

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD

APPEAL NO. AT-69/2017

M/s Noor Distributors Appellant

Versus

Deputy Commissioner (Hyderabad Zone) SRB Respondent

Mr. Arshad Siraj, Advocate, and For Respondent
Syed Ejaz Ahmed Jafry.

Syed Rizwan Ali, D.C., SRB, Hyderabad For Appellant

Date of hearing 06.02.2018

Date of Order 13.02.2018

ORDER

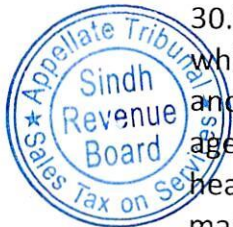
Mr. Agha Kafeel Barik: This appeal has been filed against the order of Commissioner (Appeals) dated 11. 10.2017, whereby he confirmed order-in-original dated 26.05.2017 passed under section 24B and 43 (1) of the Act, of Deputy Commissioner, SRB, Hyderabad dated 26.05.2017.

2. Facts of the case briefly, are as under:

2.1 The appellant is a distributor of goods and products of different companies including M/s Bosch Pharmaceutical (Pvt.) Ltd (hereinafter called Bosch) in Sindh.

2.02 The DC-SRB had access to the annual audited financial statement as on 30.06.2015 of the appellant and also an agreement entered by it with Bosch which revealed that the relationship between the two is that of principal (Bosch) and its agent (Noor Distributors) and that it rendered services of Commission agent of Bosch. He formed an opinion that such services fall under the tariff heading of 9819.1300 (Commission agent) as well as 9845.0000 (supply chain management or distribution (including delivery) services.

2.03. Since Noor distributors was not registered with SRB a show cause notice was therefore issued confronting the appellant as to why he should not be compulsorily registered under section 24 B. In reply thereof it was submitted that Noor distributor was doing trading of medicines on fixed margin basis and had been allowed a discount by the principal on trade price part of which is further passed on to his customers. Thus he rejected the idea of rendering any taxable services under S.S.T. Act 2011.



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- 2.04. The reply was not found satisfactory by the Deputy Commissioner SRB who compulsorily registered him under section 24 B and also imposed penalty of 10,000/- under section 43 (1) and informed him that in case of non compliance of Order under section 24 B further penalty of 100,000/- would be imposed.
- 2.05. Aggrieved of this order in original the appellant filed appeal before Commissioner (Appeals) who discussed the issues of taxability of the appellant at length in the purview of its registration under section 24/ 24 B. He however held that invoking tariff heading 9845.0000 (Supply chain management) was irrelevant and that order-in-original to this extent was ambiguous and could not sustain. However, he found that the appellant was rendering services of "Commission agent" (9819.1300) and registration under section 24 B was legal and therefore order-in-original was upheld by him. The Commissioner (Appeals) however, suspended application of penalty on the condition that the appellant complies order of compulsory registration and files monthly returns within 3 weeks. The appellant admittedly, did not comply as directed by the Commissioner (Appeals) and thus the penalty order of the Deputy Commissioner SRB stands confirmed. Aggrieved of his order this appeal has been filed before us.

3. The grounds of appeal have also have made in the same direction emphasizing that the appellant was engaged in trading of various products and has earned trade discount and not commission, as alleged by the DC-SRB. Following grounds are filed on this main issue:

Grounds of Appeal:

"3. The Learned Commissioner Appeals erred in treating the appellant as "Commission agent" only by reason of agreement.

"4. The Learned Commissioner Appeals, admitted in the appellate order that the appellant purchases the goods from the manufacturers, but the element of gross profit/ margin wrongly treated as commission.

"5. The Learned Commissioner Appeals, erred in passing the order in appeal, because he did not give any weightage to the audited balance sheet submitted before the Commissioner Appeals where the stocks and accounts receivable declared as assets of the appellant.

"6. The Learned Commissioner Appeals erred in confirming the O.I.O where the Deputy Commissioner failed to establish that the manufacturer / supplier has any control over the customers, to whom the appellant sold the goods.

"7. The Learned Commissioner Appeals erred in confirming the O.I.O where the Deputy Commissioner failed to produce any evidence that he appellant is an agent of the companies whose products are sold by the appellant.

"8. The Learned Commissioner Appeals erred in confirming the O.I.O when the Deputy Commissioner failed to cross examine the manufacturer / supplier on whose agreement was based to pass such illegal order.



"9. The Learned Commissioner Appeals erred in treating the discount / gross profit as commission, as the appellant is dealing in medicine and as such the sale price is not open for him, and he has to sell the product less than the Trade Price (T.P). The gross profit of the appellant is equal to (=) discount received minus (-) discount allowed to the customers balance.

"10. The Learned Commissioner Appeals erred in treating the gross profit / margin as "commission". The commission as narrated in the accounts is nothing but gross profit / margin between Purchase Price and Sale Price; this is the way of presentation of accounts by the appellant and other traders in this line of business. The Commissioner Appeals did not give any consideration to the trading account submitted before him."

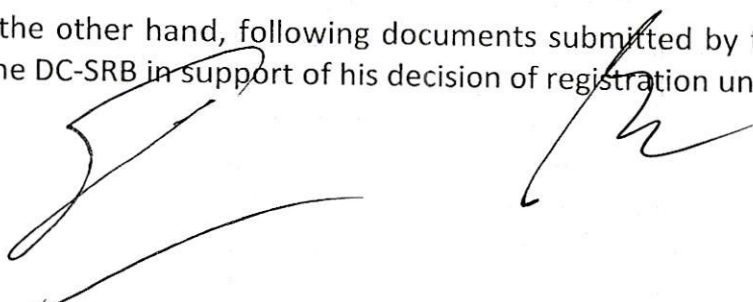
4. The learned A.R of the appellant submitted his arguments as under.

That the appellant is not providing any service, what so ever. It was contended that the appellant is a sole proprietorship concern, engaged in the purchase of pharmaceutical products of various companies and sale thereof to the parties who are customers of the appellant. As it is earning profit out of purchase & sale of medicines the officers below have wrongly applied tariff code. 9819.1300 to register him under section 24 B and impose penalty under section 43 (1) of the Act. The learned A.R submitted that the appellant was earning trade discount as seller of goods of various Pharma companies, which is distinct from commission as alleged by the Deputy Commissioner, SRB. He argued that even income tax has been with held under section 153 of Income Tax Ordinance 2001, where ever applicable, on purchase of goods by the appellant. He cited a decision of the income tax Appellate Tribunal in support of his argument that trade discount is to be treated differently as against commission.

5. The DC-SRB in his comments on the appeal submitted that the appellant is basically a commission agent of Bosch as defined under section 2(22 A) of the Act and that its agreement with Bosch and its financial statement as on 30.06.2015 belies his claim that he is doing general trading (sale & purchase) of medicines and thus falls outside the ambit of Sindh sales tax on services under S.S.T. Act, 2011. He therefore submitted that both tariff headings 9845.0000 and 9819.1300 were rightly applicable in this case and therefore the order of registration passed by him under section 24 B was quite legal.

6. The appellant also claims that he is trading with Bosch and that he is not its commission agent, as alleged by Deputy Commissioner SRB for compulsory registration under section 24 B. The appellant claims that the commission shown in the account is in fact 'trade discount' allowed by Bosch on sales / supplies to the appellant.

7. On the other hand, following documents submitted by the appellant have been relied by the DC-SRB in support of his decision of registration under section 24 B.



01. Agreement between the two parties, salient points of which are reproduced by the DC-SRB in his order as under.

- (i) M/s Bosch Pharmaceutical (Private) Limited has appointed M/s Noor distributors as an intermediary for supply of pharmaceutical products within the territory of Hyderabad including all towns/ districts and adjacent areas therein;
- (ii) The relationship between Bosch and Noor distributor is that of Principal and Agent;
- (iii) That in all dealing with third parties, the Noor distributors shall claim to be an agent for Bosch;
- (iv) That Noor distributor will provide Bosch adequate warehousing, storage facilities;
- (v) For quoting, negotiating and/ or procuring to any institution, company, firm, authority or person, Noor distributor will do it with the approval of Bosch and associated commissions will be mutually agreed;
- (vi) Noor distributors will supply Bosch product by door to door delivery;
- (vii) Besides above, there are detailed operational guidelines as to how to manage orders from retailers/ customers, inventory management, subletting of activities, damage/ loss claims, stock replenishment and communication between the two parties etc.

02. The audited statement of Account as on 30.06.2015 which shows as under:

Sales / Supplies	_____	5,561,700
Commission received	_____	<u>42,648,291</u>
		<u>48,209,991</u>
<u>Cost of Sales</u>		
Opening stock	_____	6,925,233
Purchases	_____	<u>12,002,981</u>
		<u>18,928,214</u>
Less closing stock	_____	12,924,812
Cost of goods sold	_____	6,003,402
Commission passed	_____	<u>19,052,663</u>
Cost of sales	_____	<u>25,056,065</u>

8. It was observed with concern that the figures of gross commission earned at 42.548 millions do not correlate with the figures of total sales of 5.561 (m) as commission earned is 7.5 times of the sales declared which is illogical and not possible.

9. The analysis of trading profit & loss account prepared by the appellant for presenting before the SRB/ Appellate Tribunal shows that by mixing a small trading account, in which sales of 5,561,700 have been affected, with the commission A/c in which gross commission of 42,648,291 was earned, the appellant has tried to hoodwink the department in an effort to prove that it is trading in pharmaceutical and thus does

not fall under the jurisdiction of SRB for registration under section 24 B of S.S.T 2011, whereas other factors, as discussed earlier, prove it to the contrary and support departmental case that it is the case of a commission agent falling under tariff code 9819.1300, which should be registered under section 24 B.

10. During the hearing of appeal, however, a revised statement of account as on 30.06.2015 was submitted by the A.R with the argument that the statement of account submitted earlier was incorrect / incomplete. This statement of accounts shows as under:

Sales	_____	662,223,912
Less Cost of revenues	_____	<u>639,069,986</u>
Gross profit	_____	<u>23,153,926</u>

Sales include

1. Sales	_____	875,714,875
2. Supplies	_____	<u>5,561,700</u>
		<u>681,276,575</u>

Cost of sales

Opening stock	_____	61,510,083
Purchases	_____	<u>590,484,715</u>
		<u>651,994,798</u>
Less closing stock	_____	<u>12,924,812</u>
Cost of goods sold	_____	<u>639,069,986</u>

Although the statement of account which was filed earlier has been audited by a chartered accountant firm, same has been revised as above during the hearing of appeal in this Tribunal and no reason has been given for the same, and no reconciliation of the two has been filed, despite the fact that all the figures including sales, cost of sales, profit etc have been totally changed. As such revision of statement of account cannot be accepted at this stage.

11. After hearing both the parties and going through the documents presented before me, my findings are as under:

01. The agreement between the appellant & Bosch is a valid document and has not been disowned by the appellant at any level, hence reliance of the D.C, SRB on it for his order under section 24 B as is quite justified.
02. Various clauses of the agreement clearly prove the relationship of the two parties as principal & agent / commission agent.
03. Even in the audited statement of account which was subsequently changed, the profit has been declared as 'commission' earned and also some part of it as



commission transferred to the wholesalers / retailers. In general trading the seller does not transfer his profit to the retailer. In fact it is the retailer who earns his profit from end consumer when the goods are sold.

04. As in the business of sale through agent the ownership is never passed on to the agent. In this case also the appellant has no godown nor any stock facility of his own, which were in fact provided by Bosch. This shows strict control over movement of stock as well. There are no expenses claimed in the statement of account of rent of godown either.
05. Normally the medicines and related products of a pharmaceutical company are sold under its brand name and not the name of an intermediary or the distributor and it is the company which takes responsibility of its product quality and not the distributor who is just a middle man or agent.
06. The sales representatives are appointed by the principal company who advertise its products under its brand name and not that of the distributor.

12. In view of the above I am of the considered opinion that prime facie it is a case of registration under section 24. Thus I uphold the impugned order of the Commissioner (Appeals) in confirming the order in original of the D.C, SRB under section 24 B.

13. As regards the penalty for default, under section 43 (1) I allow the appellant an opportunity to file belated returns under section 30 within 15 days and if he files the same during this period the penalty order will not be effective. In case of non compliance the penalty order will be effective from the date it was originally passed.

(AGHA KAFEEL BARIK)
TECHNICAL MEMBER

Certified to be True Copy

REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Karachi

Dated: 13.02.2018

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.