016.
9. During the pendency of appeal before the Tribunal the Assessing Officer was directed to reconcile the matter. The Final Summary of Reconciliation was filed on 04.12.2018 according to which the value of services provided in Sindh was Rs.243,793,848/= and payable amount of Sindh Sales Tax is Rs.5,122,400/= instead of Rs. Rs.39,007,016/= assessed by the Assessing officer.
10. Mr. Amjad Javed Hashmi Advocate for the appellant submitted that this appeal is filed against the order dated. 27.01.2016 passed by the SRB, Board on a revision application filed by the department against the order dated 4th May, 2015 passed by Commissioner-II SRB, Karachi in a revision filed by the appellant against the order-in-original No. 215 dated 10.04.2015 passed by Deputy Commissioner, SRB assessing tax of Rs.39,007,016/= along with default surcharge and penalty of Rs.1,950,351/= under serial No.3 of Table of Section 43 of the Act.
11. Mr. Javed Hashmi submitted that the appellant has provided services under tariff heading 9809.0000 (Contractual execution of work or furnishing supplies). The services were provided under a contract executed some times in 2009 for construction of Benazir Bhutto Park, District Khairpur. He then submitted that the tax was demanded in



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respect of payment received after 1st July, 2011. He also submitted that after passing of the order-in-original and order in revision SRB issued Notification No.SRB-3- 4/16/2016 dated 29.08.2016 exempting the projects which were funded out of Annual Development program and that notification has retrospective effect and also applies to the tax periods involved in this appeal. He then submitted that the assessing officer has created tax demand of Rs.39,007,016/= and after reconciliation dated 04.12.2018 the tax liability was reduced to Rs.5,122,400/= and after issuance of exemption notification the appellant is not liable to deposit or pay any tax.

12. Mr. Javed Hashmi further submitted that under the conditions of Exemption Notification the appellant has obtained certificate from the Executive Engineer, (Buildings) works and services department, Kharipur, No.HC/a-148/336 dated 21.03.2018 certifying that the payment has been made wholly and exclusively out of funds provided to the department under the Annual Development Program (ADP). He then submitted that the department without any cogent and plausible reason refused to accept this certificate and insist upon providing the certificate signed by the Secretary of (Buildings) works and services Department, Government of Sindh. He then submitted that the appellant fulfills all the conditions laid down in the exemption notification and despite the request of the appellant dated 01.09.2018 and 06.11.2018 to Secretary no exemption certificate has been received and the appellant is suffering due to in action of the Secretary of Government of Sindh. He also submitted that the certificate is only required to see whether the project was funded out of Annual Development Program and the certificate produced by the appellant is sufficient proof that the project was funded out of Annual Development Program. He also submitted that the certificate issued by the Executive Engineer be taken as issued by the Secretary under the doctrine of purposive construction.

13. Mr. Hashmi in alternate submitted that with in the ratio decided by the Honorable Sindh High Court in the case titled as ABAD the very



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nature of work deals with construction of immovable property fixed on the ground does not fall within the ambit of services. He also submitted that the contract was for delivery of goods, which are tangible and fixed on ground recognizable by five senses as against the services which within the cumulative dictate of section 2 (79) read with section 2 (48) in its character has to be intangible in-storable and instantly perishable, which is not available in the instant case.

14. Mr. Javed Hashmi further submitted that in his earlier submission he had already challenged the passing of order in revision by the Chairman of the Board without fulfilling the requirements provided under law, which was decided by this Tribunal by earlier order dated 24.11.2016. He supported the order of Commissioner-II and submitted that the assessment order was rightly set aside.
15. Mr. Sanjay Kumar the learned AC submitted that the Assessment Order (order in original) was cancelled by Commissioner-II without issuing notice to the Assessing Officer and without providing any right of hearing to the department.
16. Mr. Sanjay Kumar further submitted that the exemption certificate submitted by the appellant is not in accordance with clause (ii) of the exemption notification and is not admissible. He then submitted that certificate has not been signed by the Executive Engineer but someone else signed the said certificate and for availing exemption the conditions have to be strictly construed. He then submitted that appellant has also failed to meet sub clause (b) (c) (d) and (e) of clause (ii) of the exemption notification. He then submitted that the appellant has provided taxable services in Sindh under tariff heading 9809.0000 (Contractual Execution of work and furnishing supplies) and is liable to pay Sindh Sales Tax. He then submitted that the appellant is also not entitled to claim benefit of SRO dated 08.03.2012 and 18.06.2013 as the appellant has not met the requirements to qualify exemption. He submitted that to earn exemption under these notifications the appellant has to show that the value of work and supplies does not



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exceed fifty million in a financial year subject to the condition that the value component of service in such contract also does not exceed 10 million rupees.

17. Mr. Yousuf Ali place on record work order of Zong limited dated 17.09.2012 and invoice dated 17.09.2012 for Rs.267,000/= involving Sales Tax of Rs.42,720/= and submitted that the duty of payment of tax is on withholding agent/recipient of service to the extent of 20% and remaining is on the provider.
18. Mr. Sanjay Kumar submitted that the service was provided in Sindh and since the appellant has not charged tax on the invoice the entire liability of payment of tax is upon the service provider/ appellant and this amount of tax is included in the final reconciliation submitted today. He supported the order of the Board and submitted that the assessment order cannot be setaside without providing right of hearing to the Assessing Officer.

We have heard the learned representatives of the parties and perused the record made available before us.

19. After hearing the parties it appears that the points in issue are 1) whether the assessment order can be setaside without providing hearing to the Assessing Officer. 2) Whether the appellant is entitled to claim exemption under Notification No.SRB-3- 4/16/2016 dated 29.08.2016.



20.

It is not disputed that the appellant is providing services under Tariff Heading 9809.0000 under which head the tax was assessed to the tune of Rs.39,007,016/= along with penalty of Rs.1,950,351/= and default surcharge. The order in original No.215/15 was challenged before Commissioner-II (Ms. Naheed Azhar) in a Revision filed by the appellant under section 55 of the Act of 2011. As per the order in revision the said revision was filed on 17.04.2015 and was allowed on 04.05.2015. The Commissioner-II in the order held that the appellant

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has provided services outside Sindh and the services on account of construction of Shaheed Benazir Bhutto Park was performed in the year 2010 and that the DC inadvertently considered the service receipts at Rs.230.213 (m) instead of 50.231 (m). The relevant portion is reproduced as under :

"Further, in respect of the tax levied on the services in Sindh Province on account of construction of Shaheed Benazir Bhutto Park, the AR contention seems to be in order that the DC has inadvertently considered the service receipts at Rs.230213 (m) whereas as per the work order No. DCO/SD/KHP-015/2009 dated 24.042009, the total cost of the project was only Rs.50,231 (m). Thus the DC wrongly and excessively taxed an excess receipt of Rs.179.982 (m). Besides I also find substance in the contention of the AR that the subject receipts earned by the Registered Person was not liable to tax for the reason that at the time of performing services and completion of job on the said project the Act, was not promulgated. An evidence in shape of handing over note issued by the concerned official of DCO Khairpur according to which the registered person had completed job on 12.10.2010 i.e. much earlier to the promulgation of the Act. The same is also obtainable on record".

21. The Commissioner-II though observed that DC inadvertently considered the service receipts at Rs.230.213 (m) instead of 50.231 (m) has without any reconciliation annulled the assessment order. The Commissioner-II also ignored the assertion of the appellant in Reply to Show Cause Notice from which it is clear that some services have been provided in Sindh and also ignored the Chart in the order in original mentioning the services provided or rendered in Sindh. The Commissioner-II conveniently ignored the Job Completion Certificate dated 21.02.2012 issued by DCO Khairpur certifying that the job was completed in February, 2012 with work order cost of Rs.230.231 Million. Commissioner-II in the order relied upon the Work Order dated 24.04.2009 without asking explanation from the appellant regarding the Completion Certificate issued by DCO, Khairpur mentioned in the said Chart.



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22. While allowing the revision the Commissioner-II held that "In view of the above, I found that tax levied by the DC through impugned order is arbitrary and harsh and is also against the principles of justice. Accordingly, I cancel the order passed by the DC in revision for being devoid of merit". From the order of the Commissioner-II it is apparent that the order in original was cancelled without issuing any notice to the Assessing Officer or to the department and without providing them a right of hearing which is in clear violation of Article 4 and 10A of the Constitution. The decision was also taken in violation of principle of natural justice and "*audi alteram partem* (no one can be condemned unheard). The principle requiring hearing to be granted to concerned person before condemned would applies to judicial, quasi-judicial and administrative bodies as held in Mall Square Resident Association, Karachi versus M/s Mall Developers (Pvt) Limited, Karachi, PLD 1997 Karachi 1. Furthermore where there is no specific provision for issuing notice before taking action against concerned person, in a statute, such provision is required to be read as part of the enactment unless the same was specifically excluded as held in Muhammad Arshad Jalil Versus Pakistan Defence Officers Housing Authority, Karachi, PLD 1992 Karachi 304. Section 55 of the Act does not exclude right of hearing. The Commissioner-II fell in error in cancelling the assessment order without issuing notice to the Assessing Officer/Department. The Assessment Order which is in favour of the department cannot be cancelled or setaside without first issuing notice to the Assessing Officer/Department and passing of order without hearing is against the principle of due process of law. A party in whose favour an assessment order was passed had a legal right that no adverse decision should be taken against him in violation of principle of natural justice.



23. From the order of Commissioner-II it is apparent that neither the record was called as contemplated under sub-section (1) of section 55 nor the notice to concerned Deputy Commissioner was issued nor he was heard nor the Commissioner-II reconciled the matter for the

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purpose of ascertaining the value of services provided or rendered in Sindh.

24. In the circumstances of the case the Board has rightly taken notice of the order passed by Commissioner-II under section 56 of the Act. Under section 56 of the Act the Board is authorized of its own motion, to call for and examine the record of any departmental proceedings under the Act or rules made there under for the purpose of satisfying itself as to the legality or propriety of any decision or order passed therein by an officer of the SRB other than the Commissioner (Appeals). Sub-section (2) of section 56 provides that if after examining the record under sub-section (1) the Board is not satisfied with the legality or propriety of any decision or order passed therein by an officer of the SRB, it may pass such order as it may think fit. The Board issued show cause notice to the appellant, which was replied by the appellant and after hearing the order of Commissioner-II was set aside. The operative part is reproduced as under:

"30. The tax payer, in his written reply, has contended that the Commissioner thought it fit to revise the order of section 23 due to paucity of evidence. Indeed, the order of revision of Commissioner has been made without any proper verification or evidences. No verification was made from concerned authorities in Khairpur and the order was passed in hurry without due diligence required in the case. Furthermore, no internal verifications were done by the Commissioner, for neither the adjudication record was called from the concerned Deputy Commissioner nor the Deputy Commissioner himself was called to appear before her during the revision proceedings. Therefore, the order of revision under section 55 by the Commissioner is found to be improper, hence, hereby quashed and the order of Deputy Commissioner restored".



25. We have carefully examined the order of the Board and do not find any illegality and infirmity. The Board by a speaking order and for valid reasons rightly quashed the order of Commissioner-II, SRB passed under section 55 of the Act.

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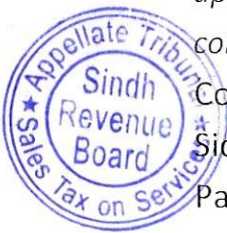
26. During pendency of the Appeal before the Tribunal the SRB issued Notification No. SRB--3-4/16/2016 dated 29.08.2016 providing exemption from payment of sales tax on the services procured by the Departments of the Government of Sindh, which are funded out of Annual Development Program (ADP) allocated by the Government of Sindh, subject to the conditions mentioned in the notification.
27. The appellant claims exemption under the notification dated 29.08.2016 and produced a Certificate dated 21.03.2018 from the Office of the Executive Engineer, Buildings works & Services Department, Khairpur, signed by Syed Nazir Shah without mentioning his designation. The learned AC objected that the exemption certificate submitted by the appellant is not in accordance with clause (ii) of the exemption notification and is not admissible. He also submitted that certificate has not been signed by the Executive Engineer but someone else signed the said certificate and for availing exemption the conditions of the notification have to be strictly construed. He then submitted that appellant has also failed to meet the conditions mentioned in sub clause (b) (c) (d) and (e) of clause (I) of the exemption notification.
28. We have perused the exemption notification dated 29.08.2016. Clause (i) provides that exemption under the notification shall be available in relation to the services specified in the table of the notification only if:
- (a) the service provider is registered with the Board, (b) the service provider issues tax invoices, (c) service provider e-files tax returns, (d) the service provider complies with the provisions of S-15 A of the Act, (e) department of Government of Sindh shall e-file the prescribed monthly returns. Clause (ii) provides for issuance of certificate by the Secretary of the respective Department in the prescribed form.
29. The appellant has produced the Certificate which is not in confirmatory with the condition prescribed (for issuance of certificate) in the exemption notification. The Certificate produced by the appellant was not issued by the Secretary of the concerned



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Department but the same was issued by the Office of the Executive Engineer, Buildings works & Services Department, Khairpur and signed by some Syed Nazir Shah without mentioning his designation and the department has rightly refused to accept the same. Apart from the certificate there are other conditions, which the appellant failed to meet. To avail exemption the appellant has to comply with all the conditions of the exemption notification in which it failed.

30. In the reported judgment in the case of Hashwani Hotels Limited Versus Government of Pakistan, 2007 SCMR 1131 it has been held that "11. It is settled law that grants or concession in the nature of exemption from payment of duties/taxes are to be given a rigid interpretation against the tax payer and in favour of the taxing power as held by this Court in the case of (i) M/s Bisvil Spinners Ltd. v. Superintendent Central Excise and Land Customs Circle Sheikupura and another PLD 1988 SC 370 and (ii) Pakistan Machine Tool Factory (pvt.) Ltd. v. Commissioner of Sales, Central Zone "B", Karachi 2006 SCMR 1577. It was thus, imperative for the appellant to have complied with all the conditions enumerated in the exemption notification for availing the benefit of exemption from payment of sales tax and payment of concessional customs duty". In the reported judgment in the case of The Federation of Pakistan versus M/s Delta Innovations Ltd. 2015 SCMR 1239 it has been held that "10. In the circumstances, and having already held that the parts/components being imported, by the respondent are chargeable to duty under PCT heading 87.11 and that concession under the SRO 436(I)/2001 shall only be applicable to the respondent in case he fully adhered to terms and conditions thereof". In the reported judgment in the case of Commissioner of Income Tax/Wealth Tax, Peshawar versus M/s River Side Chemicals (Pvt) Ltd. Gadoon 2008 PTD 1157 (Supreme Court of Pakistan) it has been held that "7.....There is no cavil to the proposition that the grant of concession in the nature of exemption from payment of duties must be given strict interpretation and the person getting such benefit must satisfy all conditions for such exemption but once the required conditions are complied with, the exemption available to a person under the law cannot be taken away by the concerned authorities in their discretion".



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31. The appellant has not complied with all the conditions mentioned in the exemption notification and the department has rightly not accepted the certificate produced by the appellant.
32. During pendency of the appeal before the Tribunal the appellant filed an application dated 19.12.2018 with the prayer to direct the Secretary of the Local Government & HTP Department to issue the prescribed certificate to the appellant. We have heard the learned representatives of the parties and considered the request. It is true that the appellant is suffering due to inaction on the part of the Government, but the Tribunal under section 62 of the Act has no powers to issue direction to the Government Departments. The application is dismissed.
33. As a result of final Reconciliation the appellant is liable to pay Sindh sales tax in the sum of Rs.5,122,400/=. If the appellant is entitled to exemption subject to compliance of the conditions under the Notification dated 29.08.2016 two month time is granted to the appellant to comply with the conditions of the notification. In case the appellant failed to comply with the conditions of exemption notification within two months from the date of this order the department may proceed against the appellant as per law.
34. As far as the penalties and default surcharge are concerned the same are not payable by the appellant for the reason that in the order in original it was alleged that appellant has provided service worth Rs.395,011,197/- and the order in original was passed determining the value of services provided in Sindh amounting to Rs.243,793,848/= involving Sindh Sales tax of Rs. 39,007,016/=. It is apparent that the show-cause notice was issued without proper care and due diligence and the tax payer was unnecessarily harassed by confronting a huge amount of tax, which was not payable. While imposing various types of penalties and default surcharge the Assessing Officer also failed to



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establish mensrea and malafide on the part of appellant. The superior courts in various judgments held that for imposing penalty the presence of mensrea is necessary (Pak Hard Castle Waud versus Dy. Collector Customs, Sales Tax and Central Excise, PLD 1967 SC 1), (Commissioner Income Tax versus Habib Bank Limited, 2007 PTD 901, DB of Sindh High Court) and (Collector Customs Versus Nizam Impex, 2014 PTD 498, DB Sindh High Court). The appellant is not liable to pay any penalty and default surcharge.

35. In view of the above the appeal is partly allowed. The order in original and order in revision (under section 56 of the Act) is maintained to the extent of payment of tax of Rs. 5,122,400/=.
36. The copy of this order may be provided to the learned representatives of the parties.


(Agha Kafeel Barik)
TECHNICAL MEMBER


(Justice Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi

Dated: 23.01.2019

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REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

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) Office copy
- 5) Guard file.