

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD

APPEAL NO. AT-78/2016

M/s S. Zia-ul-Haq & Sons Appellant

Versus

Assistant Commissioner SRB, Karachi. Respondents

Mr. Kaukab Sabahuddin, Advocate For Respondent

Ms. Nida Noor. AC-SRB, Karachi. For the Respondent

Date of hearing 25.10.2018

Date of Order 31.10.2018

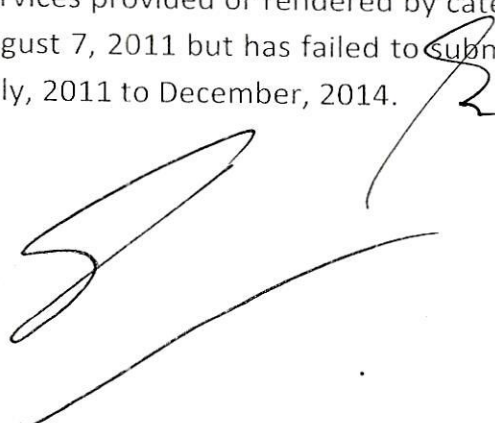
ORDER

Agha Kafeel Barik: This appeal is filed against order of Commissioner (Appeals) dated 30.08.2016 whereby he dismissed appeal against order –in-original dated 22.07.2015. The facts of the case are as under:

02. The appellant, a proprietary concern, was voluntarily registered with SRB under tariff code 9801.5000 as "Caterer" on 07.08.2011. incidentally, a private limited company, a sister concern of the appellant, with the name & stage of M/s S. Zia-ul-haq & sons (Pvt.) Ltd. too has been registered voluntarily with SRB on 21.08.2014 also under the category of caterer under tariff code 9801.5000.

03. The AC SRB, on scrutiny of business profile and tax profile of the appellant found that the appellant had neither filed tax returns under section 30 nor paid withheld tax in the government treasury on the services of "caterer," rendered to various foreign companies engaged in drilling & exploration of Oil & Gas in Pakistan. On the basis of this information he issued a show cause notice on 27.01.2015. The information he confronted in show cause notice was as under.

- (i) The Appellant got registered (voluntarily) with SRB under the principal activity of services provided or rendered by caterers, suppliers of food and drinks on August 7, 2011 but has failed to submit sales tax returns for the tax period July, 2011 to December, 2014.



- (ii) Further, information were called from the services recipient of Appellant and it has found that the Appellant failed to deposit the due SST, amounting to Rs.433,014,466/- with SRB under sections, 8,9 and 17 of the Act, 2011:
- i. ENI Pakistan Limited, vide A.F. Ferguson & Company latter No. DST 649 date January 15, 2015, stated that they have received catering or canteen services from Appellant involving sales tax, amounting to Rs.361,845,667/- . Appellant failed to deposit the sales tax amount with SRB under section 8 of the Act, 2011 read with section 9 and 17 of the said Act, 2011;
 - ii. BHP Petroleum Pakistan (Private) Limited have deducted income tax under section 153 (1) (b) of the Income Tax Ordinance, 2000 against the services provided or rendered by BHP Petroleum Pakistan (Private) Limited, thus sales tax amount of Rs.35,511,099 was found un-paid; and
 - iii. Tianjin China Petroleum, Exalo Drilling SA, Sea and Land Drilling contractor Inc., Marri Petroleum Limited and Mechanical Erection and Construction, in their sales tax returns filed for the tax periods November, 2014, reveals that they have adjusted input tax, amounting to Rs.3,657,700/-, against which the output tax was not paid by the Appellant.

04. The learned AR filed reply to the said show cause notice and stated that it was registered as manufacturer under Sales Tax Act, 1990 hence not liable to Sindh Sales Tax. The AC however, did not accept the explanation and passed order-in-original under section 23 on total tax of 433.014 million, besides penalty of 21,650,723/- under section 43 (2) and penalties 5,688,455/- under section 43 (3).

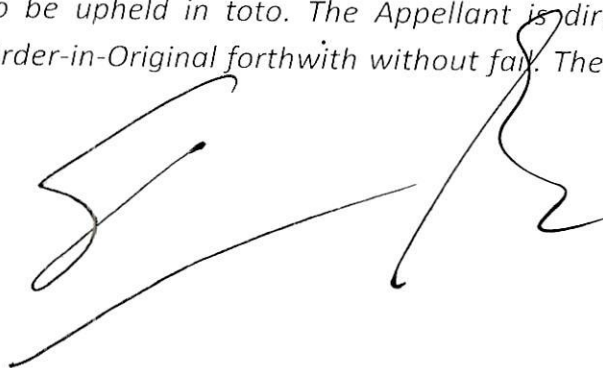
05. The Commissioner dismissed registered person's appeal with the following observation.

I have perused some of the invoices pertaining to supply of goods and also the services. The invoices show that the payment @ 17% on the supply of goods was made. The Appellant submitted that the tax on services have already been included in the 17 % of the amount deposited at FBR. In this regard it will be seen that it is immaterial if the Appellant has paid a tax on supply of goods on gross amount of invoices or the contracts inclusive of value of services. It does not in any way amount payment of tax on services at FBR. The Appellant may have claimed input credit from the FBR, the record of which has also not been provided by the Appellant. The service of catering were a vivisectable

element in its essence and no evidence of payment of services tax to any authority was produced by the Appellant. Even the Appellant voluntarily registered person and was liable to pay the tax on catering service and he could also get input credits against the supplies, supplies which too have not been done by the Appellant and now is facing embargo under the rules. The contracts, invoices and other record were also not provided. The person mentioned at Para (C) claimed input tax adjustment against the catering services of the Appellant and others mentioned at 1 (A) and 1 (B) provided information and record which clearly showed the receipts of catering services of a certain value by them from the Appellant. Further to this the Appellant was a voluntarily registered person but remained failed to file the monthly sales tax returns and did not disclose any service including the services against, as a matter of facts. In the situation the burden to prove otherwise was clearly shifted onto the Appellant and being a registered person he was liable to provide all the record and documents pertaining to the transaction in hand and was required to prove the case otherwise, if he was so certain, which he miserably failed. Reliance as to shifting of burden onto the Appellant is place on a Judgment of the Supreme Court of India reported in 1995 PTD 188, in the case of Commissioner of Income Tax (ADD1.) versus Jeevan Las Shah, in which the Honorable Supreme Court held that even a failure to declare a correct income in the return will cause shifting of burden onto the assessee.

"The appellant was also provided with sufficient time and opportunities to defend his case but he kept on hiding aback the uncalled for technical grounds not having force of law. Further to add, the Appellant did not cooperate in sprit and continuously kept on jumping from one stand to another from inception of the case and used every delaying tactics in order to delay and defeat the course of proceedings. By this display of its unique kind the malafides of the Appellant and mens rea to evade the tax can clearly be seen from proceedings carried so far. Even to my humble undertaking the violation and disregard to law is utter in nature and it is an abuse and a play with the process of law as provided by the legislature and attracts to attempt a tax fraud under section 2(94) of the Act, 2011 and the same should not be tolerated as the same resulted in waste of precious time with no outcome.

"In view of above circumstances and given reasons, the Order-in-Original needs no interference and is liable to be upheld in toto. The Appellant is directed to pay the amount established in the Order-in-Original forthwith without fail. The Respondent may



take steps for recovery of the public money upon receipt of this Order. Order accordingly.”

06. The appellant filed appeal before us raising the following issues.

06.1. The order-in-original is time barred as it was issued after a lapse of 176 days instead of 120 days. Extension of time to 60 days was neither mentioned in order-in-original nor communicated to the appellant, nor any reasons recorded. The Commissioner (Appeals) failed to discuss this issue in order-in-appeal.

06.2. No evidence supporting allegation leveled in show cause notice was provided by the AC SRB.

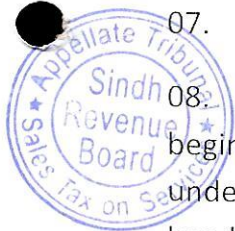
06.3. The appellant is engaged in manufacturing of portal cabins and also supply of steel containers as well as supply of food to various Oil & Gas exploration companies and these supplies etc. fall under sales tax Act, 1990 on which tax has been withheld as well as deposited by the appellant. It was stated that a sister concern M/s Zia-ul-Haq & Sons (Pvt.) Ltd. is engaged in providing catering services.

06.4. Impugned order-in-appeal by Commissioner (Appeals) decided on 30.08.2016 in appeal filed on 19.08.2015 is barred being finalized after lapse of 378 days.

06.5. The appellant never applied for registration, hence voluntarily registration is illegal as it was not communicated nor ID & Password was given to the appellant. The “A” had received 12 notices till 5.5. 2013 to get registered which is a proof itself that it was not registered in 2011 as it was already registered as manufacturer under Federal Sales Tax Act 1990.

07. After hearing both the parties our observations are as under:

08. There is no doubt about the departmental view that the appellant, from the beginning of its business, has been engaged in rendering catering services as defined under section 2 (21) of the Act and which are chargeable to Sindh Sales Tax under tariff heading 9801.5000 as “services provided by caterers, supplier of foods and drinks, as well as under tariff heading 9801.5000 (ancillary) services provided or rendered by hotels, motels, guest houses, restaurants, marriage halls and lawns, clubs and caterers). However, it is also a fact that the appellant has also made supply of porta cabins to the foreign Oil & Gas exploration, companies which are entirely a separate business transaction than catering service. The value of the supply of porta cabins is also quantified and is not part of catering business.



Two handwritten signatures in black ink, one on the left and one on the right, appearing to be the signatures of the parties involved in the appeal.

09. The appellant has been supplying various other items to its clients alongside catering service. But since these two services, catering and others have been invoiced together it is difficult to separate the same.

10. Before the promulgation of Sindh Sales Tax on Services Act, 2011 all these goods and services were chargeable to Sales Tax Act, 1990. But after 01.07.2011 the appellant was under legal obligation to pay sales tax on services to SRB, of government of Sindh. As ignorance of law is no excuse, the appellant cannot be spared only because it paid sales tax under Sales Tax Act, 1990 even after 01.07.2011.

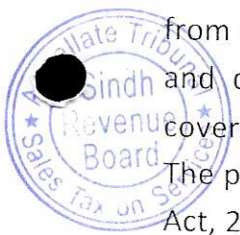
11. As to the plea of Appellant regarding his unawareness about his registration with SRB, the Respondent placed an email letter dated August 10, 2011, wherein Appellant itself admitted the fact of his voluntarily registration with SRB. The exact words of Para 1 of the letter are as under:

“In compliance to your letter dated 27.07.2011 regarding the enrollment of our company with the SRB. We have already got ourself enrolled with SRB and as there was an option on this registration forum of SRB only as event caterer’ we have clicked the sub-section of “processing and presuming meat,” as our main business activity is catering (services provider)”.

12. In view of above the contention of the learned AR is found baseless.

13. As to the plea of Appellant that the activity performed by him is covered under Sales Tax Act, 1990 and is not covered under the tariff heading 9801.5000, it is evident from perusal of the copy of agreement signed with Sea and Land Drilling Contractor Inc. and copy of invoice, that the activity provided or rendered by Appellant are fully covered under the tariff heading 9801.5000 of the Second Schedule of the Act, 2011. The plain reading of the definition of “caterers”, as provided under section 2 (21) of the Act, 2011, reveals that the ‘provision of food supply, beverages, mineral water, supplied not only for the events/ functions/ ceremonies/parties/get-together/occasion but otherwise’ are fully covered under “caterers”. It is pertinent to mention that the Appellant are paying SST on the similar services, as provided by his sister’s company S.Zia ul Haq & Sons (Private) Limited, with effect from January, 2016.

14. While the appellant has supplied certain items which are not part of catering, there are so many items which otherwise can be supplied separately but in a case of “catering” these are inseparable and are chargeable to tax. Catering is akin to a service



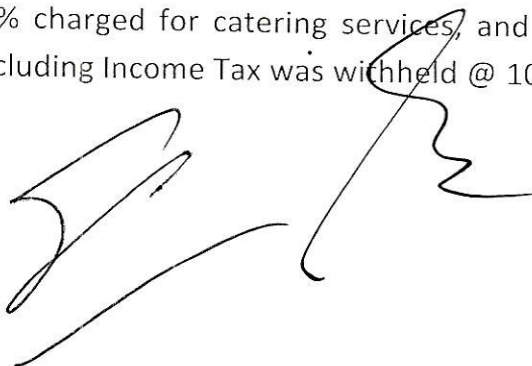
rendered by a restaurant. When one goes to a restaurant for lunch or dinner, the invoice or bill he gets is not in piecemeal for what he consumed. The restaurant issues a composite invoice for the food, the mineral water, the dessert and the ice cream. The cost of service of waiters and restaurant staff and overheads is also built in the invoice. Sales tax @ 13% would be charged on the total amount of the bill/ invoice under tariff heading 9801.2000. It is not the practice that the restaurant issues separate invoice for the food it has supplied, another for the mineral water and a separate invoice for the ice cream. The catering service is more or less of the same type and we cannot categorise the items consumed in it as supplies chargeable to Sales Tax 1990 and waiters services under Sindh Sales Tax Act, 2011. It may further be noted that definition of "caterer" under section 2 (21) is so elaborate that not only it covers providing of food & beverages but also providing furniture or fixture, crockery or cutlery etc.

15. No agreement or contract with any service recipient was filed at any stage except one incomplete contract with Sea and Land Drilling Contractor inc. In the absence of these contracts particularly with ENI and BHP Pakistan who are main recipients, the quantum and even more important, the nature of services rendered is difficult to determine.

16. The core issue, as the AR himself acknowledges, is the nature of services rendered whether it is catering or otherwise. The AR claimed it is supply of good, chargeable to Federal Sales Tax 1990. He pointed out few items showing that these did not pertain to catering services, the most important being portable cabins which were supplied worth Rs.17 million.

17. It is noted that the catering contracts are composite contracts and there are so many items which are part of it. Many items of diversified nature are used in rendering the catering services, such as all raw food items, milk, tea, mineral water as well as wages of chef, cook and other kitchen staff.

18. In fact the appellant has been issuing composite invoices to its clients in which all catering services as well as other items not relating to catering have been invoiced. An invoice to ENI dated 19.09.2014 reflects this system of accounting. It shows invoice issued for an amount of Rs.20.118 million including Federal Sales Tax @ 17% and Income Tax withheld @ 4.5% charged for catering services, and Rs.27.872. For other services, valued Rs.27.872 including Income Tax was withheld @ 10%, but it was without charge of Federal Sales Tax.



19. During the proceedings of appeal before this forum when AC Unit-2 SRB confronted the Chartered Accountants of ENI about its 15.01.2015 letter in which it was informed that they received services involving sales tax of 361.845 million whereas the appellant S. Zia-ul-Haq puts it to Rs.122,630 only, M/s A.F. Ferguson vide their letter dated 11.10.2018 informed that their letter of 15.01.2015 was inaccurate due to some inadvertence on the part of their client and that correct figures, as per Annexure Sales tax was charged at 111.052 million against which tax withheld was only 16.188 million, during the period from July, 2011 to September, 2017. This was the anticlimax of the reported figures of sales tax withheld at 361.845 down to 16.188 million. These figures are reproduced here under for reference sake.

Period	Total invoice	Sales(tax) applicable value	Sales tax charged by vender	Tax withhold
July, 11- Sep,14	1,131,640,796/-	675,922,751/-	111,052,790/-	16,188,130/-

20. Besides the above, the AR has submitted that portable cabins were also supplied on the site, supply of which would not be related to catering as these are used for the lodging of the field staff. The departmental officer failed to prove that these were used in catering service. Further, if it was presumed that these were given on rent or lease and not sold or supplied, these do not constitute catering service in any way.

21. In 2014 a private limited company with the same name & style was incorporated. It is also rendering catering service to foreign exploration companies including ENI and at present not only filing Sindh sales tax returns with SRB but also paying millions of Sales Tax to SRB. This private limited company is established on the foundations of proprietary concern of S. Zia-ul-Haq.

22. In view of the controversy as to whether the economic activity of the appellant fall under tariff heading 9801.5000 and its definition falls under section 2(21) or otherwise the provisions of law are viewed at a glance as under:

Definition 2 (21). "Caterer", by whatever named called, means a person who is "caterer", by whatever name called, means a person who is ordinary course of business and in relation to events, functions, ceremonies, parties, get-together, occasions, etc., provides or supplies, either directly or indirectly, various services, including food, edible preparations, beverages, entertainment, furniture or fixture, crockery or cutlery, panda or shamiana, ornamental or decorative accessories or lighting for illumination;

9801.5000 "Services provided or rendered by caterers, suppliers of food and drinks".

9801.6000, "Ancillary services provided or rendered by hotels [, motels, guest houses, farmhouses], restaurants, marriage halls, [clubs and] caterers.

As can be seen the definition of catering is quite exhaustive and covers so many items which the learned A.R. contends are only subject to sales tax 1990.

23. There is quite a variation in figures incorporated by the AC in show cause notice and order-in-original as against those which are placed before us during reconciliation / verification during hearing of appeal. For example, the A.F. Ferguson CA reported tax withheld by ENI amount as 361,845,667/- vide letter dated 15.01.2015, which was adopted by the AC for her show cause notice & order-in-original. But later on M/s A.F Ferguson & Company auditors of ENI, vide their letter dated 11.10.2018 addressed to AC SRB, during the hearing of appeal before us retracted from earlier statement and now stating that details as per letter dated 15.01.2015 were incorrect and correct figures were as per Annex. The figures are reproduced in Para 19 above.

On the other hand M/s S. Zia-ul-Haq Company had contended that sales tax charged & collected during the period was 12,263,090, which figures did not tally either.

24. The amount of Sales Tax on supply of Porta (Portable) cabins to 5 companies as reported by Ms. Nida Noor, the learned AC/ D.R, in a signed statement on 27. 09.2018 is 17,351,918/-. However, as contended by the learned A.R. tax withheld / deposited on it is sales tax under Sales Tax Act, 1990 and since it is in no way related to catering services, the value of these sales/ supplies is not to be reckoned for determining the value of catering, for the purpose of Sindh Sales Tax.

25. It is also noted that whatever tax has been withheld and deposited by the recipients is sales tax under Sales tax Act, 1990 and income tax under Income Tax Ordinance 2001 but nil paid under Sindh Sales Tax Act, 2011.

26. It is important to note that while it is a fact that the appellant has been supplying goods as well as rendering catering services, the breakup of the two i.e. supply of goods and the value of services has not been made by the SRB officers, which is necessary to determine the correct value of catering services and sales tax payable on it. During the proceedings of appeal it has been very clear that the appellant has been rendering catering services to the companies at their sites for their field staff. The learned AR, by



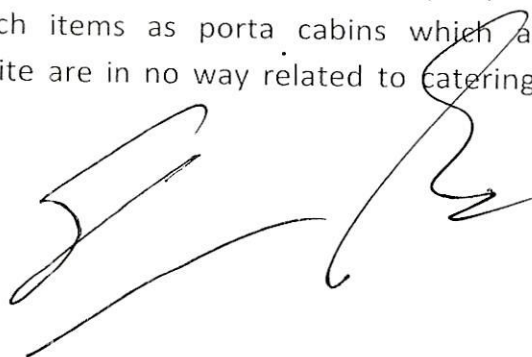
giving splinter details on bits of paper has tried to convince this Bench that it was all supply of goods and not an element of catering services. He placed on record a list of 72 individual items starting from portable cabins, water filtration plants to cold drinks, paper cups, juices, sugar, milk pack, ice cream to tea cups porcelain, in an effort to convince that these all items were individually supplied. However, it is important to note that in catering service many of these items are consumed as catering is a composite service in which raw food items are consumed and also the services of cook, waiters, bearers are also utilized, all in a composite service of catering.

27. As discussed earlier an invoice dated 19.09.2014 issued by S. Zia ul Haq & Sons (ind) to ENI the appellant has mentioned two sets of items in it, one used in catering and the other for general supplies. It is the pattern believed to have been adopted by the appellant in its business from the beginning. However, as these things would have been sorted out from the contracts, the appellant has very bluntly denied any such contracts which is not acceptable. Strangely, the departmental officers have also not made any effort to enforce copies of contracts from the recipient companies either. Such huge transactions with foreign companies would not take place without any formal contract.

28. In view of above findings we are of the opinion that necessary details & documents for verification of data are still required which is not possible at this stage at the level of the Tribunal. Hence the case is remanded to the AC SRB concerned for denovo assessment as per law keeping in view above observations and following the directions given below.

28.1. Obtain agreements / contracts from all recipient companies, as authorized under the law and work out the value of catering services during the period under reference. These directions are being issued specifically in view of our observation about figures adopted about tax withheld by ENI, which later on turned out to be incorrect.

28.2. While we are definite that catering services were being rendered in the past particularly during the period under consideration and that catering service is a composite service which involves consumption of large variety of food and water as well as utilization of kitchen staff, chef, waiters, helpers, dishwashers etc, we have observed that such items as porta cabins which are used for staff accommodation at the site are in no way related to catering business and not



liable to Sindh Sales Tax. The value of these porta cabins be excluded while working out gross value of catering services.

28.3. The appellant M/s S. Zia ul Haq & Sons are also advised to cooperate with departmental officers and furnish all such details and documents as required in correct appreciation of value of catering services during the period under reference.

29. The appeal is disposed of as above.



(Muhammdad Ashfaq Balouch)
JUDICIAL MEMBER



(Agha Kafeel Barik)
TECHNICAL MEMBER

Karachi.

Dated: 31.10.2018

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.



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