

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD

DB-II

APPEAL NO. AT-62/2016

M/s NAI GAJ DAM (JV) NIE SMABD LILLY RMS Appellant

Versus

Assistant Commissioner (Unit-03) SRB, Karachi. Respondents

Mr. Ayaz Ilahi Gajani Advocate For Respondent

Mr. Shoib Iqbal AC-SRB For the Respondent

Date of hearing 18.02.2019

Date of Order 28.02.2019

ORDER

Agha Kafeel Barik: This appeal has been filed by a Joint Venture an A.O.P. which is formed for construction of a dam on Nai Gaj River in Dadu / Baluchistan, against the order in appeal of Commissioner (Appeals) dated 08.08.2016, whereby he upheld the order in original dated 04.02.2016 in toto.

The facts of the case, briefly, are as under,

2. The J.V. comprises the following:

1. SMADB Construction group, through its Chairman and Group Member
2. M/s RMS (Pvt.) Ltd.
3. Lilly International (Pvt.) Ltd.
Party of the 1st part and
4. M/s North East Asia International Electric Power Corporation (a Chinese company having local office in Lahore). Party of the 2nd part.

3. The consortium entered into contract with WAPDA on 12.04.2011 for construction of NAI GAJ DAM on GAJ River in District Dadu in the sum of 38,792,138/- in subsequent four (4) financial years) It provided services worth Rs.5,023,448,017/- involving SST of Rs.753,517,293/-, during the period from July 2011 to June 2015, 4 financial years. According to the departmental version these services fall in the category of "contractual execution of work" under tariff heading 9809.0000 and "construction" under tariff heading 9824.0000 as these were rendered towards building of a Dam known as Nai Gaj Dam on Nai Gaj River. The department (SRB) therefore charged Sindh sales tax at Rs.753,517,293/= on the value of these services vide order dated 04.02.2016. For the sake of general interest and to know exact nature of work an extract from Dawn News is reproduced below.



"Gaj is a hill torrent that emanates from Khuzdar district of Balochistan and after passing through the plains of Kutch, eventually enters Manchhar Lake. The Nai Gaj area remains dry for eight months and gets water in four months during the monsoon. Nai Gaj flows often devastate flood protective bunds and inundate agriculture lands when Manchhar lake is not in a position to receive flows after attaining peak level during the monsoon. Monsoon water, after inundating agriculture lands and devastating houses and standing crops, falls into the sea and, as such, a huge amount of water is waster, the petition said.

Apart from serving as continuous flow of fresh water to Manchhar Lake, which will improve the ecology of the lake, the Nai Gaj dam will also serve as a lifeline for the people of this mountainous region with the potential of changing their socio-economic conditions.

The contract under consideration is towards the construction of a Dam on this river Gaj".

4. On the basis of information about the above economic activity Mr. Abdul Rauf, Deputy Commissioner, SRB issued a show cause notice on 20.01.2016 confronting the appellants on two main issues, namely non-registration with SRB and non-payment of SST on the services provided by the appellants to WAPDA during the period from July 2011 to June 2015. For ready reference the show cause notice is reproduced below:

"a) It has been found that M/s NEIE SMADB-LILLY-RMS JV (Joint Venture of M/s NEIE, M/s Sardar Muhammad Ashraf D Baluch, Lilly RMS) entered in contract / Agreement with M/s Water & Power Development Authority (WAPDA) through General Manager (Project) South WAPDA Hyderabad for construction of Nai Gaj Dam Project Dadu Sindh. Similarly M/s NEIE SMADB-LILLY-RMS JV (Joint Venture of M/S NEIE, M/s Sardar Muhammad Ashraf D Baluch, Lilly RMS) provided the taxable services of construction / contractual execution to General Manager / Project Director Nai Gaj Dam (South WAPDA), and project Director paid Rs.5,023,448,617/- involving sales tax Rs.753,517,293/- to M/s NEIE SMADB-LILLY-RMS JV (Joint Venture of M/S NEIE, M/s Sardar Muhammad Ashraf D Baluch, Lilly RMS) during the period July 2012 to June 2015. Despite fact M/s NEIE SMADB-LILLY-RMS JV (Joint Venture of M/S NEIE, M/s Sardar Muhammad Ashraf D Baluch, Lilly RMS) engaged in providing taxable services they failed to pay the sales tax returns and not getting themselves registered with SRB. Which is violation of section 2(71), 3, 4, 7, 9, 17, 24, 24A, 24B & 30 of Sindh Sales Tax on Services Act, 2011 and rules frames thereunder.

2. M/s NEIE SMADB-LILLY-RMS JV (Joint Venture of M/S NEIE, M/s Sardar Muhammad Ashraf D Baluch, Lilly RMS) are required submit the following record to make the assessment of tax due under section 23 of Sindh Sales Tax on Services Act, 2011 for the period July 2011 to Dec 2015.

a) Copies of Contracts / copies of Bills / Invoices

- b) Copies of work order.
- c) Copy of bank statement.
- d) Copy of Annual Audited Accounts.
- e) Copy of Article of Association / Memorandum.
- f) Details of services rendered / invoices issued.

"3. M/s NEIE SMADB-LILLY-RMS JV (Joint Venture of M/S NEIE, M/s Sardar Muhammad Ashraf D Baluch, Lilly RMS), being as service providers providing these taxable services of construction / contractual execution of work are required to fulfill the mandatory obligations of filing of true and correct monthly sales tax return as per section 30 of Sindh Sales Tax on Services Act, 2011 read with rule 12 of Sindh Sales Tax on Services Rules, 2011. M/s NEIE SMADB-LILLY-RMS JV (Joint Venture of M/S NEIE, M/s Sardar Muhammad Ashraf D Baluch, Lilly RMS) is also required make the payment of Sindh Sales Tax due under section 9 and 17 of Sindh Sales Tax on Services Act, 2011. Whereas M/s NEIE SMADB-LILLY-RMS JV (Joint Venture of M/S NEIE, M/s Sardar Muhammad Ashraf D Baluch, Lilly RMS) is failed to file the true and correct monthly sales tax returns for the tax period July 2011 to June 2015. This deviation or default from the referred statutory provisions of the Act-2011 and the Rules make the defaulter liable for penalties presented under Serial Number (2) and (3) of the liable under section 43 of the Act-2011 while repetition makes the defaulter liable for penalty under Serial Number (13) of Section 43 of the said Act.

"4. Therefore, M/s NEIE SMADB-LILLY-RMS JV (Joint Venture of M/S NEIE, M/s Sardar Muhammad Ashraf D Baluch, Lilly RMS), are hereby called upon to Show Cause as to why the tax liabilities of Rs.753,517,293/- 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. M/s NEIE SMADB-LILLY-RMS JV (Joint Venture of M/S NEIE, M/s Sardar Muhammad Ashraf D Baluch, Lilly RMS) are also required to explain why penal action under clauses (2), (3), (5), 6(d), 11, 12 and 13 in the Table of section 43 of the said 2011-Act, should not be imposed upon them for contravention of section 2(96), 3, 4, 5, 8, 9, 17, 30 & 52 of the Sindh Sales Tax on Services Act, 2011 and rules made thereunder.

The hearing in this case is fixed on 28.11.2016 at 11:30 a.m. in the office of the undersigned located at 12th Floor, Shaheen Complex, M.R. Kiyani Road, Karachi, when the said M/s NEIE SMADB-LILLY-RMS JV (Joint Venture of M/S NEIE, M/s Sardar Muhammad Ashraf D Baluch, Lilly RMS) may appear in person or through their authorized representatives to plead / defend their case and to answer all material questions relating to the case no one appears for hearing as per the aforementioned schedule and / or if no written explanation is submitted by above mentioned date, the case shall be decided ex-parte on merits without any further notice."

5. However, despite issuance of notices of hearing and providing several opportunities, none attended for the appellant. The AC finally passed an ex-parte order under section 23 / 47 and taxed all receipts amounting to Rs.5,023,448,617/- to SST at



Rs.753,517,293/-, beside imposing penalty of Rs.37,675,864/- under section 43(3) and Rs.100,000/- under Section 43(1) for not getting registered with SRB.

6. On appeal the Commissioner (Appeals) upheld the order in original in toto and dismissed appeal vide his order dated 08.08.2016. Hence this appeal before us on the following issues, raised in the grounds of appeal.

1. The appellant had signed a contract with WAPDA on 12.04.2011, the date on which SST Act 2011 was not even promulgated. Hence the contract cannot be subjected to any charge which was not charge at all material dates relevant to the date of contract.
2. There was no order under section 24B at the time of passing order in original and observation of Commissioner (Appeals) that order under section 24B stands passed before that is in correct.
3. Commissioner (Appeals) erred to hold that order under section 47(1A) / 23 for fraud etc. was a valid order.
4. Invoking all provisions of Section 23 and 47 in a consolidated order before complying with other conditions was not correct.
5. The Commissioner (Appeals) erred to hold that WAPDA is chargeable to tax on the ratio of the judgment of High Court in the case of KDA, but ignored the judgment of the Supreme Court in the case of CAA.

7. The learned AR submitted that while it is purely a government project the contract was signed by Member WAPDA, which is a government authority and that funds have been allocated by the government of Pakistan under annual P.S.D.P through project Implementation Agency WAPDA. The details of year wise allocation of PSDP up to 2018/19 were also filed during the hearing of the appeal and it was submitted that building water reservoirs / dams is sovereign function of the Federation of Pakistan thorough any implementation agency which in this case is WAPDA.

8. The learned A.R submitted written arguments on the issue of jurisdiction of the assessing officer and the service of show cause notice which he claimed was never served and so was the order-in-original dated 08.02.2016 which remained un served.

The learned A.R also objected to the use of two tariff heading in the show cause notice and order-in-original which is unlawful and argued that inference is also not allowed in law, and that the charge and the tariff heading has to be specific as held by the honorable High Court of Sindh in the case of ABAD cited as (2018) 118 Tax 117 (High Court Karachi)

9. The A.R also argued that the contract was entered on 12 April, 2011 which was before promulgation of Sindh Sales Tax on Services Act, 2011; hence the Act is not applicable to this contract/ agreement

Without conceding any ground and arguments the learned A.R submitted that even if Contract for Dam is taken / broken into various components same qualifies for exemption as per notification No, SRB-34/2013 Dated 18th June, 2013, which at Tariff Heading 9824.0000 at S.No (iii) exempts construction services of ROADS, BUILDINGS,



BRIDGES etc. of Government which are not for the purpose of commercial nature. It was submitted that the construction of Nai Gaj Dam is for the benefit of people of Sindh in General and people of Dadu District in particular which comprises of roads, buildings, powerhouse etc. The detailed breakup of the same was as under. In support thereof the detailed drawings were also submitted which were returned.

Detailed breakup of the project is as under.

1	Bridges on Spillway	17 Billion
2	Power House	4 Billion
3	Access Roads	0.4 Billion
4	Colony	0.5 Billion
5	DAM (consists of Overhand Roads)	5.0 Billion
6	Embankment includes Roads on top	5.0 Billion
7	Irrigation Network outside Dam.	<u>7.0 Billion</u>
		Total 38.27 Billion

10. The learned AC-SRB submitted that the argument of the A.R. that since the contract was signed before promulgation of the Act therefore it cannot be subjected to Sindh Sales Tax is incorrect. He argued that since it is an ongoing project and the contract did not complete by or before 01.07.2011 and continued till date, the Act would be applicable to it with effect from 01.07.2011.

11. With respect to registration of the appellant the learned AC claimed that since the appellant did not cooperate he was compulsorily registered under section 24 B. He also claimed that even otherwise the appellant who is a service provider is a registered person as defined in section 2 (71), which includes a "person who is liable to be registered under this Act."

12. About invoking the provisions of Section 23 and 47 simultaneously the AC argued that it was incorrect as the assessment was passed under section 23 and not Section 47 (1A)

It was also argued that the case of Civil Aviation Authority cited by the learned A.R was also distinguishable and that in this case Sales Tax is imposed on the appellant who is a service provider and not on WAPDA which is stated to be a government owned or controlled authority.

13. After hearing both the sides and after going through the record of the case our findings are as under.

1. The appellant being a service provider is under the Act responsible to collect tax from the recipient of service and pay it in the government exchequer under the provisions of section 8 read with section 3(1) of the Act.

14. The argument that since the contract was signed in April 2011, the Act promulgated on 01.07.2011 is not applicable, is neither logical nor sound. A law is applicable to all the acts and events which are taking place at the time of promulgation of such law. If an act or event reaches its logical conclusion on a certain date, it is not hit by the law enacted after that. However, an ongoing act or event does fall under the ambit of such law. Hence the contract to build a dam, which was signed in April 2011 but continued on and after 01.07.2011, is definitely hit by the mischief of SST on Services Act, 2011. In this context the judgment of the honorable Karachi High Court reported as 2007 PTD 1005 in the case of Molasses Trading and export Company (Pvt.) Ltd. & others is on all fours with the present case. The honorable court held that no vested right was created in favour of petitioner having entered into a contract prior to levy of duty to claim exemption from such duty. The honorable Court while citing the judgment of the honorable Supreme Court, reported as Government of Pakistan v/s Mohammad Ashraf and others, PLD 1993 S.C. 176 has observed that.”

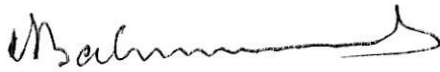
“their lordships reiterated the view, taken in several other precedents, that section 31-A of the Customs Act has effectively wiped out the principle of law declared in Al-Samrez case (1986 SCMR 1917) and that too with retrospective effect except in respect of past and closed transactions. They further held that the petitioners’ plea as to absence of power to levy regulatory duty under section 18 (2) was untenable inasmuch as abstention from exercising the delegated legislative power to impose such duty under section 18 at a given time or at the commencement of the financial year did not create any vested right in favour of party having entered into contract prior to levy of duty to claim exemption from such duty.” The argument of the AR on this point is therefore rejected.

15. As regards the claim of exemption, the plea taken by the learned AR without prejudice to all other grounds sounds to carry weight. He has claimed exemption under SRB Notification No.SRB-3-4/2013 dated 18.06.2013. However, the exemption is not without qualification and in its 5 clauses, from (a) to (e) of Para 2 various conditions are laid down. The learned AR also placed on record a latest notification No.SRB-3-4/3/2018 of 06.02.2018 and argued that the appellant qualifies for exemption. However, the learned D.R. Mr. Shoaib Iqbal AC-SRB objected, firstly as the said notification was issued after the passing of order in original and even after the order in appeal. He also argued that certain limitations and conditions are attached to qualify for exemption under this Notification. He also pointed out that the appellant has not fulfilled any of the 5 conditions laid downs (a) to (e) of para 2 of the notification.

16. In view of the above findings we deem it necessary to remand this case to the concerned assessing officer with the direction to the appellant to fulfill all the conditions as per said notifications within a period of 3 months from the date of this order. The AC-SRB having jurisdiction over the case will ensure that all these conditions are fulfilled

and will allow exemption accordingly. In case the appellant fails to fulfill any of the conditions in the said period of 3 months this appeal shall stand dismissed.

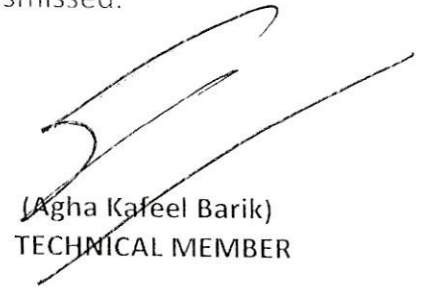
17. Appeal is disposed of as above.



(Muhammdad Ashfaq Balouch)
JUDICIAL MEMBER

Karachi.

Dated: 28.02.2019



(Agha Kafeel Barik)
TECHNICAL MEMBER

Certified to be True Copy

Copies supplied for compliance:-

1. The appellant through authorized Representative.
 2. The Assistant Commissioner (Unit-), SRB, Karachi.
- Copy for information to:-
3. The Commissioner (Appeals), SRB, Karachi. .
 4. Office Copy.
 5. Guard File.



REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on 08/03/2019

Registrar

Order Dispatched on 08/03/2019

Registrar