

BEFORE THE APPLATE TRIBUNAL SINDH REVENUEBOARD

Appeal no: AT-60/2017

Liberty Mills LTD..... Appellant

VERSUS

Commissioner (Appeals) SRB..... Respondent

Mr. Akhtar Hussain sheikh (Barrister)..... For Appellant

Ms, Shumaila Yar Muhammad A.C. SBR..... For Respondent

Date of hearing: 11-12-2018

Date of order: 29-01-2019

ORDER

Mr. Muhammad Ashfaq Balouch:

This appeal has been filed by the appellant challenging the Order in Appeal no. 89/2017 dated 06-07-2017 passed by the Commissioner (Appeals) in appeal no. 03/2017 confirming Order in Original AT-896/2016 dated 30th-December-2016 passed by Assistant Commissioner, SRB Karachi.

(02) Appellant aggrieved from the Order of Commissioner (Appeals) filed present appeal before this Tribunal.

(03) The Brief facts as disclosed in Order in Appeal (hereinafter referred to as OIA) are reproducing here as under:-

“The respondent perused the notes No.1 of both the Audited Financial Accounts of the appellant for the years ended June, 2014 and June, 2015 and observed that the appellant is principally engaged in manufacturing and processing of different types of fabrics and textile made-ups for others by means of the facilities owned by the appellant and located at Karachi. Further that the



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respondent perused the note 25 of the accounts for both the years and found that the appellant had earned revenue names as "Fabric Processing Revenue" amounting to

Rs: 1,528,445,000/-. Perusal of note 3.16 of the accounts showed to the respondent that the income from the processing activity is recognized at the time when processed goods were delivered to customers and invoices were raised. The respondent considered such activity as the "Services provided or rendered in respect of manufacturing or processing for others on toll basis" falling under the tariff heading 9830.0000 of the Second Schedule of the Sindh Sales Tax On Services Act, 2011 (hereinafter referred to as Act, 2011). The respondent calculated the amount of tax thereon as Rs: 237,586,630/- and accordingly, issued a Show Cause Notice dated 17th November, 2016 (hereinafter referred as "SCN") asking the appellant as to why the amount of tax above mentioned may not be assessed and recovered under section 23(1) and section 47(1A) of the Act, 2011, along-with the default surcharge under section 44 of the Act, 2011. And to show cause as to why the penalties under offences No. 1,2 & 3 of the table of section 43 of the Act 2011, may not be imposed, against the alleged violations of the Act, 2011 and Rule 42H of the Sindh Sales Tax On Services Rules, 2011 (hereinafter referred to as the "Rules, 2011"). On two (02) in number dated of hearing fixed the appellant remained absent but a written reply vide letter dated 24th November, 2016 was received. The appellant submitted in the letter that it is exclusively engaged in manufacturing and export of fabrics and textile made-up being manufacturer-cum-exporter. And that 91% of his sales represents exports on which income tax has already been deducted. And that the same is full and final discharge of his tax liability. In this regard the appellant relied on the FBR's Circular No.20 of 1992 dated 01-07-1992. He further relied on the clarification issued by the Federal Board of Revenue (FBR) vide its letter No. C.No.3 (2) ST-L&P/201 (Pt-II) dated 08th January, 2016. In this clarification as narrated In the OIO at para 5 it was clarified by the FBR that no provincial tax can be levied on the manufacturing and processing charges allegedly read with the entry 49 of the Part-I of the Federal Legislative List of Schedule IV of the Pakistan Constitution 1973."



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(04) The department in their parawise comments denied that Order In Original and Order in Appeal were illegal. Further department stated that economic activity of the appellant is manufacturing or process for others on toll basis which falls a taxable service classified under tariff heading 9830.0000 of Second Schedule 2 of the Act 2011. Department admitted that "Toll manufacturing" is not specifically defined as such under section 2 of 2011 Act. However, the description "services provided in the matter of manufacturing or processing for others toll basis" is specifically described as services under tariff heading 9830.0000 of First Schedule of the Act 2011 since 01-July-2011. Which shows that it is declared a "service" in terms of provision of section 2(79) of the Act, 2011. It was also added by the department that "services provided in matters of manufacturing or processing for others on toll basis", as described against tariff heading 9830.0000 of Second Schedule 2 of the Act 2011 was added through Sindh Finance Act 2013. It becomes taxable with effect from 01-07-2013, in terms of the Provisions of section 2(96), read with section 3 of the said 2011 Act. However said "services provided in the matter of manufacturing or processing for others on toll basis" is a service ab-initio ever since 01-07-2013. It becomes taxable with effect from 01-7-2013. In terms of section 2(79) of the Act 2011 Act read with First Schedule. The provision of section 2(17) and 2(16) of the Sales Tax Act 1990 as claimed in para 12 and 13 of the appeal, it was submitted that the said definition in Sales Tax Act 1990 neither change the character of service provided in matter of manufacturing or processing for others on toll basis nor restrict the scope of terms service or services which falls under the exclusive provisional domain of legislation and the same is a taxable service under the First and Second schedule to the 2011 Act. So far the amendments brought in Sales Tax Act 1990 while Federal Finance Act 2015 is concerned, the Article 77 of the Constitution debars levy of any Federal tax except by or under the authority of Act of Parliament, therefore, the said article is neither applicable for the provision tax nor over rides the provision of 2011 Act. Further, the provision of Article 143 of the Constitution of Pakistan also do not apply because the Parliament is not competent to enact any Federal Law in relation to Sales Tax on Services in terms of exclusion specified in entry no. 49 of the Fourth schedule to the constitution. Department contested that the amendments made in section 2(33) of the sales tax act 1990, through the Federal Finance Act 2015, cannot prevail over the Provision of 2011 Act



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read with the exclusion specified in entry no. 49 of the 4th schedule to the Constitution. Department claimed that toll manufacturing is a services in view of the general dictionary meaning as well as the Honorable High Court of Sindh in the case of Amie Investments (Pvt), Ltd v/s Additional collector, reported in 2006 PTD 1459 has taken the similar view. Department stated that appellant side admitted that appellant received the raw material, semi-finished goods, thereafter process it in shape of final goods and for that purpose appellant receives a certain consideration is in shape of money, which shows that the process carried out by the appellant in order to convert the raw material into the finished goods falls within the ambit of service in respective of nature of the raw material and finished goods.

(05) Mr. Akhtar Hussain sheikh, Barrister has argued that toll manufacturing is not defined in section 2 of Sindh Sales Tax Act 2011, it was inserted in second schedule vide Finance Act 2013 but definition of toll manufacturing is given in Federal Sales Act in section 2(17), therefore, the definition provided in the Federal Sales Tax will be applicable and as per section 2(16) Act 1990 of Federal Sales Tax toll manufacturing is not a service. It was also argued that article 143 of the constitution that Federal Legislation over ride the Provincial legislation, therefore, the Federal Sales Tax definition will prevail in the present case. It was also argued that treatment given by the Department amounts to double taxation.

(06) Ms. Shumaila Yar Muhammad AC SRB has argued that contention of appellant is that toll manufacturing had been mistaken as service by the SRB, in this regard the plea of department is that the toll manufacturing is a service and falls within the preview of Act 2011 and the Honorable High Court of Sindh in PTD 1459-2006, PTD 2533-2015 had declared the toll manufacturing as service. Learned A.C on behalf of Department has also adopted the parawise comments as her argument.

(07) We have considered arguments of both sides and pursued the record. The contention of appellant is that toll manufacturing is neither service nor falls under tariff heading 9830.0000.

(08) The appellant claims that he is engaged in the business of textile processing and manufacturing, registered with Sales Tax Department (FBR) since last more than decade and paying tax. It is also claimed that due to confusion also registered with SBR. Further claim of



appellant is that he received raw material from clients and after possessing convert it into yarn through the spinning process and manufacturing.

(09) From the above claim of appellant it is evident that appellant is manufacture of goods for others, registers with FBR as manufacturer and paying the tax to FBR. Further appellant is also registered with S.R.B.

(10) Now the issue is that whether manufacture goods on the bases of material provided/supplied by the other falls within the definition of "manufacturing" or toll manufacturing", in this regard Rule 42 it of Sindh sales tax Rules, 2011 is relevant, which read as under:-

"Rule 42 H (2) every such toll manufacturer or processor who renders the services in the matter of manufacturing or processing for other on toll bases shall be liable to registration under section 24 of the Act, read with the rules prescribed under chapter 2 of these rules.

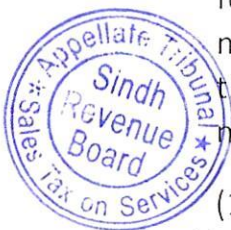
(11) While sub rule 3 provides that the value of taxable service for levy of tax shall be the gross amount charge for services provided or rendered.

(12) The words "Toll manufacturing" has not been defined in Act or the Rules made there under. But in the Black's Law dictionary 10th Edition that "toll Manufacturing" is defined as under:-

"Arrangements under which a customer provides the material for a manufacturing process and receive the finish goods form the manufacturer. The same party owns both the input and output of the manufacturing process. This is specialized form of contract manufacturing—also terms tolls processing.

(13) From the plane reading of definition supra it appears that rendering or providing services in matter of manufacturing or processing of the goods for others against consideration is toll manufacturing. And such service rendered falls under tariff heading 9830.0000 which is liable to be tax.

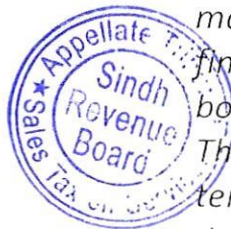
(14) In this respect reliance is placed on the following orders of this Tribunal:-



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(i) (13). Appeal No AT-08/2017 M/s International Steel Ltd v/s Commissioner Appeals SRB Karachi.

"This is not disputed that the appellant manufacture goods for others. This fact is evident form the financial statements as well as from the written defence of the appellant. As per the appellant it is registered with FBR as "Manufacturer" and paying tax to FBR and furnished tax returns with FBR. The question is whether manufacturing of goods on the basis of material provided/supplied by others comes with the definition of "manufacturing" or "toll manufacturing". Rule 42 H of the Sindh Sales Tax on Services Rules, 2011 provides that the provisions of this rule shall apply to the persons (hereinafter called "toll manufacturer or processor") providing or rendering the services in the matter of manufacturing or processing for others on toll basis. Sub-Rule (2) provides that every such toll manufacturer or processor who renders the services in the matter of manufacturing or processing for others on toll basis shall be liable to registration under section 24 of the Act, read with the rules prescribed under Chapter-II of the rules. Sub-rule (3) provides that the value of the taxable services for the levy of tax shall be the gross amount charged for the services provided or rendered. The words "Toll Manufacturing" has not been defined in the Act or the Rules made thereunder. The words "Toll Manufacturing" has been defined in the Black's Law Dictionary Tenth Edition that "*toll manufacturing (1977) an arrangement under which a customer provides the materials for a manufacturing process and receives the finished goods form the manufacturer. The same party owns both the input and the output of the manufacturing process. This is a specialized form of contract manufacturing. -Also termed toll processing*". From the above definition it is clear that providing or rendering services in the matter of manufacturing or processing of the goods for others, against consideration is toll manufacturing and the same is a service falling under tariff heading 9830.0000 and is taxable."



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(ii) (08). Appeal No AT-21/2016 M/s AL Abid Silk Mills (Pvt) Ltd v/s Commissioner Appeals SRB Karachi.

"This is not disputed that the appellant used to finished goods for others. As per the appellant it is registered with FBR as Manufacturer-cum-Exporter and paying sales tax @ 3%. The question is whether finishing of goods owned by others comes with the definition of manufacturing and export or the same comes within the definition of manufacturing or processing for others on toll basis. Rule 42 H of the Sindh Sales Tax on services Rules, 2011 provides that the provisions of this rule shall apply to the persons (hereinafter called "toll Manufacturer or processor) providing or rendering the services in the matter of manufacturing or processing for others on toll basis. Sub-Rule (2) provides that every such toll manufacturer or processor who renders the services in the matter of manufacturing or processing for others on toll basis shall be liable to registration under section 24 of the Act, read with the rules prescribed under Chapter-II of the rules. Sub-rule (3) provided that the value of the taxable services for the levy of tax shall be the gross amount charged for the services provided or rendered. From the above provisions it is clear that providing or rendering the services in the matter of manufacturing or processing for others on toll basis is a service covered by tariff heading 9830.0000. The words "Toll Manufacturing" has not been defined in the Act or the Rules made thereunder. The words "Toll Manufacturing" has been defined in the Black's Law Dictionary Tenth Edition that "toll manufacturing (1977) An arrangement under which a customer provides the materials for a manufacturing process and receives the finished goods from the manufacturer. The same party owns both the input and the output of the manufacturing process. This is specialized form of contract manufacturing. -- also termed toll processing." From the above definition. It is clear that finishing the goods for others against consideration is toll manufacturing and the same is a service falling tariff heading 9830.0000. The appellant in the arguments itself admits that it received grey cloths and



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finished it by using the material owned by it and after finishing returned the goods to owners. The reported case of Amie Investment Supra is fully applicable in this case. The reported case of Habib Jute Mills supra is not applicable to this case. Both the two forums below have rightly levied tax on the services provided or rendered by the appellant. "

(15) In view of above discussion and orders of this Tribunal the contention of appellant side that toll manufacturing is not a service has no legal force.

(16) The contention of Learned Counsel for the appellant that treatment given by the department amounts to double taxation and after the 18th amendments in the Constitution the Provinces can levy sales tax on Services and since the appellant has not provided any service, it is not liable to pay any sales tax. On the other hand the Learned AC SRB on behalf of the respondent has contended that provincial levy on the processing activity will not result on double taxation and Federation has power to Tax the manufacturer not the service provider.

(17) It is an admitted position that after 18th amendments in the constitution the sales tax on services is within the domain of provinces and the services can be only taxed by the provinces.

(18) In this respect the reliance is placed Honorable Islamabad High Court in read predation No 2957/2012. Which was relied upon by this Tribunal in A.T No. 21/2016 Ms. Abid Silk Mills (PVT) Ltd v/s, where in Para 10 this Tribunal has observed as under:-



(10) As far as the plea of appellant, that Sindh Sales Tax amounts to double taxation is concerned, the same is not correct. The Commissioner (Appeals) has dealt with this point in detail with reference to Sales Tax Act, 1990 and Federal Excise Act, 2005 and has rightly held in Para 7 of the order-in-appeal that *"The plain reading of the both the above provisions reveals that nowhere in the context the word "service" has been used. But the legislature used and termed the activity as "manufacturer" even if the raw material was not owned by the manufacturer"*. The point of double taxation

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was dealt with by Honourable Islamabad High Court in Writ Petition No. 2957/2012 and has held as under.

"It is a paramount principle of law, established and settled by the amended of the dictum of the superior court that the rule of avoidance of double taxation is merely a rule of construction therefore, it ceases to have application when the legislature expressly enact law, which results in double taxation of the same income, however, in the absence of clear provision is stipulating double or multiple levies the Courts must lean in favour of avoiding double taxation ("re: PLD 2011 Lahore 402"). In view of the aforesaid, it is not disputed that there can be double taxation if the legislature has distinctly and expressly in active it however in absence of such enactment where there are general words of taxation then the courts has to interpret the provision in the manner where they cannot be so interpreted as to tax the subject twice over the same (Re: Channel, J, in Stevens v/s the Durban-Rod deport Gold Mining Company Ltd (1909) 5 tax case 402). Accordingly, in the absence of any impediment specifically created in the Constitution of a country or legislative enactment itself, there is desirability or need otherwise to avoid such double liability, therefore, courts unless there is clear and specific mandate of law in favors of such multiple levies more than once, in construing general statutory provisions must lean in favour of an interpretation to avoid double taxation (Re: Sri Krishna Das v/s Town Area Commitee (1991 AIR 2096), Chirgaon and Radha Kishan Rathi v/s Additional collector, Drug and (AIR 1995 SC1540, JT 1995(6) SC 166). In the present case the intention of legislature to tax telecommunication operators twice on interconnection, is not visible from the legislature, in fact it is otherwise, and, therefore, this court strongly dispels interpretation put forth by the Respondents which warrant imposition of double taxation".



After 18th amendement in the Constitution the Sales tax on services is within the domain of the provinces and the services can be taxed by the provinces. In view of the aforesaid, quotation it cannot be disputed that there can be double taxation if the legislature has

distinctly and expressly enacted it, however in the absence of such enactment where there are general words of taxation then the Court has to interpret the provisions in a manner where they cannot be so interpreted as to tax the subject twice. As per the appellant's own showing the Federation taxed the Manufacturer-cum-exporter and not on services provided on consideration to others. The sales tax on services is levied on the services provided or rendered within or from Sindh. In view of the above discussion it is held that the Sindh Sales Tax on services of toll manufacturing is not double taxation and appellant is liable to pay Sindh Sales Tax on services of toll manufacturing assessed by the Assessing Officer.

(19) Furthermore this Tribunal in Appeal No AT-08/2017 M/s International Steel Ltd v/s Commissioner Appeals SRB Karachi has decided the issue of double Taxation as under:-

(14) "While making 18th amendments in constitution article 270AA was amended and clause (7) was inserted which reads as under:-

"(7) Notwithstanding anything contained in the constitution, all taxes and fees levied under any law in force immediately before the commencement of the constitution (Eighteenth Amendment) Act, 2010, shall continue to be levied until they are varied or abolished by an Act of the appropriate legislature". From this provision it appears that the levy of Sales Tax vide Sales Tax Act, 1990 was saved or protected till such time the same is varied or abolished by the appropriate legislature. The Province of Sindh has enacted the Sindh Sales Tax on Services Act, 2011 effective from 1st July, 2011. The effect of 18th amendment in the Constitution and Article 270AA was also considered by the High Court of Sindh in the reported case of Pakistan International Freight and Forwarders Association versus Province of Sindh and others 2017 PTD 1 and in paragraph 73. c. it was held as under:-

"c. it is declared that on account of the 18th amendment to the Constitution (which took effect from 19-10-2010) the Provinces alone have the legislative power to levy a tax on the rendering or



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providing of services, but this is subject to Article 270 AA (7) of the Constitution (as Substituted by the said Amendment), and by reason thereof the legislative competence has manifested in the Province of Sindh from 01-07-2011 onwards, the date on which the Sindh Sales Tax on Services Act, 2011 came into force". From this it is clear and evident that the power to levy tax on service is within the domain of the Provinces. In the same judgment supra para 73.d. it was also held that "d. Subject to sub-para (e) below, the Sindh Sales Tax on Services Act, 2011 is validly connected and intra vires the Constitution".

(15) Before 18th amendment in the Constitution Sales Tax, 1990 was enacted to levy tax on sales, importation, exportation, production, manufacture of consumption of goods. Section 3 of the Sales Act 1990 provides that there shall be charged, levied and paid a tax known as sales tax of the value of taxable supplies made in Pakistan and goods imported into Pakistan. Sub-section (41) of section 2 of the Sales Tax Act, 1990 provides that "taxable supply means a supply of taxable goods made in Pakistan by an importer, manufacturer, wholesaler (including dealer), distributor and retailer". The word supply is defined under sub-section (33) of section 2 of the Sales Tax Act, 1990, which provides that "supply includes sale, lease (excluding financial or operating lease or other disposition of goods in furtherance of business carried out for consideration". The word supply has been considered by the High Court of Sindh in the reported case of M/s Amie Investment (Pvt) Ltd, v/s Additional Collector and others, 2006 PTD 1459. The High Court has held that "there can be no denial of the fact that the business of the appellant is carried out for consideration, but the question needs to be examined is as to whether the returning of goods by the appellant after processing would amount to "disposition of goods". The High Court after considering the dictionary meaning of "disposition of goods" has held that "it is used only as an expression of transfer inter vivos or by operation of law and for such purpose an element



of ownership must exist upon the goods/property under disposition or at least the person acquiring the goods must possess some right or title in the goods in order to dispose it of at his will. Consequently, the returning of goods cannot be included in the expression "disposition of goods". It was further held in the same judgment that "the processing of goods by the appellant surely is a manufacturing process. However, the precondition to include the goods acquired, produced or manufactured in the course of business is the 'use' of the goods by the person who acquired, produced or manufactured the goods and in the present case the appellant didn't use the goods to attract the consequences of supply"

(16) After 18th amendment in the Constitution Entry No. 49 of the Fourth Schedule of the Constitution was amended. The Entry No. 49 before amendment read as under:-

"49. Taxes on the sales and purchase of goods imported exported, produced, manufactured or consumed".

Entry No. 49 of the Fourth schedule of the Constitution after amendment read as under:-

"49. Taxes on the sales and purchase of goods imported exported, produced, manufactured or consumed. (Except sales tax on services)".

The High Court of Sindh in its latest judgment reported as Pakistan International Freight and Forwarders Association v/s Province of Sindh and others 2017 PTD 1, in paragraph 58 considers the exception by framing a question " how does the "exception" apply and what is the effect? While replying the question Mr. Justice Munib Akhtar speaking for the Bench held that "In our view, the "exception" added to entry No.49 is not a true exception. Rather, it is an independent provision in its own right. It has two primary effects. Firstly, and most importantly for present purpose it recognizes expressly on the constitutional plane that a taxing power



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in respect of the taxing event of rendering or providing services vests in the provinces..... The real effect of the "exception" is to "shift" the taxing power in relation to the taxing event of rendering or providing of services from the Federation to the Provinces. In paragraph 59 of the judgment it was held that "59. The second effect of the "exception" though not directly relevant for present purpose, may also be adverted to. Entry 49 is concerned with; inter alia, the sales of goods. The taxing power in relation thereto vests solely in the Federation. The taxing power in relation to the rendering or providing of services now vests solely in the Province." After this judgment the authority of the Province to tax the services cannot be questioned on the touch stone of the Article 143 of the Constitution. Article 143 can be applied if there is inconsistency between a Federal and Provincial Law. The Sales Tax Act, 1990 was enacted to levy tax on sale, importation, exportation, production, manufacture or consumption of goods, whereas, the Sindh Sales Tax on Service Act, 2011 was enacted to levy tax on services provided, rendered, initiated or consumed in the Province of Sindh. The subject matter of the two laws is different and distinguishable and both have their own field of application.

(17) As per the appellant's own showing the Federation can tax the taxable supplies made in Pakistan and not on services provided on consideration to others. The Sales tax on services is levied on the services provided or rendered within or from Sindh. In view of the discussion it is held that the Sindh sales tax on services to of toll manufacturing was rightly levied and appellant is liable to pay Sindh Sales Tax on services of toll manufacturing as assessed by the Assessing Officer. Both the two forums below have rightly levied tax on the services provided or rendered by the appellant."



(20) The Learned Counsel for the appellant has relied upon [(2017) 116 Tax 413 (Sindh High Court)], this authority is distinguishable from the facts and circumstance of case in hand because the Honorable

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High Court of Sindh has decided the issue regarding registration not the issue of services provided by way of Toll Manufacturing.

(21) Learned Counsel for the appellant also relied upon unreported C.P.D-3723 of 2013 decided by the Hon'ble High Court of Sindh. This matter is also not applicable in present case, because Hon'ble Apex in above referred had decided the issue pertaining to building contracts, not the issue of toll manufacturing.

(22) Keeping above discussion and decision referred supra, it is safe to observe that "toll manufacturing" for others is a service and department has rightly taxed as a service. Hence, order passed by the Learned Commissioner Appeal is proper and does not require any inference.

(23) Resultantly, present appeal is devoid of merits and stands dismissed.



(Agha Kafeel Barik)
Member Technical



(Muhammad Ashfaq Balouch)
Judicial Member

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