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BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

SB-I

APPEAL NO. AT-103 /2018

M/s Redtone Telecommunication Pakistan (Pvt) Ltd.....Appellant

Versus

Assistant Commissioner, SRB, Karachi.....Respondent

Date of filing of Appeal: 05.11.2018

Date of hearing: 14.12.2018

Date of Order: 24.12.2018

Mr. Yousuf Ali, Advocate for Appellant

Mr. Javed Ali, AC-SRB for Respondent

ORDER

Justice® Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order-in-Appeal No.200/2018 passed by the Commissioner (Appeals-II) in Appeals No. 139/2017 confirming the Order in Original No. 258/2017 dated 15.09.2017 passed by the Assistant Commissioner Unit-01 (Mr. Vickey Dhingra) SRB, Karachi.



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1. It was stated in the order in original that the telecommunication services are taxable services under Tariff Heading 98.12 of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) and as per the provision of section 26 of the Act read with Rule 29 of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules) every registered person is required to maintain records of taxable services including exempt services. It was also stated that any person required to maintain record, shall on demand by the Officer, SRB produce the same for examination.
2. It was alleged in the order-in-original that appellant was served with Notice dated 08.02.2017 and 18.07.2017 to provide information/documents (whereas in the first letter the word "details" was used), however the appellant failed to produce the same, which is in contravention of provisions of section 26 and 52 of the Act of 2011.
3. That it was also alleged in the order in original that a show cause notice dated 28.07.2017 was served upon the appellant under section 52 of the Act of 2011 to show-cause as to why the penalties under serial No. 4,11, and 15 of the Table under section 43 of the Act may not imposed.

4. As per the order in original the CFO of the appellant appeared on 04.08.2017 and challenged the jurisdiction of the Officer on the ground that appellant has not rendered any services in relation to ICH agreement but received the consideration as per the agreement. The appellant also filed the written reply dated 13.09.2017 and submitted that share received from ICH did not represent consideration against



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provision of any service whatsoever by the appellant. IT was also challenged in the reply that section 52 (1) of the Act only entitles the SRB to seek information in relation to any matter under the Act or relevant to audit, inquiry or investigation under the Act.

5. The Assessing Officer passed the order in original imposing penalty of Rs.10,000/= under serial No.04, Rs.10,000/= under serial No.11 and Rs.100,000/= under serial No. 15 of the table of section 43 of the Act.
6. The said order of the Assessing Officer was challenged by the appellant by way of filing appeal before the Commissioner (Appeals), who upheld the order and dismissed the appeal, hence this appeal.
7. On 06.12.208 Mr. Yousuf Ali Advocate submitted that the first letter/notice dated 08.02.2017 under section 52 (1) of the Act was issued for asking details without assigning any reason, which makes this said notice/letter illegal. He referred to sub section (1) of S-52 and submitted that it has to be read with sub clauses (a) of sub section (1) of Section 52 of the Act of 2011. He then submitted that S 26 of the Act provides for maintaining of record by registered person providing taxable service. He then submitted that appellant was registered on 12.12.2014, whereas the record was asked for the periods October, 2012 to February, 2015 and since the appellant was not registered for the periods from October, 2012 to November, 2014 neither the appellant was bound to maintain record nor SRB can asked for the details for the period before registration. He then submitted that initially the details were called and not the documents and record and since the appellant has not provided any taxable service and the services were



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provided by PTCL who issued tax invoices in respect of LDI (long distance international) calls and the obligation to maintained record is only upon those registered persons who have provided tax able services. He then referred to Rule 29 of the Sindh Sales Tax on Services rules, 2011 and submitted that the details asked for is not available in sub rule (2A) of Rule 29.

8. Mr. Javed Ali AC SRB submitted that the appellant is providing long distance international call services and under ICH agreement and is receiving 1.95% revenue share from PTCL and being service provider is required to maintained record in terms of S-26 of the Act read with rule 29 of the Rules. He then referred to Rule 22 of the Rules and submitted that appellant has claimed input tax in relation to providing taxable services of telecommunication and for verifying the legality of input tax the information asked for is required. He then submitted that under section 52 information and record can be called and notice was issued with proper jurisdiction and the appellant malafidely is not providing the record.

9. Mr. Javed Ali, AC submitted that first letter dated 08.02.2017 was issued to appellant for calling details regarding amount received from PTCL and Sindh Sales Tax there on. He then submitted that the appellant refused to provide record vide its letter dated 17.02.2017. He then submitted that another latter dated 18.07.2017 was sent which was replied on 27.07.2017 and again the appellant refused to provide the details. He then submitted that show-cause notice was issued on 28.07.2017 which was replied on 04.08.2017 and thereafter order in original dated



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15.09.2017 was passed which was challenged before Commissioner (Appeals) who dismissed the appeal. Mr. Javed Ali has supported both the orders passed by the forums below and submitted that the penalty of Rs.120,000/= was properly imposed under serial No. 4, 11 and 15 of Table of section 43 of the Act.

10. Mr. Yousuf Ali in reply submitted that an agreement called ICH Agreement was entered into by PTCL and LDI operators (which appellant is one of them) under the direction of PTA vide letter dated 23.08.2012 and according to this agreement LDI operators including the appellant was bared to provide LDI services which now has to be exclusively provided by PTCL and the appellant is receiving 1.95% share from the total receipts on account of LDI services rendered by PTCL. Mr. Yousuf also challenged the imposition of penalty and submitted that the same has been imposed without first establishing mensrea and willful default on the part of appellant.

11. Mr. Yousuf Ali relied upon various reported judgments including the judgment in the case of Assistant Director, Intelligence and Investigation, Karachi versus B.R. Herman and others, PLD 1992 SC 485.

12. Mr. Javed Ali submitted that ICH agreement was operative affective from October, 2012 to February, 2015 and now the various LDI operators are providing services of LDI calls, which terminates in Pakistan. He also submitted that despite providing opportunities the appellant failed to provide information and the penalties under Sr. No. 4, 11 and 15 were properly imposed.



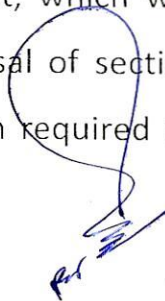
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13. I have heard the learned representative of the parties and perused the record made available before me.

14. The case of the appellant since the first reply is that no reason for asking the details had been assigned and without assigning reason the details cannot be asked and imposing penalty is not proper. The case of respondent is that despite service of letters and show cause notice the appellant failed to provide the information/documents asked for and the penalty under serial No.4, 11 and 15 of table of section 43 of the Act for non-compliance of provisions of section 52 of the Act was rightly imposed.

15. The appellant in its reply dated 17.02.2017 in response to the letter of respondent dated 08.02.2017 challenged the jurisdiction of the Officer to ask for the details without assigning any reason. Even in the reply dated 27.07.2017 sent in response to SRB letter dated 18.07.2017 the appellant reiterate the same objection taken earlier in the reply dated 17.02.2017. The Assistant Commissioner (Mr. Vicky Dhingra) who passed the order in original conveniently ignored the replies of the appellant rather suppressed the same for ulterior motives of imposing penalties.

16. Section 52 of the Act provides for obligation to produce documents and provide information. The respondent served Notice under section 52 (1) dated 28.07.2017 upon the appellant, which was duly replied by the appellant on 04.08.2017. From perusal of section 52 (1) of the Act it appears that it applies to any person required to maintain any record

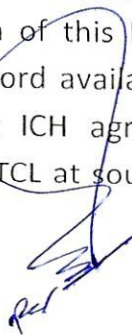


under this Act or any other law for the time being in force. The appellant is a limited company and is required to maintain record under section 220 of the Companies Act, 2017 and is covered under this provision. The appellant is also a registered person having got voluntarily registration On 16.12.2014 under others (Telecom) Tariff Heading 9812.1990 and the Act is required to furnish documents and record, which the officer of SRB considers necessary in relation to any matter under the Act or audit, inquiry or investigation under the Act.

17. Clause (a) of sub-section (1) of section 52 of the Act provides that “(a) produce for examination, such documents or records which the officer of the SRB considers necessary [in relation to any matter under the Act] or relevant to the audit, inquiry or investigation under the Act”. Perusal of the two letters dated 08.02.2017 and 18.07.2017 by which the details were asked show that no reason for asking the details has been assigned. Even the lengthy show-cause notice dated 28.07.2017 and order in original dated 15.09.2017 is silent in this regard as no specific purpose for asking details has been mentioned. Section 52 (1) of the Act cannot be read in isolation, it has to be read with relevant clause of sub-section (1) of section 52 of the Act, 2011 and clause (a) is applicable in this case.

18. Through the first Letter dated 08.02.2017 the Officer of SRB addressed the appellant as under:

“It is to inform you that the International Clearing House (ICH) was formed on October 2nd 2012 and all incoming traffic terminating in Pakistan was handled exclusively through PTCL during the term of this ICH agreements i.e. from October, 2012 to February, 2015. The record available with this office show that certain portion of receipts against ICH agreement during the said agreement period has been retained by PTCL at source. In this regard to you



are required under section 52 (1) of the Sindh Sales Tax on Services Act, 2011 to provide to the details of said transaction in the following format".

19. From the contents of the above letter it is clear that the purpose of asking details has not been assigned and the objection of the appellant in this regard has force.

20. The appellant has cited the reported Judgment of Supreme Court of Pakistan in the case of Assistant Director, Intelligence supra in which at page 486 Justice Ajmal Mian (as he then was) speaking for the Bench it has been held that "*.....The authority can only for specific purpose of determining the legality or illegality call for such information as required by Section 26. The authorized officer can call upon any importer or exporter to furnish information in case where such determination is required. It cannot make a roving inquiry or issue a notice by merely shooting in the dark in the hope that it will be able to find out some material out of those documents and then charge the party of irregularity or illegality. The authority has to state and disclose in the notice, the purpose for which the party is required to produce those documents or supply information. Unless such purpose is specified in the notice, it will be a matter of anybody's guess and the accused party will be put to inquiry without any specific allegation or fact disclosed to him. It does not permit any authority to employ the provisions of section 26 to make indiscriminate, roving and fishing inquiry irrespective of the fact whether any determination of legality or illegality in import, export or funds with which the goods were acquired is to be determined.*

21. The above judgment relates to section clause (b) of sub-section (1) of section 26 of the Customs Act, 1969 which provides (b) produce for examination, documents, or records that the appropriate officer considers necessary or relevant to the audit, inquiry or investigation under the Act". On comparing this clause with clause (a) of sub-section (1) of the section 52 of the Act it appears that both are similar to each



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other and the above reported judgment is fully applicable to section 52 (1) (a) of the Act of 2011.

22. The heading of sub-section (1) of section 52 of the Act provides that "obligation to produce documents, and provide information", but in the body of clause (a) of sub-section (1) of section 52 the word "information" is missing and instead the words "documents or record" have been mentioned. By issuing the first letter the Officer has asked for the details and not the documents and record. While construing a provision of law the substance of the provision has to be considered and not the heading. The provision has not provided for asking the information or details.

23. As far as the imposition of penalties under Serial No.4, 11 and 15 of the Table under section 43 of the Act are concerned it is to be seen that serial No.4 will be applicable if any person fails to maintain the record under this Act or rules made thereunder. In none of the letters and notice it has been alleged that appellant had not maintained record. As far as penalty under serial No.11 is concerned the same can only be imposed where any person who fails to fulfill any of the conditions, limitations or restrictions prescribed in a notification issued under any of the provisions of this Act. Again the letters, show-cause notice and order in original are silent with regard to non-fulfillment of conditions, limitations or restriction prescribed in a notification. As far as the penalty of Rs.100,000/ under serial-15 of Table is concerned, the provision provides that "where any person fails to provide the document or record or information or data or refuses to allow the officer of SRB to take extracts from or, make copies of the document or record or



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information or date or fails to appear before an officer of SRB or fails to answer any question put to him. The officer has neither asked for the documents, record or information but asked for the details.

24. In view of the above discussion the appeal is allowed and the order in original and order in appeal are set aside. However the department is at liberty to issue fresh notice for calling documents or record which the officer of the SRB considers necessary in relation to any matter under the Act or relevant to the audit, inquiry or investigation.

Copy of the order may be provided to the learned representative of the parties.



(Justice[®] Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi.

Dated: 24.12.018

Certified to be True Copy

Copies supplied to:-

1. The Appellant through Authorized Representative.
2. The Assistant Commissioner, SRB, Karachi.

Copy for information to:-

- 3) The Commissioner (Appeals), SRB, Karachi.
- 4) Office copy
- 5) Guard file.



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26/12/2018