

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD

AT KARACHI

DB-I

APPEAL NO. AT-104/2018

Independent Media Corporation (Pvt.) Ltd.
6th Floor, Printing House,
I. I. Chundrigar Road, Karachi.....Appellant

Versus

Assistant Commissioner (Unit-28) SRB,
Sindh Revenue Board,
2nd Floor, Shaheen Complex,
M. R. Kiyani Road, Karachi.....Respondent

Date of Filing of Appeal: 06.11.2018
Date of hearing: 21.04.2022
Date of Order: 29.06.2022

Dr. Ahsan Laliwala, Advocate and Mr. Omair Ahmed, Manager Taxation
for appellant.

Shoaib Iqbal, AC-SRB for respondent.



ORDER

Justice[®] Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.208/2018 dated 01.11.2018 passed by the Commissioner (Appeals) in Appeal NO. 29/2017 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 57/2017 dated 15.03.2017 passed by the Mr. Amir Ali Deputy Commissioner, (Unit-28) SRB, Karachi.

02. The facts as stated in the OIO were that the appellant was registered with SRB in respect of taxable services of advertisement on TV and was required to comply with the various provisions of Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act).

NAS

[Signature]

03. It was alleged in the OIO that during the scrutiny of financial statements of the appellant for the tax periods from July, 2012 to June, 2014 (twenty four tax periods) it was revealed that appellant had provided and received the taxable services but had neither declared the same with SRB nor paid the Sindh Sales Tax (SST) thereon.

04. A Show Cause Notice (SCN) dated 11.03.2016 under section 23 (1A) of the Act was served upon the appellant under section 23(2) of the Act to explain as to why SST amounting to Rs.1,229,073,990/= should not be assessed and recovered from the appellant alongwith default surcharge and penalties under Serial No. 3, 6 (d), 11 and 12 of the Table under section 43 of the Act.

05. The appellant filed Written Reply dated 25.03.2016 through its authorized representative, the relevant portion whereof is reproduced as under:-

".....Further we would like to refer the paragraph No.5 of the show cause notice, whereby, the perusal of aforesaid section clarifies that the said section can only be invoked in two cases, which are state as follows:

i. *Where a person fails to file the returns for a tax period by the due date; or*



ii. *Where the registered persons fails to furnish any information, explanation, documents, records or any other details as may be required in a notice under section 23, 28, 29, or 52, an officer of the SRB not below the rank of an Assistant Commissioner...."*

06. The respondent vide its letter dated 06.04.2016 informed the appellant that the SCN was issued within the provisions of the Act and the rules made thereunder.

07. Finally the appellant submitted Written Reply dated 20.02.2017 and raised a legal issue that section 23 (1A) was inserted vide Sindh Finance Act, 2015 with prospective effect and such provision cannot be invoked for the tax periods prior to the date of insertion. It was also submitted that prior to the SCN the OIOs No. i) 422/2014 dated 25.06.2014 was pending before Tribunal, in AT-No.80.2014 (ii) No. 567/2014 dated 28.10.2014 decided in Appeal No. AT-200/15 favour of

Mos'

[Signature]

the appellant by the Tribunal and iii) 206/2015 dated 04.04.2015 pending before the Tribunal in AT-19/2016. It was also alleged that for withholding of SST the jurisdiction was assigned to Unit-37 and the AC Unit 21 (Mr. Vickey Dhingra) who had issued the SCN could not exercise such jurisdiction.

08. The Assessing Officer (AO), Unit-28 passed OIO directing the appellant to deposit SST of Rs.1,201,363,018/= alongwith default surcharge. The AO also imposed penalties of Rs.60,068,151/= under Serial No. 3 of the Table under section 43 of the Act, Rs.1,201,363,018/= under Serial No. 6 (d) of the Table under section 43 of the Act, Rs.36,040,891/= under Serial No. 11 of the Table under section 43 of the Act and Rs. 8,913,660/= under Serial No. 12 of the Table under section 43 of the Act.

09. The said OIO was challenged by the appellant before the Commissioner (Appeals) by way of filing of appeal under section 57 of the Act, who maintained the OIO alongwith the imposition of default surcharge and penalties imposed by the AO, hence this appeal.

10. Mr. Ahsan Laliwala, advocate for the appellant submitted as under:-

i) The assessment order was erroneously passed under section 23 (1A) of the Act inserted vide Sindh Finance Act 2015 with prospective effect and had no application on the tax periods from July, 2012 to June, 2014.

ii) That Section 23 (1A) was inserted to cater the situation where the person failed to file tax returns or where the registered persons failed to furnish any information, explanation, documents, record or any other details as may be required in a notice issued under sections 23, 28, 29 or 52 of the Act and not to pass assessment order.

iii) The appellant being a registered service provider of advertisement services was neither liable to withhold the SST nor was liable to deposit the same with SRB. Moreover in terms of sub-rule (4) of Rule 3 of the Sindh Sales Tax Special Procedure (Withholding Rules) 2011 (hereinafter referred to as the Withholding Rules, 2011) the service

Mos

[Handwritten signature]

recipient was liable to withhold the entire SST amount and to deposit the same with SRB. Alternatively it was submitted that the service of advertisement on TV was provided to Information and Archive Department, Government of Sindh and the same was exempted under Notification dated 14.02.2014.

- iv) The advertisement in newspapers was exempted from payment of SST and the same was erroneously taxed.
- v) The AC, Unit 28 who had passed the OIO dated 15.03.2017 had no jurisdiction to pass the OIO in respect of alleged withholding of SST by the appellant. However at that time Notification dated 06.02.2017 was in field by which earlier Notification dated 01.12.2016 was amended vesting jurisdiction of passing of OIO in respect of withholding AC, Unit 37 (Withholding) and not AC, Unit 28 (Advertisement on TV).
- vi) The department passed multiple OIOs in respect of same tax periods and same subject matter.
- vii) The appellant has not withheld any amount of SST and that in view of the case of Fatima Fertilizer wherein it was held that in the Act there was no provision to fix the liability of the appellant as withholding agent. However sub-section (3) of section 13 of the Act fixing the liability of withholding agent was brought to tax net effective from July-2019 with prospective effect.
- viii) The AO imposed several types of penalties without just cause, and without establishing mensrea and malafide on the part of the appellant, and these penalties were requested to be deleted.

11. Mr. Muhammad Shoaib Iqbal the learned AC for SRB submitted as under:-

- i) That Section 23 (1A) of the Act was a machinery provision and procedural in nature and could be applied retrospectively. Moreover by invoking this section the assessment order for the tax periods July, 2012 to June, 2014 could be passed.

Mos

[Signature]

- ii) That by merely mentioning wrong provision of law was not sufficient to quash the SCN since specially the allegations were clear from the form the contents of the SCN.
- iii) The DC Unit-28 had rightly passed the OIO as at the relevant time the jurisdiction to deal with the cases of advertisement service were vested in him.
- iv) The earlier OIOs were passed for different tax periods and different subject matters and the SST involved in those OIOs were not the subject matter of the OIO challenged in this appeal.
- v) The service provider of advertising services if provided services to a non-resident or non-registered person was liable to withhold the entire SST and to deposit the same with SRB.
- vi) The appellant has failed to fulfill the conditions of exemption notification and thus was not entitled to claim exemption.
- vii) The appellant has failed to prove that advertisements were published in newspapers. The appellant produced a consolidated invoice for the entire financial year for publication of advertisement in its associate newspapers without proof of payment which make the invoice doubtful. That Sub-section (3) of section 13 to the Act was added for the purpose of clarification and the same could be applied retrospectively. Moreover the assessment order against a withholding agent could be passed under section 23 (1) read with section 47 (1) of the Act.
- ix) The appellant was liable to pay the withheld amount of SST to SRB under section 16 of the Act.
- x) The default surcharge and penalties were rightly imposed as the appellant by not depositing the due tax as prescribed had caused loss to exchequer.

12. We have heard the learned representative of the parties and perused the record made available before us.

not

[Signature]

13. The appellant was registered as service provider of advertisement services with SRB on 10.08.2011 and was also a recipient of advertisement and other services. The appellant in its capacity as the service provider of advertisement service was required to charge the SST on the invoices and it was the responsibility of the recipient of advertisement services to withhold the entire amount of SST and pay the same to SRB. Moreover being the service recipient/withholding agent of the advertising services it was the responsibility of the appellant to withhold the entire amount of SST and pay the same to SRB whereas in respect of other services it had to withhold 1/5 of the SST and to pay the same to SRB and pass on the remaining to the service provider for depositing the same with SRB.

14. The AC-SRB Unit 21 Mr. Vickey Dhingra, issued SCN dated 11.03.2016 under section 23 (2) of the Act invoking section 23 (1A) of the Act alongwith several Tariff Headings of the Second Schedule to the Act confronting the appellant with an amount of Rs.1,229,073,990/= as detailed under:-



Description	SST Amount
Table No. 02 (Advertisement and Royalty)	458,266,000
Table No. 03(Royalty Revenue)	20,683,000
Table No. 04(Advertisement Revenue)	17,525,000
Table No. 05(Received Taxable Services)	297,122,000
Table No. 06(Received advertisement services)	286,571,000
Table No. 07(Provided advertisement services and the recipient after withholding 20% paid remaining paid to appellant)	137,145,482
Table No. 08 (services provided to Mehran Enterprises)	586,968
Total payable SST in '000'	1,229,074
Total payable SST in Rupees	1,229,073,990

Handwritten signature/initials

Handwritten signature/initials

15. That after adjudication the Assessing Officer (AO) passed the OIO determining the SST at Rs.1,201,363,018/= against Rs.1,229,073,990/= confronted in the SCN alongwith payment of default surcharge under section 44 of the Act and penalties of Rs.1,306,385,719/= under various provisions of the Table under section 43 of the Act.

16. In the appeal before us under our direction the learned AC-SRB prepared various Reconciliation Statements. We have taken the figures from the Reconciliation Statement submitted by the AC on 31.08.2021. The amount of SST due was shown to Rs.439,312,322/= against the determined amount of Rs.1,201,363,018/= in the OIO. The AC worked out the SST on account of provision of services at Rs.192,225,322/= and SST on account of withholding on services received were shown at Rs.247,087,000/=. The Report is annexed with this order as Annexure "A".

17. The appellant has also filed its own Reconciliation Statement dated 13.04.2022. The amount under various heads as determined by the AC in the Reconciliation Report dated 31.08.2021 was not disputed. However the appellant in the column of "Remarks" disputed the taxability of the items. The said report is annexed with this order as Annexure "B".

18. After hearing the parties at length and perusing the record available with us it appears that the SST was charged on account of service provided or rendered by the appellant as well as services received and the SST withheld by the appellant.

19. The case of the respondent is that the appellant was liable to pay SST of Rs.192,225,322/= on providing advertising services and had neither charged nor deposited SST and instead it had claimed self-styled exemptions. Moreover the appellant provided advertising services involving SST of Rs.136,982,808/= and the service recipient had declared 20% withholding in their monthly tax returns and passed on the 80% SST to the appellant which the appellant had not deposited with SRB. The respondent further alleged that M/s Mehran Enterprises instead of withholding the SST passed on the entire SST of Rs.586,000/= to the appellant which was not deposited with SRB. The department further alleged that the appellant while receiving advertisement and other

MOS

A. Prady

services was required to withhold the SST. However it had failed to withhold and deposit the same thus it was liable to pay Rs.247,087,000/.

20. That it is appropriate to frame the following issues so that the dispute in hand is properly determined:-

- i) Whether the AO who issued the SCN and passed the OIO had jurisdiction to issue SCN and pass the OIO?
- ii) Whether the appellant being the recipients of advertising services and other services was required to withhold and deposit the entire SST and 1/5th of the SST respectively with SRB or it was the responsibility of the service recipient to withhold the SST and to deposit the same with SRB?
- iii) Whether before insertion of sub-section (3) of section 13 in the Act through Sindh Finance Act, 2019 there was no provision in the Act which fixed the responsibility/liability of withholding agent?
- iv) Whether the appellant being the service provider of advertisement service was required to deposit the SST with SRB or it was the responsibility of the service recipient to withhold entire amount of SST and to deposit the same with SRB?

21. We will first take up the issue No. (i) supra for discussion i.e. "Whether the AO who issued the SCN and passed the OIO had jurisdiction to issue SCN and pass the OIO?" The discussions on this issue are as under.

- i) In the instant matter the SCN dated 11.03.2016 was issued by AC-Unit No. 21 (Mr. Vickey Dhingra). However at that time Notification dated 06.07.2015 was in field which provided that the AC-Unit 21 had the jurisdiction to deal with the cases of advertisement on TV and AC-Unit No. 22 had the jurisdiction to deal with the cases of withholding of SST. Clause 2 of the said Notification provided that "where a service provider is engaged in the economic activity of providing or rendering more than one taxable service, as specified against Unit No. 1 to 21 in column (3) of the Table, he shall be placed in the jurisdiction of the Unit, specified in

nas

[Signature]

column (2), relatable to the service which was his principal activity as per registration particulars”.

- ii) That as per the Registration Profile the appellant was registered for providing advertisement on TV, Tariff Heading No. 9802.1000 of the Second Schedule to the Act. The appellant at the same time was providing advertisement services and had also received various services and had acted as withholding agent. As per clause 2 of the Notification dated 06.07.2015 the jurisdiction to issue notices was with the Officer of SRB who was dealing with the cases for which the appellant was registered. It is thus held that the SCN was rightly issued by AC-Unit 21 of SRB.
- iii) That the OIO dated 15.03.2017 was passed by DC-Unit No. 28 (Mr. Amir Ali) since at that time Notification dated 6.02.2017 was in field which provided that the AC-Unit 28 had the jurisdiction to deal with the cases of advertisement on TV. Whereas the AC-Unit No. 37 had the jurisdiction to deal with the cases of withholding of SST. Clause 2 of the said Notification provided that “where a service provider was also a withholding agent, the officers of the SRB in Unit No. 37 shall exercise concurrent powers and functions with the respective officers of the SRB in unit No. 1 to 36 in relation to the amounts of SST withheld or liable to be withheld under the provisions of the Sindh Sales Tax Special Procedure (withholding) Rules 2011 and 2014”. It is apparent from this clause that for dealing the cases of withholding, the Officer of Unit No. 28 and 37 had concurrent jurisdiction and one of the Officer could issue SCN and passed the OIO.
- iv) In view of the above discussions it is held that the SCN was rightly issued by AC (Unit-21) of SRB and the OIO was lawfully passed by the AC-Unit 28 of SRB.

22. Now we will take up issue No. (ii) “Whether the appellant being the recipients of advertising services and other services was required to withhold and deposit the entire SST and 1/5th of the SST respectively

WAS

[Signature]

with SRB or it was the responsibility of the service recipient to withhold the SST and to deposit the same with SRB?" The discussions on this issue are as under:-

i. The tax periods involved in this appeal were from July-2012 to June-2014. During the tax periods involved the Withholding Rules, 2011 were in field. The appellant is a company as defined under sub section (28) of section 2 of the Act. The appellant being a service recipient of advertisement and other services was the withholding agent as provided under clause (e) of sub-rule (2) of rule 1 of the Withholding Rules, 2011. Moreover the appellant being the service recipient of advertising services was also a withholding agent as provided under clause (f) of sub-rule (2) of rule 1 of the Withholding Rules, 2011. The appellant being a withholding agent other than a recipient of advertising services was required to deduct an amount equal to one-fifth of the total amount of SST shown in the sales tax invoice and pay the balance amount to service provider as provided under sub-rule (2) of rule 3 of the Withholding Rules, 2011.

The appellant being a recipient of advertising services was a withholding agent and was required to deduct the amount of SST as mentioned in the invoice and in case the SST was not mentioned in the invoice the recipient could deduct the amount of SST at the applicable rate from the payment made or to be made to the service provider.

iii. In view of the above discussion we hold that the appellant being the service recipient of advertising and other services was a withholding agent and was required to withhold and deposit the entire SST and 1/5th of the SST respectively and to pay the same to SRB.

23. Now we take up issue No. (iii) "Whether before insertion of sub-section (3) of section 13 in the Act through Sindh Finance Act, 2019 there was no provision in the Act which fixed the responsibility/liability of withholding agent?" The discussion on this issue are as under:-

10/5

[Signature]

- i. It is not disputed that the respondent was a registered for providing service of advertisement on TV and was also recipient of various taxable services.
- ii. It was alleged that the appellant while receiving advertisement and other services was required to withhold the SST but it had failed to withhold and deposit the same with SRB and was thus liable to pay Rs.247,087,000/-.
- iii. The tax periods involved in this matter were from July-2012 to July-2014 (24 Tax periods). During the relevant tax periods the Withholding Rules, 2011 were in field and were fully applicable on the respondent.
- iv. The contention of the department is that the assessment order could be passed under sub-section (1) of section 47 of the Act. The contention of the appellant was that before insertion of section 13 (3) of the Act inserted vide Sindh Finance Act, 2019 dated 05.07.2019 there was no provision in the Act to fix the liability of the appellant as withholding agent during the tax periods from July-2012 to June-2014 (24 tax periods). The appellant has relied upon the case of *Fatima Fertilizer, 2021 PTD 484*.
- v. There was no dispute that the appellant being the recipient of taxable services was a withholding agent as provided under clause (e) of sub-rule (2) of rule 1 of the Withholding Rules, 2011. Sub-rule (2) of rule 3 of the Withholding Rules, 2011 provided that a withholding agent other than a person in the jurisdiction of LTU and a recipient of advertisement services, shall deduct an amount equal to one fifth of the total sales tax shown in the sales tax invoices issued by the registered person and make payment of the balance amount to the registered person.
- vi. That sub-rule (3) of rule 3 of the Withholding Rules, 2011 provided that a withholding agent falling under clause (a) to clause (e) of sub-rule (2) of rule 1 of the Withholding Rules, 2011, shall on receipt of taxable services from unregistered persons, deduct SST at the applicable rate of the value of taxable services provided or rendered to it from the payment due to the service provider.



Was

Asif

- vii. That sub-rule (4) of the rule 3 of the Withholding Rules, 2011 provided that the person mentioned in clause (f) of sub-rule (2) of rule 1 of the Withholding Rules, 2011 who received the services of advertisement provided or rendered by a person based in Pakistan or abroad shall, deduct the amount of SST as mentioned in the invoices issued by the service provider, from the payment due to the service provider.
- viii. It is thus evident from the perusal of the above provisions that the appellant being a withholding agent was required to withhold one fifth of the SST if the services were acquired from registered persons. Moreover in case the services were acquired from unregistered person the entire SST was to be withheld in the invoices on receipt of advertising services.
- ix. The appellant on the strength of the case of Fatima Fertilizer had challenged that prior to insertion of sub-section (3) of section 13 of the Act there was no provision to fix the liability of a withholding agent. In our earlier decision in the case of Fatima Fertilizer, Appeal No. AT-52/2018 we while relying on sub-section (1) of section 47 of the Act had held as under:-



23. The object of section 47 of the Act is to recover tax not levied or short levied. Sub-section (1) of section 47 of the Act provides that where by reason of some inadvertence, error or miscalculation any tax or charge has not been levied or has been short levied, the person liable to pay any amount of tax or charge shall be served with a notice, within five years of the relevant date, requiring him to show cause for payment of the amount specified in the notice. In this provision the word "person" has been used and not withholding agent. The word "person" has been defined under clause (a) of sub-section (63) of section 2 of the Act as a "company, an agency or an association of persons incorporated, formed, organized or established in Pakistan or elsewhere". The appellant is a company established in Pakistan and fully

Mas'

covered by the definition of person. Sub-section (2) of section 47 of the Act provides that "the officer of the SRB empowered in this behalf shall, after considering the objections of the person served with a notice to show cause under sub-section (1), determine the amount of tax or charge payable by him and such person shall pay the amount so determined". The appellant being service recipient of advertising services is a withholding agent under clause (f) of sub-rule (2) of Rule 1 of Withholding Rules, 2011 and being company fall within the definition of a person and has short deposited the tax with SRB thus SCN was rightly issued and tax liability was rightly determined under sub-section (2) of section 47 of the Act".

- x. The taxpayer M/s Fatima Fertilizer had challenged our decision before the Honorable High Court of Sindh in the referential jurisdiction. The Honorable High Court of Sindh in Fatima Fertilizer versus SRB, 2021 PTD 484 held as under:-

"6. Section 9 of the Sindh Sales Tax on Services Act, 2019 (the Act") contains the statutory definition liable to tax. It is manifest from the provision that the liability is generally imposed upon the registered person providing the service or the person receiving the service. Section 13 (3) was inserted in the Act vide the Finance Act, 2019 to impose liability upon a withholding agent. The applicant's case quite simply is that prior to the coming into effect of the finance Act 2019, a withholding agent was not a person liable to tax within meaning of the Act.

- xi. The case of Fatima Fertilizer was in respect of tax periods prior to July-2019 and in that context the Honorable High Court in para 8 of the judgment had held that "there is no cavil to the proposition that the liability upon a withholding agent to pay tax was not imposed until the Finance Act, 2019 by which sub-section (3) of section 13 was inserted; hence any apportionment thereof prior thereto appears to be devoid of statutory sanction."
- xii. That in the instant case such point is identical since during the tax periods from July-2012 to June-2014 there was no

Mas

provision in the Act to fix the liability of withholding agent. Moreover as per the Honorable High Court of Sindh Section 13 (3) of the Act was inserted in the Act vide the Finance Act, 2019 to impose liability upon a withholding agent. The Honorable High Court in the case of Fatima Fertilizer further held as under:-

"8. The initial imposition of liability upon the applicant was per section 47 (1A) of the Act, however, the learned Tribunal has already disregarded the application of the said provision and instead maintained liability per section 47 (1) of the Act. The period for issuance of the show cause notice read five years at the relevant time; however, the verbiage of section 47 of the Act clearly states that the obligation is placed upon a person liable to pay any tax. There is no cavil to the proposition that the liability upon a withholding agent to pay tax was not imposed until the Finance Act, 2019; hence, any apportionment thereof prior thereto appears to be devoid of a statutory sanction".

- xiii. It is evident from the above judgment in the case of Fatima Fertilizer that the liability of withholding agent was interlinked with the insertion of sub-section (3) of section 13 of the Act which was inserted vide Sindh Finance Act, 2019 and it was held that before that date the withholding agent was not liable to account for the SST. The implication of sub-section (3) of section 13 was prospective and was not applicable to the tax periods from July-2012 to June-2014.
- xiv. The above judgment in the case of Fatima Fertilizer is binding on this Tribunal in view of Article 201 of the Constitution of Pakistan unless set aside by the Honorable Supreme Court. However, in presence of case of Fatima Fertilizer no contrary view could be taken.
- xv. It is thus evident from the above portion of the Judgment that the case of Fatima Fertilizer is fully applicable to the tax periods prior to July-2019 and the tax periods from July-2012 to June-2014 were covered under the Fatima Fertilizer

Mos

Ansari

case and no SST could be demanded from a withholding agent.

xvi. The position would however be different in case the appellant being recipient of service had actually withheld/deducted tax but had not deposited the same with SRB. In that case if evidence or material of withholding/deduction of SST and its non-deposit was available with the department appropriate proceedings under section 16 of the Act could be initiated against the appellant.

xvii. In view of the above discussions it is held that subject to the decision of the Honorable Supreme Court of Pakistan in the case of Fatima Fertilizer it is held that the appellant for the time being was not liable to account for the withholding of SST and no SST could be demanded from it during the tax periods prior to July-2019. However, if the appellant had actually withheld the SST and had not deposited the same the department may initiate fresh proceedings against it under section 16 of the Act.

24. Now we take up the issue No. iv "Whether the appellant being the service provider of advertisement services was required to deposit the SST with SRB or it was the responsibility of the service recipient to withhold entire amount of SST and to deposit the same with SRB?" The discussion on this issue are as under:-

- i. It was not disputed that the appellant being provider of advertisement services was required to charge the SST on its invoices and the service recipient was required to withhold entire SST shown in the invoices and to deposit the same with SRB.
- ii. In Table 07 of the OIO it was mentioned that the recipients of advertisement services declared the SST of Rs.170,486,575/= and deducted/withheld Rs.33,341,093/= and passed on the balance of Rs. 137,145,483/- to the appellant which it had not deposited. The assertion of the appellant was that the recipients have withheld the entire SST and the appellant was not liable to pay the same.

M. A. S.

[Signature]

iii. In the final Reconciliation Report the AC worked out the SST at Rs.54,656,514/= on account of providing of services by the appellant. The AC had bifurcated such SST as under:-

<u>PARTICULARS</u>	<u>AMOUNT OF SST</u>
a) Services Provided to Archives Department Govt. of Sindh	Rs. 1,672,945/=
b) Services provided to Mir Khalil Ur Rehman Foundation (MKRF)	Rs. 6,287,057/=
c) Service provided to UNICEF	Rs. 2,449,615/=
d) Service provided to USAID Pak.	Rs. 1,470,479/=
e) Royalty/Content Sale Broadcasting Rights	Rs. 19,039,945/=
f) Up linking Cost Sharing	Rs. 3,729,060/=
g) IVR Revenue	Rs. 390,437/=
h) Web Advertisement	Rs. 6,142,441/=
i) You Tube Revenue	Rs. 1,300,011/=
j) Production Revenue	Rs. 11,952,059/=
k) Others	RS. 172,765/=
Total	Rs. 54,656,514/=
l) SST paid by the recipients to the appellant which was not deposited with SRB was shown at Rs. 137,145,483/- in the OIO whereas in the reconciliation it was shown at Rs.136,982,808/= which is taken for discussion	Rs.136,982,808/=
m) SST paid by Mehran Enterprises to appellant who had not Deposited the same with SRB.	Rs. <u>586,000/=</u>
Total	<u>Rs. 192,225,322/=</u>

All the above particulars / services are discussed individually as under:-

Mos

[Signature]

a) That the SST was charged at Rs.1,672,945/= relating to the services provided to Archives Department, Government of Sindh as at para (a) supra. This issue is discussed as under:-

1) That the advertisement services Tariff Heading 9812.1000 of the Second Schedule to the Act which was provided to Information and Archives Department, Government of Sindh. The representative of the appellant submitted that as per sub-rule (4) of rule 3 of Withholding Rules, 2011 the recipient of service was required to withhold entire amount of SST. The appellant claimed exemption in terms of SRB Notification No.SRB-3-4/2014 dated 14th February, 2014. The AC offered explanation that Notification No. SRB-3-4/2/2014 Dated 14th Feb, 2014 only pertained to the Sindh Culture Festival and there was no other exemption in this regard and the appellant failed to provide any invoice, justification and certificate as required under the said notification.



That the exemption Notification is to be strictly construed. In case the service of advertisement was not exempted it was the responsibility of the service provider to charge SST on the invoice and the recipient of advertising service was required to withhold the entire amount of SST and to deposit the same with SRB. It is not known whether the appellant had charged SST on its invoices or not. However, since the appellant had claimed exemption it was clear that it had not charged the SST in its invoices and the same was also not disclosed in the SST returns. In case the SST was not charged in the invoices the SST was to be deducted from the payment made to the appellant in view of sub-rule (4) of rule 3 of the Withholding Rules, 2011 which was applicable during the tax periods from July, 2012 to June, 2014.

M. Asif

III) In view of the above we hold that the SST of Rs.1,672,945/= was rightly charged from the appellant on advertisement related services as it had failed to prove that it had charged the SST and the same was withheld by the recipient. Moreover the appellant also failed to fulfill the requirement of Exemption Notification.

b, c and d) That the SST was charged on advertisement services provided by the appellant to (b) Mir Khalil Ur Rehman Foundation (MKRF) at Rs.6,287,057/=(c) UNICEF at Rs.2,449,615/= and (d) USAID Pak. at Rs.1,470,479/= as at page 16 of the order supra. These issues are discussed as under:-

1) The appellant claimed exemption on the ground that the services were provided under grant in aid. The AC submitted that the appellant failed to prove existence of any grant in aid. The AC also submitted that this point was already decided in favour of the department vide Appeal No. AT-46/2014 dated 09.05.2017. The relevant portion is reproduced as

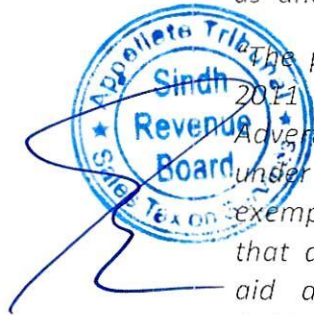


under "18. As regard services rendered to MKRF, Unilever and Glaxo SmithKline the exemption from taxability of which is claimed on two scores; firstly that it was through grant-in-aid funding and secondly it was not advertisement but public service message. The AC argued that service generated through an economic activity is taxable. The AC further argued that all advertisements are taxable and there is no provision of exemption on the basis that the advertisements were public service messages. The Appellant Representative argued that public service messages are not advertisements and issued for public good. The AC also argued that advertisements issued through electronic media, in particular Geo & Jang is used for image building of the Foundation and the founder of Geo and Jang group as well. The AC also submits that it is a well-known fact that MKRF is aided and supported by Jang group. The argument of grant-in-aid does not carry much weight as nothing is available on record to show that such

Mos

grant is channeled through government organizations. Furthermore there is no exemption available to the public service messages advertised on TV channels. For all tax purposes the said public service messages are advertisements liable to tax. The appellant has telecast the advertisements against consideration and is liable to charge and deposit tax. Furthermore the appellant has no authority to claim exemptions on behalf of some other party who is liable to pay tax. Since neither the appellant has mentioned the tax amount on the invoices nor deposited the tax but claimed self-designed exemption it is liable to pay Sindh Sales Tax to SRB. (Emphasis supplied)

19. That the issue relating to exemption claimed in respect of service provided or rendered to UNICEF, was resolved by a DB of the Appellate Tribunal, Sindh Revenue Board in Appeal No.119/2015 dated 26.09.2016 in the case of ARY Communications Private Limited versus Assistant Commissioner IV, SRB, Karachi wherein it was held as under:-



The perusal of the Notification Ref.S.R.B.Leg. (I) 2011 dated 01.07.2011 provides that Advertisement financed out of funds provided under grants-in-aid agreements are exempted. The exemption is unqualified. The only restriction is that advertisement was financed from grants-in-aid agreements. The appellant has produced Pakistan Enhanced Partnership Agreement between the United States of America and Islamic Republic of Pakistan. The appellant also produced Exemption Letter from UNICEF. We have examined the provisions of the Agreement and the Certificate. From the perusal of the Article 1 of Agreement it appears that the purpose of the Agreement is to set out the understanding of the parties in connection with the objectives for the provision of development assistance of Pakistan. The objectives are set out in Article 2 which provides foreign assistance objectives of peace and security, democratic governance, economic growth, social sector support and humanitarian assistance articulated by Government of United

W. as

[Signature]

States of America. The objectives are wide enough to cover various fields. The Government of Pakistan being Grantee is also liable to contribute not less than the equivalent of one third of the portion of the Grant that is used to support activities that directly benefit the grantee or over which the grantee exercises direct and substantial involvement. In Article 3 the word grant has been used and provides that US AID hereby grants to the grantee amount mentioned in the Agreement. Clause (d) of Article 3 provides that the contribution may be disbursed by US AID through contracts, grants, cooperative agreements and other implementing instruments with third parties, whether public or private. The Agreement is between two governments and both have contributed towards the funds. As per the Agreement the funds can be utilized with the assistance of public and private sector. The advertisements charges paid under the above agreement is grant from two Governments and is covered under exemption and no sales tax is payable. (Emphasis supplied). As far as the Advertisement of UNICEF is concerned no Agreement is placed on record and only a photocopy of exemption certificate has been placed on record which is not sufficient for granting exemption. The appellant has telecast the advertisements against consideration and is liable to charge but, the appellant under self-designed exemption has not charged the tax. Furthermore the appellant has no authority to claim exemptions on behalf of some other party who is liable to pay tax. Since neither the appellant has mentioned the tax amount on the invoices nor deposited the tax but claimed self-designed exemption it is liable to pay Sindh Sales Tax. (Emphasis supplied).

- ii) We therefore, while relying upon our earlier decision hold that the appellant was liable to pay SST at Rs.6,287,057/= on account of services provided to Mir Khalil Ur Rehman Foundation (MKRF) as at para (b) supra, and to pay SST at Rs.2,449,615/= on account of services provided to UNICEF as at para (c)

Kas

[Signature]

supra. However it was not liable to pay SST on the services provided to USAID as at para (d) supra.

e) That the SST was charged on Royalty/Content Sale/Broadcasting Rights at Rs. 19,039,945/= at para 16 of this order supra. This issue is discussed as under:-

1) the activity was treated as Franchise and Intellectual Property services. The explanation offered by the appellant was that royalty income was not taxable under the Act as the revenue was earned from foreign broadcasters who acquired rights from the appellant to telecast its programs. Whereas the contention of the learned AC was that the income from royalty was a taxable activity and the same was already decided by the Tribunal in favour of the department in Appeal No. AT-78/2019 dated 28.02.2020 in the case of M/s Distribution Club and the appellant also failed to provide any concrete evidence in the shape of foreign invoices, and other related documents.



It is apparent from the nature of transactions that the appellant allowed its contents to be telecasted by foreign broadcasters (non-resident persons) against certain consideration. The programs produced by the appellant were in the nature of intellectual property and others and it could not use these programs unless permitted by the appellant. The intellectual property service is covered under Tariff Heading 9838.0000 of the Second Schedule to the Act. However for the relevant tax periods intellectual property right was not defined under the Act.

The meaning of Intellectual property is as under:-

a) Intellectual property as appearing in the Oxford Advanced Learners Dictionary, International Student Edition is as under:-

"An idea, a design, etc. that has created and that the law prevents other people from copying intellectual property rights.

Was

[Signature]

b) The "Intellectual property rights as defined in Google:

"the rights given to persons over the creations of their minds. They usually give the creator an exclusive right over the use of his/her creation for a certain period of time".

c) The Intellectual property as defined in the Black's Law Dictionary, Tenth Edition:

"A category of intangible rights protecting commercially valuable products of the human intellect. The category comprises primarily trademark, copyright and patent rights, but also includes trade-secret rights, publicity rights, moral rights and rights against unfair competition".

III) It is apparent from above definitions that the intellectual property is anything produced by the mind of human is covered by such definitions.

IV) The providing or rendering to a person by any person by transferring temporarily or permitting the use and enjoyment of an intellectual property right fall within the ambit of services and is covered under Tariff Heading 9838.000 of the Second Schedule to the Act. Therefore in case a resident person provided service to a non-resident person thus liability to pay SST was on the resident person providing the service in terms of clause (a & b) of sub-section (1) of section 3 of the Act read with sub-section (1) of section 9 of the Act.

V) In view of the above discussions the SST of Rs.19,039,945/= was rightly charged on Royalty/Content Sale/Broadcasting Rights and the appellant is liable to pay SST to SRB on this account.

f) That the SST was charged on Up linking Cost Sharing at Rs.3,729,060/= under Tariff Heading 9827.2000 (Exhibition Services) of the Second Schedule to the Act as mentioned at page 16 of this order supra. This issue is discussed as under:-

1) The AC submitted that the revenue was covered under advertisement services as the media only provided time to the recipient for sharing their contents. The explanation offered by the appellant was that revenue was earned on account of up-

nos

[Signature]

BEFORE THE HONORABLE APPELLATE TRIBUNAL, SINDH REVENUE BOARD

REPORT IN THE CASE OF AT-104/2018

M/s Independent Media Corporation (Pvt) Ltd-----Appellant

Deputy Commissioner (Unit-28)-----Respondent

Subject: APPLICATION FOR CONSIDERING THE FRESH RECONCILIATION REPORT

It is respectfully submitted that after conclusion of the arguments of the learned representative of the parties, it appears that the final reconciliation report dated 03.03.2021 was not proper and had not cover the entire liability of the appellant. It is submitted that while preparing the reconciliation some entries of Table No. 5 was not incorporated resulting in loss of revenue.

2. It is further stated that to avoid any error in the appellant order it is appropriate to consider the revised reconciliation report. This prayer is made in the interest of justice.



Mas

2

31/08/2021
Muhammad Shoaib
AC (Unit-19)

Revision of Verdict Annexure - A

Table No.	Recipient Name	As per Order-in-Original	After Reconciliation	Amount of SST (As a Service Provider)	Amount of SST (As a Service Recipient)	Relevant tariff heading	Remarks
2	Information and Archives Dept			1,672,945		9802.1000 (Advertisement on TV)	Notification No. SRB-3-4/2014 dated 14 th Feb, 2014 only pertains to the Sindh Culture Festival and there is no other exemption in this regard. Further, the registered person failed to provide any invoice and justification and Certificate as required under the said notification.
	MKRF Zara Sochiye			6,287,057		9802.1000 (Advertisement on TV)	The case already decided vides Honorable Tribunal Order in Appeal No. AT 46/2014 in favour of the department.
	UNICEF			2,499,615		9802.1000 (Advertisement on TV)	
	USAID PAKISTAN			1,470,479		9802.1000 (Advertisement on TV)	
	Royalty /Content Sale/Broadcasting rights			19,039,945		9823.000/9838.000 (Franchise & Intellectual property Services)	Royalty income covered under Sindh sales tax and case in this regard already decided vide Appellate Tribunal Order No. AT-78/2019 dated 28.02.2020 in the case of M/s Distribution Club. However, the registered person failed to provide any concrete evidences in this regard i.e. foreign invoices and other related documents. Therefore, their contention is not acceptable.
	Uplink Cost sharing	458,266,000	54,656,514	3,729,060		9827.2000 (Exhibition Services)	The revenue of uplinking cost sharing are covered under Advertisement services basically the media only provide time to the recipient for sharing their contents. Therefore, the uplinking cost included advertisement services for the recipient.
	IVR Revenue			390,437			Not provided any details
	Web Advertisement			6,142,441		9802.9000 (Other Advertisement)	Services provided from Pakistan, booked in Pakistan and payment received in Pakistan. Therefore, the services covered under all aspect covered under Advertisement services.
	YouTube Revenue			1,300,011		9802.9000 (Other Advertisement)	Basically the platform and space given by the registered person, just like TV Channel these advertisement also covered under Advertisement services and receiving of advertisement services required to withhold 100% Sindh sales tax.
	Production Revenue			11,952,059		9832.0000 (Production House)	Not provided any details
Others			172,465			Not provided any details	
Total			54,656,514				
7	Declared by Service Recipient that the IMC provided services to them but IMC failed to declared and paid the due tax	137,145,000	136,982,808	136,982,808		9802.0000 (Advertisement Services)	i. The recipient of service declared in their Sindh sales tax return filed with SRB that they have received services from registered person involve sales tax amount of Sindh sales tax Rs.137,145,482/- and also declared partial withholding of the tax amount and the remaining amount of tax remained unpaid. Moreover, 2 recipients, M/s Shield Corporation and M/s Punjab Oil Mills provided deduction certificates issued to the appellant and it was ascertained that the recipients indeed withheld full amount of the tax involved therein. Therefore, the amounts of M/s Shield corporation and M/s Punjab Oil Mills, Rs.161,472/- & Rs.720/- respectively, may be reduced from the table No. 07. iv. Hence, the appellant is liable to pay the amount of Rs.136,982,808
8	Declared by Mehiran Enterprises that they have received services from IMC and instead of withhold due tax as per rule, paid the tax to IMC (IMC has no objection in this case.)	586,000	586,000	586,000		9802.0000 (Advertisement Services)	M/s Mehiran Enterprises declared that instead of withhold the due Sindh sales tax as per rule, they have paid the tax amount to the services provider M/s Independent Media Corporation but on the contrary they have failed to pay the same.
Grand Total		595,997,000	192,225,322	192,225,322			




 W.D.

RECONCILIATION TABLE

Table No.	Total SSI Involved in order	SSI after four reconciliation	Annexure
Table 2	458,266,000	54,656,514	Annex-A
Table 3	20,683,000	-	Reconciled by my predecessor
Table 4	17,525,000	-	Reconciled by my predecessor
Table 5	297,122,000	235,911,000	Annex-B
Para 3.4	11,176,000	11,176,000	Annex-B
Table 6	286,571,000	-	Reconciled by my predecessor
Table 7	137,145,000	136,982,808	Annex-A
Table 8	586,000	586,000	Annex-A
Total Value	1,201,363,018	439,312,322	



[Handwritten mark]

Service

Annex

Remarks

gement Consultancy Services which are taxable under Sindh sales tax and the registered person required to withhold and pay Sindh sales tax for the said
ontended that the services received by the registered person outside Pakistan and not in Sindh. However, no justification provided on the same.

services received by the registered person (taken from expenditures specified under Note 24, 25 and 26 of the Accounts for the years 2013 and 2014). In Oder-in-
t Rs.297,122,000/-. After third reconciliation the amount worked out in the O-in-O was reconciled to the amount of Rs.235,911,000/-. Breakup and calculation is as
under:

July 2012 to June 2013	Total	Rate of Tax	SST	Payable amount of SST	Reconciled	Unreconciled	Remarks
	117,724,000	4%	4,709,000	942,000	-	942,000	
45,490,000	93,384,000	16%	14,941,000	2,988,000	-	2,988,000	
13,585,000	33,971,000	16%	5,435,000	1,087,000	-	1,087,000	
	24,315,000	16%	3,890,000	778,000	-	778,000	
	523,000	4%	21,000	4,000	-	4,000	
1,206,000	2,226,000	5%	111,000	22,000	-	22,000	
	443,000	16%	71,000	14,000	-	14,000	Not provided any justification
							Only an amount of Rs. 330,000,000 for the services provided to Independent Music Group is reconciled for which SST amount of Rs. 52.8 million excluded for the Services received under the head of Advertisement Expenses. Further, in the same head, the registered person provided single invoice for whole of the year for the services received from Newspaper which is not justified.
761,825,000	1,757,967,000	16%	282,875,000	282,875,000	52,800,000	230,075,000	This amount already included in para 3.4, therefore, amount of Rs. 8411000 excluded in the reconciled statement.
	52,509,000	16%	8,411,000	8,411,000	-	-	
322,106,000	2,093,062,000		320,464,000	297,121,000	52,800,000	235,910,000	



Receipt of

Table No.	Recipient Services	As per Order-in-Original	After Reconciliation	Amount of SST (As a Service Recipient)	Relevant tariff heading																
3.4	Consultancy Services	11,176,000	11,176,000	11,176,000	9815.4000 (Management Consultant)																
5	Withholding of Sindh sales tax	297,122,000	235,911,000	235,911,000	9802.0000 (Advertisement Services) and other Misc Services																
					<table border="1"> <thead> <tr> <th>Description</th> <th>July 2013 to June 2014</th> </tr> </thead> <tbody> <tr> <td>Legal & Professional Services</td> <td>117,724,000</td> </tr> <tr> <td>Repair & Maintenance Services</td> <td>47,894,000</td> </tr> <tr> <td>Insurance</td> <td>20,386,000</td> </tr> <tr> <td>Software & System Implementation</td> <td>24,315,000</td> </tr> <tr> <td>Auditors Remuneration</td> <td>523,000</td> </tr> <tr> <td>Repair & Maintenance Services</td> <td>1,020,000</td> </tr> <tr> <td>Web Hosting</td> <td>443,000</td> </tr> </tbody> </table>	Description	July 2013 to June 2014	Legal & Professional Services	117,724,000	Repair & Maintenance Services	47,894,000	Insurance	20,386,000	Software & System Implementation	24,315,000	Auditors Remuneration	523,000	Repair & Maintenance Services	1,020,000	Web Hosting	443,000
Description	July 2013 to June 2014																				
Legal & Professional Services	117,724,000																				
Repair & Maintenance Services	47,894,000																				
Insurance	20,386,000																				
Software & System Implementation	24,315,000																				
Auditors Remuneration	523,000																				
Repair & Maintenance Services	1,020,000																				
Web Hosting	443,000																				
					<table border="1"> <tbody> <tr> <td>Advertisement Expenses</td> <td>1,006,142,000</td> </tr> <tr> <td>Consultancy Fee</td> <td>52,509,000</td> </tr> <tr> <td>Total</td> <td>1,270,955,000</td> </tr> </tbody> </table>	Advertisement Expenses	1,006,142,000	Consultancy Fee	52,509,000	Total	1,270,955,000										
Advertisement Expenses	1,006,142,000																				
Consultancy Fee	52,509,000																				
Total	1,270,955,000																				
		308,298,000	247,087,000	247,087,000																	
	Total																				



[Handwritten signature]

Rajkoti APPD
 M OS
 13/04/2022

APPEAL NO. 104/2018

INDEPENDENT MEDIA CORP. (PVT) LTD

Represented by Dr. Ahsan Laliwala

Vs.

AC. (UNIT 8) SINDH REVENUE BOARD

Represented by Shoaib Rajkoti

Tax periods (12 months ended June 2013 and June 2014)

The O&O No. 57 of 2017 in this case was passed on March 15, 2017 which was first assailed by the taxpayer before Commissioner Appeal, SRB who vide his Order-in-Appeal NO. 208/2018 dated November 1, 2018 confirmed the treatments and demand raised in O&O. Eventually, the taxpayer approached this Tribunal. Initially the appeal was reserved for order on March 3, 2021 but order could not be passed and case was fixed for re-hearing on April 6, 2022

Against the aforesaid tax demand raised in O&O; number of grounds on double taxation of same amounts were raised and therefore the Honorable Tribunal directed for reconciliation of factual controversies. Finally, after the due reconciliation and agreement on the factual issues; remaining issues that need verdict of this Tribunal are stated below; which are also acknowledged by AC in his latest report and principally not disputed by the AR of taxpayer:

A. Tax in relation to services provided by appellant .

The comparative counter arguments of both the parties are summarized as under:

Service recipient	Amount	AR argument	SRB argument
Information and Archives Department (Govt. of Sindh)	1,672,945	Service provided were exempt under notification SRB-3-4/2/2014 dated February 14, 2014	
MKRF - Zara Sochiye	6,287,057	The message telecasted on channel for persons were simply <i>public service message and not advertisement</i> as no commercial purpose or objective was being such message telecasted	The issue is already decided in favour of SRB vide Appeal NO. At 46/2014
UNICEF	2,499,615		
USAID PAKISTAN	1,470,479		

M OS
 A



Service recipient	Amount	AR argument	SRB argument
Royalty, content sale/ broadcasting rights		These receipts were earned by granting broadcasting rights to foreign channels to telecast appellants contents. Its not taxable because revenue is earned from foreign broadcasters who acquired rights from company to telecast its programs outside Pakistan	
Up-linking cost sharing	3,729,060	Its neither revenue source nor taxable under any head of Second Schedule to the Act. Its merely sharing of cost with sister company on account of spare capacity available on satellite.	Up linking cost is covered in advertisement services.
IVR revenue	390,437		
Web Advertisement	6,142,441	Neither provided in Pakistan nor for Pakistan. These advertisements appear when the appellant's website was viewed from outside Pakistan and that too of foreign goods or services. Already decided vide AT/46/2014 dated 09.05.2017 in appellate own case	
YouTube revenue	1,300,011	It merely reflects share of profit/ revenue earned by YouTube from advertisements reflected by YouTube anywhere in the world while viewing appellants contents. Already decided in and Appeal NO. at-175/2015 dated 10.12.2018	
Production revenue	11,952,059	Entry No. 9832.0000 i.e. 'Services by Programme producers and production house" was only inserted in Second Schedule of the Act vide Finance Act, 2014 i.e. applicable from July 1, 2014 whereas the period under appeal only relates to periods upto June 30, 2014	
Others	172,465		
Total	54,656,514		

MS
MS

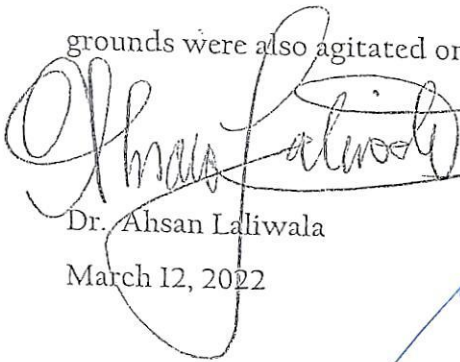


B. Tax in relation to default in withholding tax obligation

Balance amount of Rs. 247,087,000 is identified by the AC in his latest report on account of default of appellant in discharging its withholding tax obligation in relation to management consultancy services and advertising services received by the appellant. The learned AR cutting the discussion short submitted that the legal issue of applicability of relevant law is already decided by the Honorable High court of Sindh in the case of Fatima Fertilizer (reported as 2021 PTD 484- H.C.Kar) whereby prior to the amendment brought through the Finance Act, 2019 there was no provision in the Sindh Sales Tax on Services Act, 2011 to held and recover default in withholding tax from any service recipient and since the appeal under consideration pertains to all tax periods falling prior to Finance Act, 2019; the decision is squarely applicable in the instant case. Hence, even without further dilation this issue can be decided based on the binding precedent cited about.

C. Other legal grounds

Apart from the above stated factual controversies and argument thereon; number of legal grounds were also agitated on behalf of the appellant in its first six grounds of appeal


Dr. Ahsan Laliwala
March 12, 2022





linking on signals to satellite on account of spare capacity. It is therefore apparent from this explanation that the appellant has allowed its facility to be used by others for certain consideration.

- II) No specific Tariff Heading or sub-Tariff Heading was available in the Second Schedule to the Act to cover this economic activity. Under section 3 of the Act only those services could be taxed which were part of the Second Schedule to the Act. Allowing its facility to be used by others for unlinking purposes was also not part of advertisement and was not covered by advertisement service Tariff Heading 98.02.
- III) We therefore, hold that no SST could be charged on up linking cost, sharing and the appellant was not liable to pay SST of Rs.3,729,060/- on this item.
- g) That the SST was charged on IVR Revenue at Rs.390,437/= as mentioned at para 16 of this order supra. This issue is discussed as under:-
- I) The AC submitted that the appellant had not offered any explanation nor had provided any details in this regard. However the SST could not be charged on presumptions and assumptions of the Taxing Officer and it is settled law that the burden to prove taxability of an item was on the department, and in the instant addition the department failed to discharge its burden.
- II) We therefore, hold that charging of SST on IVR Revenue requires proper probe. Thus keeping in view the lack of details we remand the case to concerned AC to decide this issue after calling the details from the appellant and providing proper right of hearing to the appellant.
- h) That the SST was charged on web advertisement at Rs.6,142,441/= as mentioned at para 16 of this order supra. This issue is discussed as under:-
- I) The AC had offered explanation in this regard and submitted that the services were provided from Pakistan, booked in Pakistan and payment was received in Pakistan, therefore the services were covered under advertisement services. The



MOS

[Handwritten signature]

explanation offered by the appellant was that neither the revenue was earned on account of any services rendered or provided in Pakistan nor the same was for Pakistan. However there is no specific denial to the fact that earning were made from web advertisement. The web advertisement is fully covered under Tariff Heading 9802.9000 of the Second Schedule to the Act, other advertisement including those on web or internet. The service is a listed service in the Second Schedule to the Act and was provided from the office of the appellant situated in Sindh. According to sub-section (1) of section 3 of the Act a taxable service is a service listed in the second schedule and provided by a registered person from its registered office or place of business in Sindh. It is therefore apparent from the submissions of the appellant that the services were provided to non-resident person and the liability to pay SST was upon the resident person providing such service.



In view of the above discussions we hold that the SST at Rs.6,142,441/= was rightly charged on web advertisement and the appellant was liable to pay the same to SRB.

- i) That the SST was charged on YouTube Revenue at Rs.1,300,011/= as mentioned at para 16 of this order supra. This issue is discussed as under:-

- 1) The AC had offered explanation in this regard and submitted that the platform and space given by the appellant was just like TV channel and the recipient of service was required to withhold 100% of SST. The explanation offered by the appellant was that the revenue was neither generated from YouTube advertisements nor run was or governed by the appellant. This issue was earlier raised in Appeal No. AT-46/2014, Independent Media Corporation versus

Nos

[Signature]

Commissioner (Appeals) and the Tribunal had held as under:-

"The department has also taxed the service allegedly provided to Google. The contention of the appellant is that under an agreement between Google and appellant, which reflects that the payment received by the appellant is not on account of rendering any service rather for monetizing contents, which are made available to Google to be displayed at their own or their partner's or their partner's site. Mr. Ahsan Laliwala further explained that programs were uploaded on Google Site; in which revenue has been earned by Google on the basis of advertisements provided by Google or Google approved third party and displayed or streamed on the YouTube video player and on Playback page. These advertisements were not provided by the appellant rather by Google and only the page of the appellant was used with its permission. He further explained that the use of this right is even outside Pakistan beyond the territory of Sindh. From the explanation of the appellant it is clear that the appellant neither provided or rendered nor received any advertising services nor is liable to pay any tax in this regard. For claiming tax it is necessary for the Department to first establish that either the appellant is a service provider or service recipient of advertising service in which the department is failed. The appellant is not liable to pay any tax in this regard.



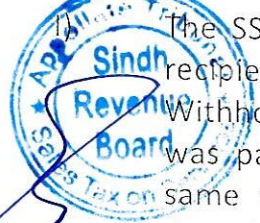
- II) In view of the above discussions and relying upon our earlier Order Dated 09.05.2017 we hold that no SST could be charged on revenue from YouTube and the appellant was thus not liable to pay the same.
- j) & k) That the SST was charged on Production Revenue at Rs.11,952,059/= and others at Rs.172,465/= as mentioned at page 16 supra:-
- l) The AC submitted that this revenue related to advertisement services but to evade SST the same was classified as production revenue without providing necessary details. The appellant submitted that Tariff Heading 9832.0000 of the Second

Nas

Schedule to the Act was applicable from July-2014 and was not applicable to tax periods from July-2012 to June-2014. However for lack of proper details and In absence of explanation from both sides it is not possible to decide the case on merits particularly due to the reason that the SST could not be charged on presumptions and assumptions of the Taxing Officer and it is settled law that the burden to prove taxability of an item was on the department and the department failed to discharge its burden.

II) We therefore, hold that due to lack of details the case is remanded to concerned AC to decide this issue after calling for complete details from the appellant and after providing proper right of hearing to the appellant.

I) That the SST paid by recipients to the appellant which were not deposited with SRB was shown at Rs.137,145,483/- in the OIO whereas in the reconciliation the same was shown at Rs.136,972,808/= as mentioned at para 16 of this order supra. The later amount shown in reconciliation is taken up for discussion:-



The SST was charged on the allegation that service recipients in their monthly SST Returns and Withholding Statements had declared that the SST was passed on to the appellant for depositing the same with SRB. However, the appellant had not deposited the same with SRB despite receiving the same from the service recipients. The claim of the appellant was that the AC has no jurisdiction to proceed against this issue.

II) The AC has argued that the appellant had received the SST from the service recipients even though mistakenly but since it had received the SST it was liable to deposit the same with SRB under section 16 of the Act. It is pertinent to point out section 16 of the Act provides for collection of excess SST, which reads as under:-

"16. Collection of excess sales tax: (1) Any person who has collected or collects any tax or charge, whether under misapprehension of any provision of this Act or otherwise, which was not payable as tax or charge or which is in excess of the tax or

M as

A handwritten signature in black ink is located at the bottom right of the page.

charge actually payable and the incidence of which has been passed on to the person to whom the service is provided, shall pay the amount of tax or charge so collected to the government.

(2) Any amount payable to the Government under sub-section (1) shall be deemed to be an arrear of tax or charge payable under this Act and shall be recoverable accordingly”.

III) The burden to prove that the appellant had received the SST from the recipients but had not deposited the same with SRB was on the department. The AC relied upon the SST returns and Withholding Statements of service recipients and submitted that the same were sufficient proof to establish that the appellant had received SST from its service recipients and had not paid the same to SRB.

IV) The provision of section 16 of the Act is an independent section and was inserted to safe guard the revenue if collected by a person whether under misapprehension of any provision of this Act or otherwise, which was not payable as tax or charge or which is in excess of the tax or charge actually payable and the incidence of which has been passed on to the person to whom the service is provided and it shall pay the amount of tax or charge so collected to the Government.

V) The respondent being a service provider of taxable services of advertisement was bound to Charge the SST on its invoices and the service recipient was liable to withhold such amount and to pay the same to SRB. However, in this case the service recipient of advertising services had withheld the SST and passed on the same to the appellant who had not deposited the same with SRB. Therefore in view of section 16 of the Act the appellant was liable to pay the same to the SRB. However, neither this ground was specifically taken in the SCN nor section 16 was invoked in the SCN and in absence of a ground in the

was



[Handwritten signature]

SCN the same could not be taken up at this stage. This aspect of the case was also considered by the Honorable High Court in the case of Fatima Fertilizers, supra and it was held as under:-

"14.....The learned counsel for the department had adverted to section 16 of the Act, during the course of arguments, to suggest that the department was competent to seek recovery wrongly collected tax; however, admitted that no notice had ever been sent to the applicant in such regard. It is in this context that we deem it proper to eschew any deliberation in such regard lest it prejudice the legal position of either party in such regard".

VI) In the instant case the AO had not invoked section 16 of the Act in the SCN and keeping in view the above observation of the Honorable High Court we are unable to provide any relief to Department regarding the SST paid by recipient to the appellant which was not deposited with SRB as shown in the OIO at Rs.136,972,808/-. However we hold that the department is at liberty to proceed against the appellant by issuing fresh SCN if the evidence of receipt of SST is available with the department.

m) That the SST paid by Mehran Enterprises to appellant which had not deposited the same with SRB at Rs.586,000/- as mentioned at para 16 of this order supra. The discussion on this issue is as under:-

l) The appellant has agreed to pay SST of Rs.586,000/= received from Mehran Enterprises to the Department, therefore the appellant is liable to pay such amount to SRB.

25. Now issue No. iv is further specifically discussed as under:-

l) The tax periods involved in this appeal were from July-2012 to June-2014. During the tax periods involved the Withholding Rules, 2011 were in field. The appellant is a company as defined under sub section (28) of section 2 of

Mas



the Act. The appellant being a service recipient of other services was the withholding agent as provided under clause (e) of sub-rule (2) of rule 1 of the Withholding Rules, 2011 and being the service recipient of advertising services was also a withholding agent as provided under clause (f) of sub-rule (2) of rule 1 of the Withholding Rules, 2011.

- ii) That the appellant being a withholding agent other than a recipient of advertising services shall be required to deduct an amount equal to one-fifth of the total amount of SST shown in the sales tax invoice and pay the balance amount to service provider as provided under sub-rule (2) of rule 3 of the Withholding Rules, 2011.

26. In view of the above discussions this appeal is decided as under:-

- i) That the OIO was lawfully passed by the AC-Unit 28 of SRB (page 9 supra).
- ii) That the appellant being the service recipient of advertising and other services was a withholding agent and was required to withhold the SST and to pay the same to SRB (page 10 supra).



The appellant subject to the decision of the Honorable Supreme Court of Pakistan in case of M/s Fatima Fertilizers for the time being was not liable to pay SST as withholding agent. However if the evidence is available with the department that the appellant had actually withheld the SST but had not deposited the same with SRB the department is at liberty to initiate fresh proceedings against the appellant under section 16 of the Act (page 15 supra).

- iv) A) The particulars and amount of SST relating to final reconciliation worked out by AC on account of providing services by the appellant as at page 16 supra, it is held by us on each particular issue separately as under:-
- a) That the SST of Rs.1,672,945/= was rightly charged from the appellant on advertisement related services as it had failed to prove that it had charged the SST

A handwritten signature in blue ink, appearing to be 'S. S. S.', located at the bottom right of the page.

and the same was withheld by the recipient. Moreover that the appellant also failed to fulfill the requirements of Exemption Notification (page 17 supra).

- b) That while relying upon our earlier decision we hold that the appellant was liable to pay SST at Rs.6,287,057/= on account of services provided to Mir Khalil Ur Rehman Foundation (MKRF) (at page 20 supra).
- c) That while relying to our earlier decision we hold that the appellant was liable to pay SST at Rs.2,449,615/= on account of services provided to UNICEF (page 20 supra).
- d) That the appellant was not liable to pay SST on the services provided to USAID (page 20 supra).

e) That the appellant was rightly charged the SST of Rs.19,039,945/= on Royalty / Content Sale / Broadcasting Rights and the appellant is liable to pay SST to SRB on this account (page 22 supra).

- f) That the appellant was not liable to pay SST of Rs.3,729,060/- on uplinking, cost sharing (page 23 supra).
- g) The issue of payment of SST on IVR revenue is remanded to the concerned AC to decide the same after calling the details from the appellant and after providing proper right of hearing to the appellant (page 22 supra).
- h) That the SST at Rs.6,142,441/= was rightly charged from the appellant on web advertisement and the appellant was liable to pay the same to SRB (page 24 supra).
- i) The appellant is not liable to pay SST amounting to Rs.1,300,011/- on earning from YouTube. Thus the



appellant was not liable to pay the same (page 25 supra).

j)&k) The issue of payment of SST on the production revenue and others have been set aside keeping in view the lack of details available in this regard and the same is remanded back to the concerned AC to decide this issue after calling the details and providing proper right of hearing to the appellant (page 25 and 26 supra).

l) In the instant case the AO had not invoked section 16 of the Act in the SCN and keeping in view the observation of the Honorable High Court we are unable to provide any relief to Department regarding the SST paid by recipient to the appellant which was not deposited with SRB as shown in reconciliation at Rs.136,972,808/-. However we hold that the department is at liberty to proceed against the appellant by issuing fresh SCN if the evidence of receipt of SST is available with the department (page 28 supra).

m) The appellant has agreed to pay SST amounting to Rs.586,000/= received from Mehran Enterprises to the Department, thus the appellant is liable to pay the same to SRB (page 28 supra).

IV B) That the appellant being a withholding agent other than a recipient of advertising services shall be required to deduct an amount equal to one-fifth of the total amount of SST shown in the sales tax invoice and pay the balance amount to service provider as provided under sub-rule (2) of rule 3 of the Withholding Rules, 2011.

27. In view of the discussions which have been summed up in para 26 supra the appellant is liable to pay SST of Rs.36,178,003/- to SRB alongwith default surcharge as provided under section 44 of the Act.



28. The AO imposed penalty of Rs.1,306,385,719/- under the various provisions of Table under section 43 of the Act. The penalty imposed was more than the SST charged and the same was imposed without establishing mensrea. We consider it obligatory on the part of department that before imposition of penalty it has to prove that the tax payer had acted deliberately in defiance of law or was guilty of contumacious dishonesty or acted in conscious disregard of its legal obligation. In case of non-payment of tax it has to be seen whether the same was deliberate or not. The purpose of imposing penalty was to create deterrence for the tax payers to avoid default in payment of due tax and not for enrichment of the department and to meet its target of collection of SST. The penalty imposed should not be harsh and exemplary. Furthermore the levy of penalty is a matter of discretion which must be exercised by the authorities judiciously on consideration of relevant circumstances and facts of the case. Penalty should not be imposed merely because it is lawful to do so. However for ready reference some of the decisions are quoted as under:-

- a) In the reported case of DG Khan Cement Company Limited versus Federation of Pakistan, 2004 SCMR 456 relating to imposition of penalty / additional tax it was held as under:-



"Each and every case is to be decided on its own merits as to whether the evasion or non-payment of tax was willful or malafide, decision on which would depend upon the question of recovery of additional tax. In the facts and circumstances of this case, we find that non-payment of the sales tax within tax period was neither willful nor it could be construed to be malafide evasion or payment of duty, therefore, the recovery of additional tax as penalty or otherwise was not justified in law".

- b) In the reported judgment of Dy. Collector Central Excise and Sales Tax versus ICI Pak. Ltd. Lahore, 2006 SCMR 626 the Supreme Court of Pakistan has held as under:-

"...In an appropriate case of default in payment of sales tax, a manufacturer or producer of goods could be burdened with additional sales tax under section 34 of the Act as well as the penalty under section 33 of the Act.

Mas

[Signature]

However, it does not necessarily follow that in every case such levy was automatic. It was further held that "...In case of failure of a registered person to pay the sales tax within time, he shall also be liable to pay additional tax and surcharge. The liability being not automatic would be determined by the appropriate authority as to whether or not there was any reasonable ground for default in payment of Sales Tax which could be considered to be willful and deliberate".

- c) In the reported judgment of Collector of Customs versus Nizam Impex, the Honorable DB of Sindh High Court while considering the imposition of default surcharge under section 34 of the Sales Tax Act, 1990 held as under:-

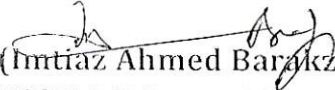



"9. It is well settled law that provisions of section 34 are attracted when there is a deliberate failure to pay the sales tax. In the present reference the perusal of the show-cause notices, order-in-original and order-in-appeal reveal that there was no allegation against the present respondent in respect of deliberate or willful default, or to defraud the Government. We are, in agreement with the learned counsel for respondent that ample law is available on the point that imposition of penalty was illegal where the evasion of duty was not willful as held by the Hon'ble Supreme Court of Pakistan in the case of D.G. Khan and others. Further reliance is placed upon the case of Messrs Lone China (Pvt.) Ltd. v. Additional Secretary, Government of Pakistan decided by the Hon'ble Lahore High Court, reported as PTCL 1995 CL 415 wherein it has been held that if the party did not act mala fide with intention to evade the tax, the imposition of penalty of additional tax and default surcharge was not justified. In another case Additional Collect-orate of Sales Tax Multan v. Messrs Nestle Milk Pak Ltd., Kabirwala and another, 2005 PTD 1850, it has been held that in such circumstances the Tribunal has discretion to waive / remit additional tax and penalties".

MAS

Considering the facts of the case and above discussions of superior courts the penalty imposed by the AO at Rs.1,306,385,719/- deleted.

29. The appeal is disposed of in terms of para 26 to 28 above. The copy of this order may be provided to the learned representatives of the parties.


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER


(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi:

Dated:29.06.2022

Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
- 2) The Assistant Commissioner (Unit-28), SRB, Karachi.


Copy for information to:-

- 3) The Commissioner (Appeals), SRB, Karachi.
- 4) Office Copy.
- 5) Guard File.

Certified to be True Copy

REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on

04/07/2022


Registrar

Order Dispatched on

04/07/2022


Registrar