(Guard file)

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-I

APPEAL NO. AT- 105 /2018

M/s Abacus Consulting Technologies (Pvt) Ltd.....Appellant

Versus

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

Date of filing of Appeal: 09.11.2018

Date of hearing: 07.11.2019

Date of Order: 16.12.2019

Mr. Abubaker, Advocate for appellant along with Mr. Yawar Hussain, Deputy General Manager, Taxes.

Ms. Uzma Ghory, AC-DR and Mr. Bilal Faruqui, AC for Respondent

ORDER

Appellate Tribunal Sindh Revenue Board Sales Tax on Services

Justice ® Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.205/2018 dated 27.10.2018 passed by the Commissioner (Appeals) in Appeals No. 263/2016 filed by the Appellant against the Order-in-Original (hereinafter referred to as the OIO) 759/2016 dated 25.08.2016 passed by the Assistant Commissioner (Ms. Nida Noor), SRB, Karachi.

02. In short the facts of the case as stated in the OIO are that appellant got registration under principal activity of "Management Consultants", Tariff Heading 9815.4000 of Second Schedule to the Sindh Sales Tax on Services Act, 2011 (herein after referred to as the Act) chargeable to

Sindh Sales Tax (SST) at the rate specified in the Second Schedule to the Act with effect from July 1st, 2013.

03. The allegations against the appellant in the OIO are that from the perusal of invoice wise breakup of the revenue earned as submitted by the appellant for the year ended 30th June, 2014 revealed that in addition to "Management Consultant Services" it had provided or rendered taxable services of "Software or IT based System Development Consultants" Tariff Heading 9815.6000 of the Second Schedule to the Act valuing Rs.63,934,125/= from its place of business located at Sindh. However, the appellant had failed to deposit Sindh Sales Tax (SST) amounting to Rs.10,229,460/= at the statutory rate of 16% with SRB.

04. The appellant was served with a show-cause notice (SCN) dated 20.05.2016 to explain as to why the short paid Sindh Sales Tax (SST) amounting to Rs.10,229,460/= may not be assessed and recovered under section 23 and 47 (1A) (a) of the Act for the tax periods July, 2013 to June, 2014 along with default surcharge under section 44 of the Act and penalties under serial No. 3 and 6 of the Table of section 43 of the Act.

05. The appellant filed written reply dated 01.06.2016 and submitted that the consideration received was not taxable and provided the relevant details as under:-

(a) Actual expenses incurred on behalf of clients.	Rs. 1,845,310/=
(b) SAP education and Training Services	Rs. 7,062,310/=
(c) Software license fee	Rs. 50,374,596/=
(d) Period prior to Registration	Rs. 4,652,089/=
Total	Rs. 63,934,125/=
SST @ 16%	Rs. 10,229,460/=

06. The appellant vide its letter dated 22.06.2016 furnished copy of invoices relating to reimbursement expenses, and it contended vide its letter dated 30.06.2016 that the software licensing was neither goods nor

services. It was further contended that appellant was paying royalty to their parent company for the use of name and right to use its software and thus was not covered under the Second Schedule to the Act. The appellant further submitted in letter dated 14.07.2016 that no new SCN can be issued according to law. Moreover its main plea was not considered regarding taxability of licensing fee/sale of software governed under federal legislation.

07. The appellant submitted vide letter dated 28.07.2016 that (a) the SST leviable on the items mentioned in the Second Schedule to the Act and the license fee was not the part of Second Schedule to the Act (b) the transection related to software was covered under the Federal Sales Tax Act, 1990 (c) and reiterated that consideration received by it was not taxable.

08. The Assessing Officer passed the OIO assessing the value of service at Rs.63,934,125/= and levied SST of Rs.10,229,460/= under section 23 read with section 47 (IA) (a) of the Act together with default surcharge and penalty of Rs.511473/= under clause 3 of section 43 and Rs.10,229,460/= under clause 6 (without specifying sub-clause) of section 43 of the Act.

09. The Appellant challenged the OIO by way of filing appeal before the Commissioner (Appeals) who maintained the OIO to the extent of tax on software licensing fee and default surcharge and setaside the same on education and training fee and conditionally setaside the penalty imposed under clause 6 of section 43 of the Act.

10. The appellant being dissatisfied has now challenged the said OIA before this Tribunal. In written as well as oral arguments Mr. Abubaker the learned advocate for the appellant in relation to charging SST on software license/sale and other issues such as actual expenses incurred on behalf of clients and period prior to registration has submitted as under:-

i) The sale of SAP software against "License Fee" is received against the sale of already developed software by some foreign party. This

sale in its nature is sale of goods and that such software is booked as intangible asset in the books of accounts and the same is also amortized. Moreover such sale of goods is not taxable under the Act considering that it is not covered under the definition of services provided in the Act.

ii) The appellant is not developing any software and simply selling already developed software "SAP" (under Agreement-Partner Edge Agreement) copy already provided to AC & Commissioner (Appeals). The agreement authorized the appellant to resale already developed software by a foreign company. The Tariff Heading could only come into play where some development was made. The appellant was not authorized to make any change or modification in the developed software code.

iii) The Appellant was not involved in any type of development of software considering the wording of the Tariff Heading, i.e. "Software or IT-based system Development Consultant". License fee is charged on already developed and coded software. Licenses of such goods have not been taxed under the Act. There is no entry/ Tariff Heading in the Second Schedule to the Act to tax license fee of already developed software and it is illegal to tax something which has not been specifically taxed by the legislature in its wisdom. Reliance was placed on case law titled M/S Pakistan Television Corporation Ltd Versus Commissioner Inland Revenue, Islamabad reported as [2019 SCMR 282], where in it was held in para 15 citation "I" as under:

> *"For FED to be levied on this amount it must further be established that it is a "service" as defined in section 2 (23) of the Federal Excise Act and is subject to the charge levied under section thereof, which, as discussed above, is clearly not the case. TV license fee not being the product of any service provided by PTV, FED cannot be levied on it".*

iv) It was further held in the above citation that before taxing any service it has to be established that it is a "taxable service" as defined in the respective provision under the Act and is subject to charging section. On this principle tax could not be levied on TV license fee since it was held that it was not any service provided by the PTV.

v) The SAP was already developed software and the Appellant only implemented installation of already developed software. It is

important to point out that The Appellant has paid its due tax under its implementation services as the same is duly treated as services by the Appellant. Reliance was placed on Tata Consultancy Services v. State of A.P. [(2005) 1 SCC 132] wherein it was held as under:-

> *"We are in complete agreement with the observations made by this Court in Associated Cement Companies Ltd. (supra). A software programme may consist of various commands which enable the computer to perform a designated task. The copyright in that programme may remain with the originator of the programme. But the moment copies are made and marketed, it becomes goods, which are susceptible to sales tax. Even intellectual property, once it is put on to a media, whether it be in the form of books or canvas (in case of painting) or computer discs or cassettes, and marketed would become "goods".*

vi) The appellant had discharged tax liability in respect of Tariff Heading 9815.4000 and 9815.6000 and the department has wrongly charged tax on resale of software license which is a sale of goods not chargeable to SST.

vii) The Tariff Heading No. 9815.6000 relating to software or IT based system development consultants was same in the Act and Punjab Sales Tax on Services Act, 2012. However an amendment was made in Punjab Sales Tax on Services Act, 2012 through Punjab Finance Act, 2015 and the scope of Tariff Heading 9815.6000 was widened. Amended relevant heading is reproduced herein under-:

> *"Information technology- enabled or information technology based services including software development, software customization, software maintenance, system support, software assembly, system integration, system designing and architecture, system analysis, system development, system operation, system maintenance, system up-gradation and modification". However in the Act the Tariff Heading 9815.6000 has remained same and has not been amended and the scope of the said heading is quite narrow.*

viii) However in the Act the Tariff 9815.6000 has remained same and not amended, resultantly the scope of said heading is quite narrow. Appellant also submitted that tax regarding reimbursement of expenses amounting to Rs. 1,845,310/= was not chargeable since it was incurred out of pocket for the clients. Since these amounts are reimbursable and no tax is

liable to be charged on the same.

ix) The appellant submitted that under the Act there was no provision to charge tax on unregistered person thus no tax on value of service amounting to Rs. 1,717,275/= was liable to be charged during the period when the appellant was unregistered. The trite law is applied and implemented in true letter and spirit and in this regard the respondent has failed to show how tax could be charged from the unregistered person. Therefore, the tax levied under this head is also liable to be deleted.

11. In her written synopsis as well as oral arguments Ms. Uzma Ghory the learned AC-DR for the respondent submitted as under:-

i) The "Software and IT System Development Consultants" (Tariff Heading 9815.6000) shall have the meaning and scope as construed and understood from the description of the said term. It is evident from the description of the Tariff Heading (9815.6000) of the Second Schedule of the Act that all services provided or rendered in relation to the consultancy services of software development or IT- based system development are covered under the respective Tariff Heading 9815.6000. She relied upon the earlier decision of this Tribunal in Appeal No. AT-32/2017 of M/s Oracle System Pakistan (Private) Limited where in it was held as under:-

> *"the content, as available on the website presented by the Respondent during hearing shows that the services of Software or IT based system development consultants covers all services including the services in relation to software licensing, software up-gradation, software development, software deployments, installation or maintenance, support and training."* Thus, software licensing fully covered under the scheme of *service 'Software development or IT- based System Development Consultants'.*

ii) The business of the Appellant was based on the System Development business models. All the statements of the CFO of the company were duly recorded in his presence, which established that the activity performed by the

appellant was covered by the Tariff Heading 9815.6000.

iii) The appellant has provided or rendered consultancy services in relation to system development and the SST was justified and imposed on the basis of law.

iv) The proprietary rights draw a line between goods and services. The same is referred in the judgment of this Tribunal in the case of M/s Six Sigma Plus in Appeal No. AT-29/2016 which is reproduced below for your ready reference:

> *"It is noted that an important ingredient in the sale of a certain goods is 'proprietary rights' which are permanently transferred to the buyer, once the deal is finalized. If the proprietary rights or ownership remains with the seller it is no sale. Any transaction where the party of the first part, the real owner, keeps the right of ownership may be in case of rental, lease, licensing, but no sale of goods."*

v) The basic thing, which distinguishes software as service or goods lies between proprietary rights. In the sales of goods, the proprietary rights are transferred to the buyer once the deal is finalized. Whereas, in supply of software by way of licensing, the proprietary rights of the software remains with the owner and does not transfer to the buyer who purchases a software license.

vi) The process narrated by appellant includes (a) Marketing the software license, (b) advising the clients to buy software as per their need, (c) implementation (configuration, installation and working). All these activities fall within the definition of software or IT based system development consultants.

12. Ms. Uzma Ghory supported the OIA and OIO and submitted that the activity of selling or licensing software falls within the ambit of software or IT based system development consultant and submitted that in the OIO the Assessing Officer has clearly stated that the system development generally is the process of defining,

designing testing and implementing a software application. She submitted that it also includes the internal development of customized system as well as the acquisition of software developed by third parties, with or without alteration.

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

13. The controversy between the parties is whether or not the reselling or licensing of already developed software falls within the ambit of "software or IT based system development consultants".

14. The appellant's clear stand was that it was not developing any software and was merely selling software developed by third party. Whereas the contention of the department is that sale or license of software with or without development is not sale but service.

15. The learned Assessing Officer in the OIO discussed the software or IT based system development as under:-

> *"18. As regard the contention of registered person in relation to software licensing, it is stated that the Software or IT-based System Development Consultant (tariff heading 9815.6000) shall have the meaning and scope as construed and understood from the description of the said term. From the description of tariff heading 9815.6000 of the Second Schedule to Act, it is crystal clear that all services provided or rendered in relation to the consultancy services of software development of IT-based system development are covered under the said tariff heading 9815.6000.*
>
> *19. The system development, generally, is the process of defining, designing, testing and implementing a software application. It includes the internal development of customized system as well as the acquisition of software developed by third parties, with or without alteration. System Development is also referred to as software development, software engineering or application development System Development includes the management of the entire process of the development of computer software. A system development includes a number of different phases, such as feasibility, analysis, requirement*

analysis, software design, software coding, testing and debugging, installation and maintenance etc. The System Development also ensures proper training on the system before transaction the system to its support staff and end users. . . ."

"

. . . 23. As regard the contention submitted by registered person in respect of reimbursement of actual expense incurred on behalf of their client, it is stated that the invoices, as submitted by registered person shows that the said amount is mentioned under the head of out of pocket expense against the Professional fee In this Regard, it is stated that section 8 of the Act, Sindh sales tax is leviable on the value of taxable services. The value of taxable services is provided under section 5 of the Act and reads as under:

In view of the above provision, Sindh sales tax is leviable on the gross value of services. It is levy on the consideration in money including all Federal and Provincial duties and taxes, if any, which the person providing a service receives from the recipient of the service but exclude the amount of sales tax charged under this Act. Hence, the contention of the registered person regarding out of pocket is unlawful and baseless in terms of section 5 of the Act. The registered person was required to charge, levy, collect and pay Sindh sales tax on the gross value of taxable services".

16. The Act does not provide the definition of software or IT based system development consultants. This Tariff Heading has two parts (i) software development consultants and (ii) IT based system development consultants. The basic ingredient is that one must act as developer or consultant in relation to the development of software or IT based system development. The learned AC in para 18 of OIO has held that "*From the description of tariff heading 9815.6000 of the Second Schedule to Act, it is crystal clear that all services provided or rendered in relation to the consultancy services of software development or IT-based system development are covered under the said tariff heading 9815.6000*". However from the definition adopted by the learned AC it is clear that for invoking this Tariff Heading it was necessary to provide consultancy or development service, which is lacking in this case. Thus the simple sale or license of

software without any development, alteration and modification does not fall within the ambit of the Tariff Heading 9815.6000.

17. The settled law is that while interpreting taxing statute the authorities must look to the words of the statute and interpret it in the light of what is clearly expressed. The authorities cannot import provisions in the statute so as to support assumed deficiency. It is also settled law that tax could only be levied under a provision of law, which is unambiguous and clear. In interpreting fiscal laws there is no room for any intendment and there is also no presumption as to tax. .

18. The learned AC in para 19 of OIO has stretched the meaning/definition of the phrase "Software or IT-based System Development Consultant" by concluding that *"The system development, generally, is the process of defining, designing, testing and implementing a software application.* The general rule is that words used in a statute must first be given their ordinary and natural meaning. It is only when such an ordinary meaning does not make sense then resort can be made to discovering other appropriate meaning. This view gain support from the following case laws. In the case of Government of Pakistan versus M/s Hashwani Hotels Limited, PLD 1990 Supreme Court 68 it has been held as under:-

"Before examining the wording of clause (a) of section 4 (3) of the Act to which reference shall be made later on, it is essential to advert to the accepted principles for the construction of statutes with special reference to the Taxing Statutes.

The first and the foremost principle of interpretation is that words are to be taken in their literal meaning. The plain ordinary meaning of the word is to be adopted in construing a document. There have to be special circumstances where this principle is to be deviated and certain words have to be interpreted differently than their plain meanings with reference to the context.

(ii) In the case of Pakistan Textile Mill Owners Association Karachi v/s Administrator of Karachi PLD 1963 Supreme Court 137, it was observed that:-

"In a taxing statute, as in any other statutes, there is no reason to depart from the general rule that words used in a statute

must first be given their ordinary and natural meaning. It is only when such ordinary meaning dies not make scene that resort can be made to discovering other appropriate meanings."

(iii) In the case of Messrs Hirjina and Co. (Pakistan) Ltd., Karachi v. Commissioner of Sales Tax Central, Karachi 1971 SCMR 128 the supreme court made it quite clear by making the following observation:-

"We may here observe that interpreting the taxing statute the Courts must look to the words of the statute and interpret it in the light of what is clearly expressed. It cannot import provisions in the statute so as to support assumed deficiency."

19. It is a well-recognized principle of interpretation of statutes that a fiscal enactment should be construed strictly as it is and whenever there is an ambiguity the benefit of doubt should be given to the taxpayer. Again if two equally reasonable constructions are possible then construction favorable to taxpayer should be preferred.

20. The Assessing Officer (AO) has also enlarged the meaning of phrase "software or IT based system development consultants". AO while concluding in para 19 of OIO has held that *"It includes the internal development of customized system as well as the acquisition of software developed by third parties, with or without alteration"*. The AO has no legal authority to enlarge the definition of the above phrase and this power is only vested with the Sindh legislature who has the power to enlarge the meaning of the words or phrases used in the enactment.

21. The Commissioner (Appeals) while agreeing to tax the sale or license of software has given his own reasoning. The Commissioner (Appeals) had framed five points in para 6 of OIA and discussed these till para 7.6 of OIA and concluded as under:-

"7.6 The Above display of facts as are concluded in the para 7.4 will show that it will not be correct to say that in the event of alleged sale or resale of the software the Appellant works on an already developed system. May it be a case already the SAP system is installed, but still the

whole process above mentioned is followed for improvements in the system by mean of software support or its customization, which still is a system development in its nature and not a work on already developed system. It is also required to be seen that the process of alleged sale is necessarily connected to the implementation phase, by which the existing system of a client is to be developed. These two phases can be separated in order to understand and study but cannot be said to be the separate economic activities factually. In view of the above discussion it cannot be said and construed as separate transactions by any stretch of imagination or the interpretation. In any humble opinion in this regard the submissions of the Appellant are false, fabricated, manipulated, evasive and misleading".

22. The Commissioner (Appeals) tried his best to treat the sale of already developed software in the ambit of software development. He has held in para 7.4 of OIA as under:-

"And by such reading it will becomes clear in a mind that it is not merely the allege sale but it includes the complete process of marketing, demonstration, proposal, lead identification, diagnostic, negotiation, lead generation initial meeting, contract signing and training thereof". However Commissioner (Appeals) could not point out any development, alteration and modification in the already developed software by the appellant which is a necessary ingredient to bring the activity in the ambit of the Tariff Heading 9815.6000.

23. The word "develop and development" as per simple dictionary meaning is "grow, bigger, advance, better stronger and new idea". The simple meaning of the phrase "Software or IT-based system development consultants" appears to be persons engaged in development or consultancy of software or IT-based systems. If a person simply deals in purchase and sale of IT-based software without any development, amendment, alteration, modification and without element of service the same could not be covered by the phrase "software or IT-based system development consultants".

24. The Learned AC cited the Order of Tribunal in the case of ORACLE. The facts in this case are distinguishable. Here it was established from the documents available on record that the Oracle was not simply selling/licensing the software, but it could do any modification to the programs and Documentations created by or for ORASUB and was considered a work available for hire. Under another clause ORSAUB has the right to develop its own technology and it was considered as "work made for hire" and shall be owned exclusively by OCAPAC. It was held in the order in the case of ORACLE that *"what is seen, is that the appellant stands fully involved in development/modification of the software and develops its own technology known as ORASUB Technology on 'work for hire basis' for implementation of the Agreement. This evidently shows that the appellant has the expertise in its field and is liable not only to compatibly implement the agreement but is licensed to develop its own technology and also authorized to sub-license the same and the Oracle"*. No such facts and material is available in this case and the department has failed to establish that the appellant was providing any development, alteration and modification in the soft-ware sold or licensed.

25. Since we have held that licensing/sale of already developed software is not a service the discussion on other items mentioned in para 05 above and taxed by AO are neither necessary nor required.

26. The appellant in its letter dated 30.06.2016 submitted that the software licensing is neither goods nor services and further stated that it was paying royalty to their parent company for the use of name and right to use its software and this was not covered under the Second Schedule to the Act. From this statement it appears that the appellant is dealing in intellectual property. The clause (54A) and (54B) of section 2 of the Act relating to intellectual property right and intellectual property service and Tariff Heading 9838.0000, relating to intellectual property service were added to the Act vide Sindh Finance Act, 2015 effective from 10th July, 2015. The said Tariff Heading 9838.0000 was not part of Second Schedule to the Act and was not taxable for the tax periods from July, 2013 to June, 2014.

27. In view of the above discussions both OIO and OIA are setaside and the appeal is allowed. The copy of the order may be provided to the authorized representatives of the parties.

(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER

(Justice ® Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi. Dated: 16.12.2019

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REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Copies supplied for compliance:-

1. The Taxpayer through authorized Representative.
2. The Assistant Commissioner (Unit-), SRB, Karachi.

Copy for information to:-

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

Order issued on 31/12/19

Registrar

Order Dispatched on 31/12/19

Registrar