

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-1

APPEAL NO. AT-19/2016

M/S Independent Media Corporation (Pvt.) Ltd.Appellant

Versus

Commissioner (Appeals), SRB, KarachiRespondent

Mr. Ahsan Laliwala FCA, Advocate and Mr. Omair Ahmad, Tax Supervisor for
the Appellant

Mr. Zain Manzoor, A.C. for Respondent

Date of hearing 20.02.2018

Date of Order 20.03.2018

ORDER

Justice (R) Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order in Appeal No. 14/2016 dated 25.02.2016 passed by the Commissioner (Appeals) in Appeal No. 87/2015 filed against the Order-in-Original No. 206/2015 dated 04.04.2015 passed by the Assistant Commissioner-4 (Mr. Muhammad Yousuf Bukhari) SRB, Karachi.

01. In short, the facts of the case as stated in the Order-in-Original are that the appellant are registered with SRB and that it was observed that the appellant had provided taxable services of Advertisement to M/s Huawei Device, Hong Kong and had declared sales tax of Rs.13,508,868/= as withheld by the service recipients. It was further

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stated that the appellants were informed vide letter dated 25.08.2014 and 11.09.2014 that M/s Huawei Technologies Pakistan (Pvt) vide letter dated 09.01.2014 have informed the respondent that they have not received any advertisement services. The advertisement services were received by Huawei Device Hong Kong, who is a foreign entity and the payment was made inclusive of Sindh sales tax to the channels through foreign remittance by the said foreign entity. It was further stated that the appellant was provided with two opportunities to deposit the sales tax with default surcharge or attend the office along with withholding certificates and deduction certificates if the amount is withheld by service recipient.

02. That a show-cause notice dated 30.09.2015 was served upon the appellant to explain as to why Sindh Sales Tax of Rs.13,508,868/= with respect to the services provided to Huawei may not be assessed and recovered along with default surcharge and penalties.

03. The appellant filed written reply through M/s Anjum Asim Shahid Rehman, Chartered Accountant, wherein the appellant submitted that advertisement services were provided to the aforesaid company through Advertising Agent and the payments were received through local banking channel without Sindh sales tax. It was further submitted that the responsibility of Sindh sales tax lies upon the withholding agent and not on the service provider; therefore, further communication may be made with media agency.

04. The department in response to the reply vide its letter dated 13.10.2014 asked the appellant to provide requisite certificates along with payment evidence and banking instrument. In the reply dated 17.10.2014 the appellant has reiterated its earlier submissions. The department informed the appellant vide letter dated 28.01.2015 that a sum of Rs.816,693/= was reconciled and the balance amount of Rs.12,692,175/= was remained un-reconciled.



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05. That the appellant vide letter dated 04.02.2015 submitted invoice wise details of advertisement of Huawei and reiterated its earlier stand. The department vide letter dated 11.03.2015 requested the appellant to provide copies of banking instruments and bank statements in support of its stand that the payments were received without sales tax. On 26.03.2015 the appellant took the stand that the show-cause notice is time barred and reiterated its earlier stand that the payments were received without Sindh sales tax.
06. The Assessing Officer passed Order in Original on 04.04.2015. It was stated in the order in original that the appellant provided advertisement services M/s Huawei Device Hong Kong and had declared Sindh Sales Tax of Rs.13,508,868/= as withheld by service recipients. It was also stated that the aforesaid service recipient was non-resident person, therefore, appellant was required under section 9 of the Act of 2011 to deposit Sindh sales tax on the aforesaid service. It was also stated in the order in original that the aforesaid service recipient does not fall under the definition of "Withholding Agent". It was also stated that the reconciliation was made with the media agents and a sum of Rs.3,729,592/= (Deposited by Starcrest Advertising Agent) was reconciled out of Rs.13,508,868/= leaving a balance of Rs.9,779,276/=. It was also stated in the order in original that despite several opportunities the appellant failed to provide banking instruments, bank statement and Withholding Certificates and Tax Deductions Certificates as required under Circular No.2 of 2012 dated 05.03.2012. Finally the Assessment Order was passed in the sum of Rs.9,779,276/= along with default surcharge. The Assessing Officer also imposed penalties of Rs.293,378/= under serial No. 13 of Table of section 43 of the Act (for repeating offence for which a penalty is provided), penalty of Rs.80,000/= under serial No. 2 of Table of section 43 of the Act (for non-filing of true and correct sales tax returns) and penalty of Rs.488,963/= under serial No. 3 of Table of section 43 of the Act of 2011 (for violation of section 8 & 9 of the Act of 2011).



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07. Appellant challenged the order-in-original by way of filing of appeal before the Commissioner (Appeals) who dismissed the appeal and upheld the order in original to the extent of principal amount of Rs.9,779,276/= the default surcharge and penalty of Rs.488,963/= under serial No.3 of Table of section 43 of the Act of 2011. The appellant aggrieved by the order-in-appeal has filed this appeal.

08. Mr. Ahsan Laliwala the learned Advocate for the appellant on various date of hearings submitted as under :

18.04.2016

(i) The tax liability has been fixed on the basis of correspondence exchanged between SRB and Huawei Pakistan without providing such correspondence to the appellant.

(ii) The services have been provided to Huawei through advertising agents M/s Interflow and M/s Midas who have issued release orders to the appellant on behalf of Huawei Technologies (Pakistan) Limited herein after referred to as Huawei Pakistan and payment was received from advertising agents after deduction of tax and for the purpose of appellant the advertising agents being resident person were service recipient.



(iii) In all invoices issued to the advertising agents the tax was mentioned/charged, which was 100% withheld by the service recipient.

(29.08.2016)

(iv) All release orders were issued in the name of Pakistani Company. (On perusal of release orders it appears that on Release Orders issued by M/s Interflow the name of client is mentioned as M/s Huawei Technologies (Pakistan) Private Limited and on the Release Orders issued by M/s Midas the name of client is mentioned as Huawei Technologies.

11.11.2016

(v) Mr. Ahsan referred to the letter of M/s Huawei Pakistan to SRB and submitted that in the letter M/s Huawei Pakistan admitted

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that evidence of Rs.4,090,601/= out of total Rs.9,180,862/= was arranged and is in process of collecting remaining evidence.

20.09.2017

- (vi) The dispute is whether services have been provided to Huawei Pakistan or Huawei Devices Hong Kong. The contention of the appellant is that the service of advertisement were provided to M/s Huawei Pak through Agencies M/s Midas and M/s Interflow from whom the appellant has received the release orders (advertisements) and payment was recovered by the appellant through Pakistan Broadcasters Association from the two above mentioned agencies without tax.
- (vii) Mr. Ahsan referred to an undertaking of Huawei Pakistan and submits that according to this undertaking the tax amount was withheld by the advertising agents and the appellant being a service provider of advertisement service is not liable to deposit the tax and that the appellant by mentioning the tax amount in the invoice and by declaring withholding amount in Annexure "C" to the return has discharged his duties provided in the rules. He also referred to a letter dated 09.01.2014 (Chartered Accountant of Pakistani Company) and pointed out para 4 in which it was stated that the company has collected the information of alleged sales tax withholding amounting to Rs.4,059,020/- and a complete list along with copies of the invoices issued to Huawei Devices Hong Kong (HDHK) by M/s Midas is attached. Mr. Ahsan further submitted that the services have been provided to M/s Midas & Interflow on behalf of their clients and they are liable to withhold the amount of tax and to deposit the same with SRB.



20.02.2018

- (viii) Mr. Ahsan submitted that the issue involved in this appeal is whether the appellant has provided services to Huawei Devices Hong Kong through advertising agents M/s Interflow and Midas or to Huawei Technologies Pakistan.

M. Ahsan

(ix) Mr. Ahsan Laliwala submitted that all the invoices and release orders contains the name of M/s Huawei Technologies Pakistan and the Advertising Agents to whom invoices were sent were never objected. He then submitted that all the release orders issued by Advertising Agents contains the name of client as "Huawei Technologies" which is a Pakistani company and the responsibility of payment of tax is upon the service recipients and not upon the service provider. He then submitted that Huawei Hong Kong had paid gross amount on invoices including sales tax to advertising agents who are responsible to make payment to media-company.

09. The learned AC for SRB on various date of hearings submitted his reply submitted as under :

11.11.2016

(i) Mr. Asad Raza the learned AC submitted that the Pakistani Company has disowned the advertisements telecast by the appellant and submitted that no NTN number is mentioned on release orders and as per Active Tax payer list there are number of tax payers registered under the business name of M/s Huawei Technologies Pakistan Limited.

03.05.2017



(ii) Mr. Aamir Ali DC confirms that the department has received letter dated 09.01.2014. He submitted that from the letter produced it appears that the amount of Sales tax was paid to M/s Midas for onward payment to service provider and since the recipient of service is a non-resident under section 9(1) of the Act, the liability of payment of tax is upon service provider the appellant. On a question he submitted that the department has not questioned M/s Midas regarding the receipt of tax from M/s Huawei and its payment to appellant. He then submitted that since the service recipient is non-resident the Special Withholding Rules are not applicable.

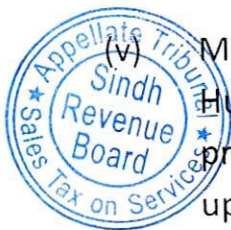
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- (iii) Mr. Aamir Ali after going through the undertaking of Huawei Pakistan submitted that earlier M/s Huawei denied to have received any services and there is also evidence that services were provided to Huawei, Hong Kong Device. He then submitted that this undertaking is without any stamp and no date and reference number is mentioned on the said undertaking.

20.09.2017

- (iv) Mr. Zain Manzoor, AC-SRB submitted that the appellant being service provider of advertisement services is required to produce withholding certificates from the recipients of service under sub-rule (9) of Rule 3 of Withholding Rules to show that service have been provided to a resident person who had already withheld the tax amount. He then submitted that in case of non-resident service recipients the liability to collect and pay tax is upon the resident service provider under section 9(1) of the Act read with Rule 3 of the Withholding Rules. He further submitted that from the available record it appears that services were provided to a foreign entity namely M/s Huawei Devices, Hong Kong who remitted the gross invoice amount including sales tax to advertising agencies i.e. Midas & Interflow.

20.02.2018



- (v) Mr. Zain Manzoor submitted that as per the agreements between Huawei Hong Kong and M/s Midas & Interflow the services were provided to a non-resident company and the responsibility was upon the service provider to collect tax and to deposit the same with SRB.

- (vi) He then submitted that M/s Huawei Technologies Pakistan has clearly denied regarding obtaining services of advertisements from appellant and that M/s Huawei Pakistan disowned the undertaking and submitted that the tax was paid to advertising agent.

10. In rebuttal Mr. Ahsan further submitted that advertising agents have received services as principal in their individual capacity and paid amount of services charges to the appellant and being recipients of service the advertising agents were responsible to pay the tax to SRB.
11. On a question Mr. Ahsan states that the appellant has not received any response from two advertising agencies regarding supply of withholding certificates.
12. Mr. Zain Manzoor informed that summons to provide information were issued to both advertising agents but till date no proper compliance has been made except that Interflow provided the Agreement between itself and Huawei Devices Hong Kong.

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

13. The main contention of the Id. Advocate for appellant is that the appellant is a service provider of advertising on TV and had received release orders from advertising agents and in all its invoices issued to the service recipients through agents the amount of tax was mentioned and the service recipients as per Withholding Rules were liable to withhold and deposit the tax with SRB. It was further stated that the appellant being service provider of service of Advertising on TV (tariff heading No. 9802.1000) is not liable to pay Sales tax and the responsibility to withhold and deposit of tax under the Special Procedure (withholding) Rules, 2014 (hereinafter referred to as the Withholding Rules) is upon the recipients of service. The case of the respondent is that the appellant has provided services to a foreign entity namely M/s Huawei Devices, Hong Kong and in case of services provided to non-resident service recipients the liability to collect and pay tax is upon the resident service provider under section 9(1) of the Act, of 2011. He then submitted that appellant being service provider of advertisement services is required to produce withholding certificates from the recipients of service under sub-rule (9) of Rule 3

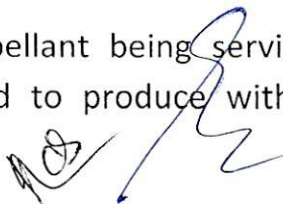


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of withholding rules to show that service has been provided to a resident person who had already withheld the tax amount.

14. The respondent has placed on record photocopies of the Agreements entered into between M/s Huawei Device (Hong Kong) Co., Ltd. and M/s Interflow Communications (Private) Limited and M/s Midas (Private) Limited. Perusal of record shows that the appellant had received Release Orders for telecasting advertisements from three advertising agents namely M/s Interflow, M/s Midas and M/s Starcrest. It appears that on Release Orders issued by M/s Interflow to the appellant the name of client is mentioned as M/s Huawei Technologies (Pakistan) Private Limited and on the Release Orders issued to appellant by M/s Midas the name of client is mentioned as Huawei Technologies. Factually the name of the client to whom services were provided through two advertising agents is M/s Huawei Devices (Hong Kong) Co. Ltd. Both the two advertising agents have shown to have acted on behalf of a non-resident person under separate agreements. It appears that the appellant was kept in dark regarding the actual service recipient and the deception was caused by the two advertising agents who failed to mention that the services from appellant have been obtained for a non-resident service recipient. M/s Huawei Technologies Pakistan Limited (HTPL) in para 2 of its letter dated 09.10.2017 addressed to Mr. Zain Manzoor, AC-SRB has clearly mentioned that *"HTPL is not the recipient of advertisement services. Its name is wrongly reported by the advertisement service providers. The service recipient is actually Huawei Device Hong Kong (HDHK) who does not have its presence in Pakistan"*. In the same letter it was further stated that *"Being a non-resident foreign entity not having a place of business in Pakistan. HDHK has paid gross amount of invoices including sales tax to the advertising agents who were responsible to further payments to the respective service providers"*.

15. It is true that appellant being service provider of advertisement services is required to produce withholding certificates from the



recipients of service under sub-rule (9) of Rule 3 of withholding rules to show that services have been provided to a resident person. But in this case the payment was received by the appellant from the above named two advertising agents through intervention of Pakistan Broadcasters Association and despite request of the appellant the advertising agents have failed to provide the certificates. The fact of not providing the withholding certificates and payment through Pakistan Broad Casters Association was confirmed by M/s Grant Thornton Anjum Rehman in its letter dated May 24, 2017 addressed to Mr. Amir Ali, DC-SRB. Mr. Zain Manzoor in his submissions submitted that from the available record it appears that services were provided to a foreign entity namely M/s Huawei Devices, Hong Kong who remitted the gross invoice amount including sales tax to advertising agencies i.e. Midas & Interflow.

16. From the statement of the learned AC it appears that the Advertising Agent M/s Starcrest has deposited the tax payable on the services obtained from appellant. From this fact also is it evident that the tax has been paid or transferred to the Advertising Agent for onward depositing the same with SRB.

17. The appellant being a TV Channel is a registered service provider of service of advertising on TV. By virtue of sub-section (1) of section 9 the service provider was liable to pay the tax. However the Board has issued Sindh Sales Tax Special Procedure (Withholding) Rules 2014 (hereinafter referred to as the Withholding Rules) in exercise of powers conferred by section 13 of the Sindh Sales Tax on Services Act, 2011 read with sub-section (4) of section 3, sub-section (3) of section 9, and section 72 thereof. Sub-rule (1) of rule 3 of the Withholding Rules provides responsibility of withholding agent. Sub-rule (3) provides that a withholding agent, other than a person or a recipient of advertisement service covered by clause (f) of sub-rule 2 of rule 1, shall deduct an amount equal to one-fifth of the total amount of sales tax shown in the invoice. This means that the recipient of service of advertisement is required to withhold the



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entire tax amount and to deposit the same with SRB. This position is clear from sub-rule (5) of rule 3 of the withholding rules, which provide that a withholding agent, who received the service of advertisement from a registered person, shall deduct the amount of sales tax as mentioned in the invoice or the bill issued by the service provider, from the payment due to service provider. From this rule it is clear that the service provider of advertisement service is not responsible to pay or deposit the tax and that the resident recipient of advertisement service is responsible to withhold entire amount of tax and to deposit the tax.

18. Now the question is who the service recipient is in this case. The services have been obtained by advertising agents M/s Midas, M/s Interflow and M/s Starcrest from the appellant for their non-resident client under agreements without disclosing to the appellant that the actual service recipient is a non-resident person. M/s Starcrest and the advertising agents M/s Midas and M/s Interflow acting under Agreement with M/s Huawei Hong Kong have obtained the services of advertisement from the appellant by issuing release orders in the wrong name and by making payment to the appellant through Pakistan Broadcasters Association. Clause 15.7 of the Agreements under which M/s Midas and Interflow were acted provides the relationship between M/s Huawei Hong Kong and M/s Midas and M/s Interflow which read as under:



15.7. Relationship of the Parties: The supplier and Huawei shall be deemed to have the status of independent entities and nothing in this Agreement shall be deemed to place the Parties in the relationship of employer-employee, principal-agent, partners or joint ventures". From this agreement it appears that both advertising agents under Agreement have acquired advertisement service from appellant independently and have acquired the status of service recipient. The advertising agents who have received services on behalf of their foreign clients do not fall within the definition of Agent provided in section 67 of the Act of 2011 and the Advertising Agents cannot act as agent of foreign clients. Both the advertising agents are deemed to be

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registered person under section 24 (3) of the Act for the purpose of tax periods in which such person (i) receives the service, (ii) an invoice for the value of service is sent to the person; or (iii) consideration for the service is paid by the person. In this case the two advertising agents M/s Midas and M/s Interflow received the service of advertisement by issuing release orders, invoices were sent to them by the appellant and consideration of services provided or rendered were paid to the appellant through Pakistan Broad Casters Association. From the discussion and perusal of the Agreement it is clear that the above two advertising agents have obtained services of advertisement from the appellant independently and are the actual service recipients in this case and are liable to withhold the tax and to deposit the same with SRB..

19. The appellant being service provider of advertisement services has discharged its responsibility by mentioning the sales tax on the invoices and it was the responsibility of the advertising agents (actual service recipients in this case) to withhold the tax and to deposit the same with SRB. Furthermore from the available record it appears that services were finally provided to Advertising Agents on behalf foreign entity namely M/s Huawei Devices, Hong Kong who remitted the gross invoice of amount including sales tax to advertising agencies i.e. M/s Midas & M/s Interflow as disclosed by Huawei Pakistan. The respondent had placed on record some invoices of M/s Midas issued to Huawei Device (Hong Kong) Co. Limited, which shows that amount mentioned on the invoices were inclusive of all taxes. This also shows that the advertising agents M/s Midas and Interflow are responsible to pay tax to SRB. Furthermore from the order in original it appears that the department has alleged tax liability of Rs.13,508,868/- from which a sum of Rs.3,729,592/- (Starcrest) was reconciled leaving a balance of Rs.9,779,276/-, this also shows that the tax has been transferred to Advertising Agent who withhold the same and deposited the same with SRB.

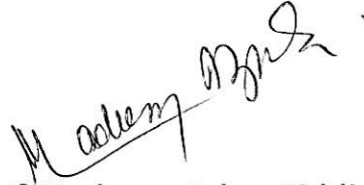


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20. In view of the above discussions this appeal is allowed and both the orders in original and in appeal are set aside. The department is at liberty to initiate action against the advertising agents if deemed appropriate.



(Agha Kafeel Barik)
Technical Member



(Justice[®] Nadeem Azhar Siddiqi)
Chairman

Karachi

Dated: 20.03.2018

Copies supplied to:-

1. The Respondent through Authorized Representative.
2. The Assistant Commissioner, SRB, Karachi.

Copy for information to:-

- 3) The Commissioner (Appeals), SRB, Karachi.
- 4) Office copy
- 5) ~~Guard file.~~

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