

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD

APPEAL NO. AT-10/2018

M/s E-Realty Solution (Pvt.) Limited Appellant

Versus

1/ Commissioner (Appeals), SRB, Karachi
2/ Assistant Commissioner (Unit-6), SRB, Karachi Respondents

Mr. Ajeet Sunder, Advocate and
Mr. Nadir Hussain, Advocate For the Appellant

Ms. Nida Noor, Assistant Commissioner, SRB, Karachi For the Respondents

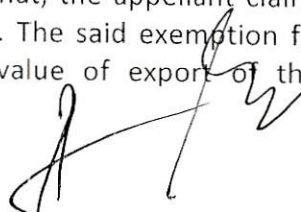
Date of hearing 23.04.2018
Date of Order 17.05.2018

ORDER

Razia Sultana Taher: This appeal has been filed by the appellant challenging the order in appeal No.22/2018 dated 6th February, 2018 passed by the Commissioner (Appeals) in appeal No.176/2016 who modified the order in original No.304/2016 dated 5th May, 2016 to the extent as given in paragraph 8 of the order in appeal which reads as "For the given reasons the OIO is upheld principally. The appellant is directed to pay the principal amount of tax and the default surcharge as per section 44 of the Act, 2011. However, the appellant shall only be required to pay the penalties if he fails to pay the principal amount and the default surcharge. Order accordingly".

In short, the facts of the case as stated in the order in original are that the appellant registered under the principal activity of 'Software or IT based System Development Consultant' falling under tariff heading 9815.6000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as SSToS Act, 2011). The said services are chargeable to Sindh Sales tax vide SRB notification No.SRB-3-4/7/2013 dated 18.06.2013 exemption is allowed from Sindh sales tax leviable on 'Software or IT based System Development Consultant' services exported by registered person. The said exemption is subject to conditions that the value of export of the services is rendered in foreign exchange through proper banking channels in the business bank account of the appellant exporting the services and is also reported to the State Bank of Pakistan in the manner prescribed by the State Bank of Pakistan.

3. The concerned Assistant Commissioner in the order in original No.304/2016 dated 5th May, 2016 observed and concluded that, the appellant claimed exemption under notification No.SRB-3-4/7/2013 dated 18.06.2013. The said exemption from Sindh Sales Tax is subject to certain conditions namely (a) The value of export of the software or IT based system



development consultants services received in foreign exchange through banking channels in the business bank accounts of the registered person exporting the services; and (b) The value of export of software or IT based consultants services reported to the State Bank of Pakistan in the manner prescribed by the State Bank of Pakistan.

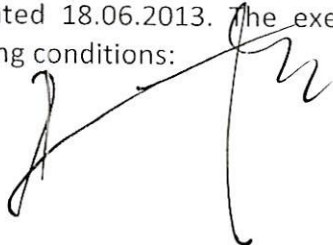
The respondent stated that the appellant had failed to fulfil the condition of reporting the value of export to State Bank of Pakistan in the manner prescribed by said State Bank. The appellant was ordered to pay an amount of Rs.402,381/- under section 23 readwith Section 47(1A)(a) of the Act, 2011 alongwith default surcharge under Section 44 (to be calculated at the time of payment) of the SSToS Act, 2011 and penalty of Rs.100,000/- imposed under Sr. No.15 of the table under section 43 of the Act for non-production of record and Rs.290,666/- under Sr. No.3 of the table in section 43 of the SSToS Act, 2011 for contravention on sections 8 and 17 of the SSToS Act, 2011.

4. The said order of the assessing officer was challenged by way of filing of appeal before the Commissioner (Appeals) SRB who upheld to the extent as detailed at paragraph I of this order.

5. During the course of hearing, the appellant's advocate submitted that there are two legal issues in the instant case. The first legal issue pertains to Sections 23 and 47 – as the same is not applicable to the instant appeal case, reason being that section 23 becomes applicable when there is short payment of tax and imposed section 47 which again becomes operational when recovery is to be made. The case is not covered under the said two sections and the Commissioner (Appeals) has also not given his findings on the first legal issue. Second legal issue pertains to time period. The Commissioner (Appeals) had passed the order in appeal beyond 600 days, whereas Section 59(5) of the SSToS Act, 2011 states that order in appeal is to be passed within 120+60 days plus the reasons be recorded. Whereas the said order was passed and no reasons were assigned by the Commissioner (Appeals). Taking the issue on merit the export of services was made and, two conditions are required to be fulfilled namely (i) remittances be made through banking channel (ii) The report of remittance to State Bank of Pakistan.

6. The advocate argued that the report was submitted late to the State Bank of Pakistan and attributed the reason that the appellant was unaware but was done so subsequently. It is out of scope of recovery. The learned advocate submitted that no unnecessary adjournments were sought but the appellant waited for Commissioner (Appeals) and further stated that he had reached at 2 p.m. and had to wait till 04:30 p.m. The advocate submitted that he had given only 3 adjournment applications. The show cause notice is out of scope of section 23, it is not a case of short payment but factually it is a case of procedural lapse as had been reported late to the State Bank of Pakistan. Placed reliance on case law 2010 PTD (Trib.) 1112.

7. The respondent Assistant Commissioner representing the department, submitted that the appellant is registered with SRB under the principal activity of Software or IT based System Development Consultant which is subject to Sindh Sales tax but if the services of software or IT based development consultant are exported outside Pakistan, the same are exempt vide Notification No.SRB-3-4/7/2013 dated 18.06.2013. The exemption provided under the said notification is subject to the following conditions:



i) The value of the export of services is received in foreign exchange through banking channel in the business bank account of the registered person exporting the services and the second condition is that the said value of the export of services is also reported to the State Bank of Pakistan in the manner prescribed by the State Bank of Pakistan. The appellant during the tax period July 2015 to October 2015 had declared total value of Rs.4,907,754/- at zero rate against Annexure 'C' to the said Sindh Sales Tax Returns. On enquiry from the appellant, the respondent found that the appellant did not fulfill the condition of reporting the value of export to the State Bank of Pakistan. Thus the said amount was imposed through order in original dated 5th May, 2016 which was challenged before Commissioner (Appeals). The respondent further submitted that the appellant got registered with the State Bank of Pakistan on 15.09.2016 and reported on 15.09.2016. The appellant has not followed the condition provided by the State Bank of Pakistan in the prescribed manner, invited reference to para 12 of Chapter XII of the Foreign Exchange Manual 2002 and the same was upheld by Commissioner (Appeals). The respondent added that the appellant's contention that order in appeal is not within the statutory time limit, the appellant had himself during the course of hearing sought time of 227 days and through letters requested adjournments of 310 days. The said number of days were excluded under section 59(5) of the Act, 2011. Thus the order of Commissioner (Appeals) is within the statutory limit as provided under section 59 of the Act, 2011 and placed reliance of the judgment reported as 2015 SCMR 1239, PLD 1997 SC 582 wherein the Honorable Court have decided that the exemptions which was granted as contingent exemption, it can be assumed that the appellant was liable to pay duties and taxes unless he fulfilled the conditions on which the exemption was contingent and not fulfilling these conditions or violations thereof will render them liable to pay the Government dues. So far as the amount of default surcharge and penalties – in that the appellant did not pay the due taxes and has claimed exemption unlawfully therefore penalty was rightly imposed under Serial Nos.2 and 3 of the table under section 43 of the SSToS Act, 2011 together amount of default surcharge was imposed.

8. I have heard the learned representatives of both sides and perused the record made available before me. The appellant's advocate has raised two legal issues. Firstly section 23 and 47 are not applicable to the instant appeal and has taken the stance that it is not a case of short payment of tax. Going through the issue and record of the file, there seems no convincing reason has been explained reason as to why the case does not fall under short payment. The providing / rendering of services of Software or IT based System Development Consultant are taxable and fall under the tariff heading 9815.6000 of the Second Schedule to the SSToS Act, 2011. The exemption of sales tax vide notification No.SRB-3-4/7/2013 dated 18.06.2013 is given when the services are exported outside Pakistan and that too is subject to the conditions, hence if the appellant has not met with the conditions, the service remains taxable and if the payment is not made it amounts to short payment.

Now taking the 2nd legal issue presented by the learned advocate that the Commissioner (Appeals) delayed in issuance of the order in appeal. The perusal of the file of office of Commissioner (Appeals) shows that the appellant sought extension through applications / letter. On hearing dates 26.08.2016, 17.10.2016, 01.12.2016, 27.03.2017, 09.05.2017, 08.09.2017 and 06.10.2017. Furthermore adjournments sought on the following hearing dates 22.07.2016, 03.10.2016, 29.12.2016, 31.01.2017, 28.02.2017, 24.04.2017, 07.07.2017, 08.08.2017, 12.01.2018. The total adjournments taken by the appellant comes to 536 days. The said adjournments taken by the appellant are excluded while computing the period specified in

subsection 6 of section 59 of the SSToS Act, 2011. Under section 59(5) of the SSToS Act, 2011 the Commissioner (Appeals) SRB may extend not exceeding sixty days for reasons to be recorded in writing fix. In view of the foregoing it is seen that the issue raised by the appellant is unfounded and the order passed by Commissioner (Appeals) SRB is within the statutory time limit prescribed under section 59(5) of the SSToS Act, 2011.

9. On merits, the learned advocate made referral to exemption Notification no.SRB-3-4/7/2013 dated 18th June, 2013 arguing that the appellant had submitted late report to the State Bank as he the appellant was unaware but nevertheless done subsequently. Perusal of SRB notification No.SRB-3-4/7/2013 dated 18th June, 2013, clearly states against tariff heading 9815.6000, that the exemption to services being exported is subject to the conditions that the value of export of the services is received in foreign exchange through banking channels in the business bank accounts of the registered person exporting the services and is also reported to the State Bank of Pakistan in the manner prescribed by the State Bank of Pakistan. Available on record is a copy of Chapter 12 of the Foreign Exchange Manual, which at clause 8 reads "Certification of Export forms by authorized dealers"; and at clause 12 'Export of Software' 12(i)(c) reads as "Each exporter will submit a monthly statement of his exports / earnings in the prescribed form (Appendix V-13) alongwith the Export Proceeds Realization Certificates issued by the Authorized Dealer through which the value of exported software is repatriated to Pakistan". This shows that the responsibility lies with the appellant and none else. Furthermore, it requires of the exporter to submit a monthly statement showing exports and earnings and that too in the prescribed form (Appendix V-13), it is a monthly statement – Whereas, in the instant order in original No.304/2016 is dated 5th May, 2016 it is stated that the appellant did not fulfill the condition of reporting the value of export to the State Bank of Pakistan and the Respondent submitted that the appellant got registered with State Bank of Pakistan on 15.09.2016 and also reported to State Bank of Pakistan on 15.09.2016 thus failing to meet with the conditions provided by the State Bank of Pakistan in the prescribed manner.

I have gone through the citations relied upon by the both the parties.

The appellant relied upon 2010 PTD (Trib.) 1112 wherein it has been held that they have made payments through banking channels as per requirement of Section 73 but due to financial problems – payment were delayed and procedural omission were condoned. The citation relied upon have distinguishable facts and hence not relevant.

The respondent has also relied upon the judgment of the Honorable Supreme Court of Pakistan 2015 SCMR 9239

The Federation of Pakistan and others

Versus

Messers Delta Innovations Ltd.

Wherein in the conclusive paragraph it has been held that

"In the circumstances and having already held that the parts / components being imported by the respondent are chargeable to duty under PCT heading 87.11 and that the concession under the SRO 436(1)/2001 shall only be applicable to the respondent in case he fully adhere to the

terms and conditions thereof. We feel it appropriate to remand the matter to the concerned adjudication officer of the FBR to decide the same accordingly.

Respondent placed reliance on 2012 SCMR 1860

Messers Paramount Spinning Mills Ltd.

Versus

Customs, Sales Tax and Central Excise , Appellate Tribunal

The second citation relied upon by the respondent have distinguishable facts and hence not relevant.

It is thus seen that where exemptions are granted the same are to be strictly construed and followed. Above all, the argument forwarded by the learned advocate of the appellant does not appear to have substance.

10. In view of the foregoing discussions, I do not find any reason to interfere with the order in appeal. However if the appellant deposits the principal amount of Sindh sales tax involved within thirty days of the receipt of this order, extreme leniency will be shown as a special case, penalties would not be required to be paid by the appellant and in so far as the amount of default surcharge is concerned, I recommend that SRB may kindly consider exempting at least 50% (fifty percent) of the amount of default surcharge as case pertains to the initial stages of coming into force of the new law by exercising the powers under section 45 of the SSToS Act, 2011. In implementation of the Act and Rules, the purpose is not to create hardship but at the same time ensure proper and timely implementation of the laws and rules framed thereunder.

11. The impugned order in appeal is modified to the above extent only as detailed in the preceding paragraph.

12. The appeal is disposed of in the above terms.

Razia Sultana Taher
(RAZIA SULTANA TAHER)
TECHNICAL MEMBER
17/05/18

Karachi

Dated:17.05.2018

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) The Deputy Commissioner (Legal), SRB, Karachi.
 - 5) Office Copy.
 - 6) Guard File.

Certified to be True Copy

G
REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD