

APPEAL NO. AT-108/2018

The Assistant Commissioner, SRB .....Appellant

Versus

M/s Genix Pharma (Private) Limited.....Respondent

Ms. Nida Noor, AC and Ms. Umi Rabbab, AC-SRB for appellant.

Mr. Afzal Khan, advocate and Mr. Noman Qureshi, ITP for respondent.

Date of Filing of Appeal: 26.04.2018.

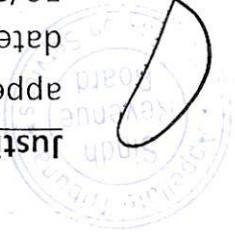
Date of Hearing: 10.02.2020 & 02.06.2020

Date of Order: 10.06.2020

ORDER

Justice (R) Nadeem Azhar Siddiqi. This appeal has been filed by the

appellant/department challenging the Order-in-Appeal (AIO) No. 177/2018 dated 27.09.2018 passed by the Commissioner (Appeals-II) in Appeal No. 50/2018 filed by the respondent against the Order-in-Original (OIO) No. 71/2018 dated 23.02.2018 passed by the Assistant Commissioner (Mr. Ghulam Mustafa Kathio), SRB, Karachi.



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02. The facts of the case as stated briefly in the OIO are that the respondent under sub rule (2) of rule 1 of Sindh Sales Tax Special Procedure (Withholding) Rules, 2014 (hereinafter referred to as Withholding Rules) being a withholding agent, was liable to withhold and deposit the amount of Sindh Sales Tax (SST) at the applicable rates on receipts of taxable services provided or rendered to them from the invoiced/billed amount of service providers.

03. The allegations against the respondent in OIO are that while scrutinizing the record available with SRB, it was revealed that the respondent had received various taxable services from un-registered service providers amounting to Rs.63,457,067/- which involved SST of Rs.8,249,419/- during the tax year July, 2016 to June, 2017. It was further alleged that under sub rule 4 of rule 3 of Withholding Rules read with section 9(2) of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) the respondent was liable to deduct and withhold SST of Rs.8,249,419/=. However, the respondent failed to declare the said service in its monthly head of account in relation to the taxable services which were received or procured by it. Details of the same are as under:

Services Received By M/s Genix Pharma Private Limited									
Category as per FBR online portal	Taxable services under Tariff Headings	Service Provider	Tax Year	Purchase Value	SST @13	SST to be deducted & Deposited	SST Deposited	SST Payable	
Technical, Scientific and Engineering Consultant/ etc.	9815.5000	Faisal Hussain	2017	3,205,067	416,659	416,659	416,659	0	416,659
Contractual Execution /etc.	9809.000/et c.	Muhammad Younus Ghanchi	2017	45,631,58	5,932,10	5,932,106	5,932,106	0	5,932,106
Contractual Execution /etc.	9809.000/et c.	Tanveer Ahmed	2017	14,620,4	1,900,6	1,900,654	1,900,654	0	1,900,654
Grand Total				63,457,0	8,249,4	8,249,419	8,249,419	0	8,249,419

04. A show-cause notice (SCN) dated 02.02.2017 was served upon the respondent to show cause as to why sales tax amounting to Rs.8,249,419/= may not be recovered under provisions of section 47 of the Act, read with withholding rules along with default surcharge under

section 44 of the Act and penalties under Serial No.3 and 11A of Table

under section 43 of the Act.

05. The Assessing Officer (AO) passed an ex parte OIO determining SST of Rs.8,249,419/= under section 47 (without mentioning the relevant sub-section) of the Act alongwith default surcharge under section 44 of the Act and penalties of Rs.412,471/= under serial No.3 of the Table under section 43 of the Act and Rs.8,249,419/= under serial No.11A of the Table under section 43 of the Act.

06. The respondent challenged the said OIO before the Commissioner (Appeals-II), SRB by way of filing appeal under sub-section (1) of section 57 of the Act. The Commissioner (Appeals) vide OIA reduced the tax liability from Rs.8,249,419/= to Rs.3,887,123/= This OIA has been challenged by the department/appellant through instant appeal.

07. Mr. Ghulam Mustafa AC-SRB initially appeared in this matter on behalf of department/appellant and submitted as under:-

(i) The Assessing Officer had determined tax liability of respondent at sum of Rs.8,249,419/- This tax liability was erroneously reduced by learned Commissioner (Appeals) to Rs.3,887,123/= which was paid by the respondent.

(ii) The learned Commissioner (Appeals) has also erroneously waived the penalties & default surcharge.

(iii) The learned Commissioner (Appeals) without any justification and notice to the appellant had altered the Tariff Heading regarding the services provided by Faisal Hussain from 9815.5000 (Technical, scientific and engineering consultant) to 9809.000 (Services provided or rendered by persons engaged in contractual execution of work or furnishing supplies). Similarly the learned Commissioner (Appeals) wrongly altered Tariff Heading in respect of services provided by M. Younus Ghanchi form Tariff Heading 9809.0000 (Services provided or rendered by persons engaged in contractual execution of work or furnishing supplies) to 9824.0000 (Construction Services).

08. On subsequent dates Ms. Nida Noor, AC, appeared on behalf of the

appellant and submitted as under:-

(i) In the re-conciliation report dated 24.07.2019 the payable tax amount works to Rs.1,721,230/=. The respondent had paid an amount of Rs.4,030,989/- as determined by the Commissioner (Appeals). The appellant was not eligible for availing amnesty as the amount of default surcharge had not been paid in terms of Amnesty of 2018.

(ii) All the three services providers were not registered with SRB thus the liability to deduct and pay SST was upon the service recipient i.e. the respondent under sub rule (4) of Rule 3 of Withholding Rules.

(iii) The learned Commissioner (Appeals) misinterpreted the Notification No.SRB-3-4/7/2013 dated 18.06.2013 and its amendment dated 28.06.2016 (available on page 407 of 8<sup>th</sup> Edition of Book titled as Sindh Sales Tax on Services Act, 2011 by Mr. Tariq Najeeb Chaudary ) and wrongly allowed relief to the respondent.

(iv) The Commissioner (Appeals) erroneously treated the value of contract/project as the turnover of service provider to provide relief under exemption notification (Contractual Execution of work). The Commissioner (Appeals) also erroneously failed to apply the conditions of exemption, since it was mandatory to allow exemption (for construction services).

(v) In the income tax return of Tanveer Ahmed the respondent had deducted Income Tax amounting to Rs.1,096,531/- on the value of contractual execution of work which clearly reflected that the services provided by Tanveer Ahmed were not covered under exemption notification and the respondent was liable to pay further tax of Rs.204,856/=-.

(vi) The services of contractual execution of work and supplies were provided by Faisal Hussain to the respondent amounting to Rs.3,205,067/=. Whereas, the turnover of Faisal Hussain during the Tax Year 2017 (tax periods

involved in this appeal) as per Income Tax Return was Rs.22,537,475/- which showed that the value of services exceeded Rs. 4 million turn over. Thus the relief was wrongly allowed.

(vii) The construction services provided by Muhammad Younus Ghanchi to the respondent amounted to Rs.45,631,587/= The Commissioner Appeals wrongly treated an amount of Rs.16 million as prior to July, 2016 and wrongly granted relief under exemption notification of 28.06.2013. It was submitted that for availing exemption the criteria was that "(i) projects of commercial and industrial nature, where the value of consideration does not exceed 50 million rupees subject to the condition that the value component of services in such a project also does not exceed Rs.10 million". It was further submitted that as per agreement provided by respondent the entire amount of Rs.16 million pertained to services.

09. Mr. Afzal Khan, advocate initially appeared on behalf of the assessee/respondent and submitted as under:-

(i) The arguments of Ms. Nida Noor were disputed and it was submitted that Commissioner (Appeals) had rightly determined the amount of tax at Rs.3,887,123/= Whereas against this amount the payment of Rs.4,030,989/= was duly made.  
(ii) The reconciliation report dated 24.07.2019 was also disputed since the same was not based on the factual position.

10. In his written submissions the learned representative of the respondent further submitted as under:-

(i) Regarding the services received from Faisal Hussain having NTN 3107211-9 it was stated that SRB vide Notification No.SRB034/7/2013 dated 18<sup>th</sup> June, 2013 amended by Notification No. 3-4/10/2016 dated 28<sup>th</sup> June, 2016 had

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provided exemption to taxable services if rendered by service provider having turnover below Rs.4 Million. However, SRB had not prescribed any criteria for service recipient to verify turnover of service provider. Thus the respondent had asked the service provider to confirm his annual turnover, and on the basis of said confirmation, respondent had not withheld SST. Accordingly, the service provider furnished undertaking to respondent relating to its qualifying for exemption criteria, whereby service provider had undertaken for having turnover below Rs.4 Million. Based on said undertaking, respondent did not withhold SST. However, relating to the concern of Appellant that the service provider had turnover of Rs.14,952,726/- whereby reliance had been placed on withholding statement of income tax the attention of the Tribunal is invited toward accessibility of said withholding statement, it may be stated that the respondent had no knowledge of service provider's actual turnover.

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The Tribunal attention was drawn toward Rule 3(4) of the Withholding Rules, 2014 which prescribed to withhold SST by using tax fraction formula; upon receipt of services from unregistered persons. However, if the respondent had to withhold SST in the instant matter, then, it cannot be denied that it had not deducted SST but had paid the same to the service provider.

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The matter relating to the services received from **TANVEER AHMED** having **NTN: 1258389** it was submitted that the respondent had made contract with Mr. Tanveer Ahmed (Abacus Electrical Engineers) worth of Rs. 14,620,413/- for both goods and services including supply of light fixtures, wiring, installation of cameras, fire alarms, earthing system, low voltage system etc. attracting classification under the head of "Contractual Execution of work or furnishing supplies" Tariff Heading 9809.000". The contract was executed during Tax Year 2016 [TY16] and till June, 2016 the

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respondent had received taxable services worth Rs.1,780,679/-. However the remaining services were received in TY17. During TY16 above-said services were exempt from chargeability of Sindh Sales Tax [SST] subject to the condition that:

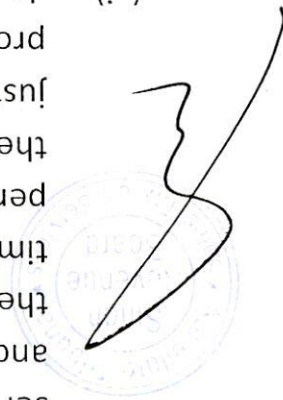
"if the value of contract does not exceed 50 million rupees in a financial year subject to the condition that the value component of services in such contractual execution of work or furnishing supplies also does not exceeds 10 million rupees." In view of the fact that the services rendered till June, 2016 were qualifying for above exemption, thus the respondent paid consideration to the service provider without deducting SST.

(iv) The appellant/department in the Report has denied rendition of services during TY16 without furnishing any evidence in support of its contention. Whereas, the respondent has furnished copy of agreement and invoices dated 09<sup>th</sup> June, 2016 which were sufficient evidence relating to rendition of above services during period of exemption.

(v) The appellant has disregarded aforesaid submissions and has relied on Withholding Income Tax Statement of the service provider. There is a difference between sales tax and income tax law. The sales tax is levied on the services at the time of supply; however, Income Tax is deducted at the time of payment which might have been paid in subsequent period or year. Therefore, the reliance of the appellant on the withholding income tax statement is not rational and justified. The copy of invoice dated 09<sup>th</sup> June, 2016 was also produced.

(vi) In relation to services received from **MUHAMMAD YOUNUS GHANCHI** having NTN 4305395-5 it was submitted that the respondent had made contract with Mr. Muhammad Younus Ghanchi worth Rs.48,656,835/- for both goods and services; including cements, bricks,

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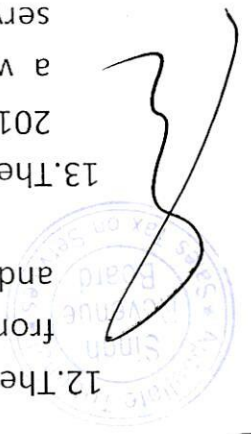
13. The tax periods mentioned in the OIO were from July, 2016 to June, 2017. However, in view of sub-rule (4) of rule 3 of the Withholding Rules a withholding agent/recipient of service shall, on receipt of taxable services from unregistered persons, deduct the amount of sales tax, at the tax rate applicable to the taxable services provided or rendered to him, from the amount invoiced or billed or demanded or charged by such un-registered service provider. Such tax shall be worked out on the basis of gross value of taxable services under the tax fraction formula.

12. The respondent as per the department's criterion had received services from unregistered persons for Rs.63,457,067/= but had failed to deduct and deposit SST amounting to Rs.8,249,419/=with SRB.

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

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submitted by the respondent vide letter dated 29<sup>th</sup> April, Agreement, invoices and proof of payment have been withheld/deducting SST for the Tax Year 2016. Copy of exempted from SST and processed payments without Thus the respondent considered that such services were *in such a project also does not exceed 10 million rupees.* subject to the condition that the value component of service the value of construction does not exceed 50 million rupees where *"The projects of commercial and industrial nature, where condition that:* chargedability of Sindh Sales Tax [SST] subject to the TY17. During TY16 above said services were exempt from Rs.16,122,042/- and remaining services were received in respondent had received taxable services worth of effect from 20<sup>th</sup> November, 2015 and till June, 2016 and contract was executed during Tax Year 2016[TY16] with "Construction Services" Tariff Heading 9824.000. The concrete, flooring attracting classification under the head of





14. The AO had treated the services provided by Faisal Hussain under Tariff Heading 9815.5000 (Technical, Scientific and engineering consultants), Muhammad Younus Ghanchi under Tariff Heading 9809.0000 etc. (services provided or rendered by persons engaged in contractual execution of work or furnishing supplies) for charging or levying SST.

15. The Commissioner (Appeals) in OIA had treated the services provided by Faisal Hussain under Tariff Heading 9809.0000 (services provided or rendered by persons engaged in contractual execution of work or furnishing supplies) subject to sales tax at the rate of 13% instead of 8% instead of Tariff Heading 9809.0000 etc. (services provided or rendered by persons engaged in contractual execution of work or furnishing supplies) and Tanveer Ahmad under Tariff Heading 9809.0000 (services provided or rendered by persons engaged in contractual execution of work or furnishing supplies) subject to sales tax at the rate of 13% for charging or levying SST.

16. It was held by the Commissioner (Appeals) that no tax was payable in respect of services received from Faisal Hussain as the same was exempted under SRB Notification dated 18.06.2013 amended vide SRB Notification dated 28.06.2016 against SST of Rs.416,659/= determined by AO in OIO. In respect of services received from Muhammad Younus Ghanchi the tax determined by Commissioner (Appeals) was worked out at Rs.2,409,985/= against SST of Rs.5,932,106/= determined by AO in OIO. The Commissioner (Appeals) while extending the benefit of SRB Notification dated 18.06.2013 to the respondent had treated the value of service provided before 30<sup>th</sup> June, 2016 as exempted. In respect of services received from Tanveer Ahmad the tax determined by

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Commissioner (Appeals) was Rs.1,477,138/= against SST of Rs.1,900,654/= as determined by AO in OIO. The Commissioner (Appeals) while extending the benefit of SRB Notification dated 18.06.2013 to the respondent treated the value of service provided before 30<sup>th</sup> June, 2016 as exempted.

17. The relief provided by Commissioner (Appeals) to the respondent was in accordance with SRB Notification dated 18.06.2013 which was amended vide SRB Notification dated 28.06.2016. The AC had opposed the change of Tariff Heading from 9815.5000 to 9809.0000 in respect of services provided by Faisal Hussain on the pretext that he was registered with FBR for Income Tax and not for Sales Tax and they could not sell the goods to the respondent. The AC had also opposed the change of Tariff Heading from 9809.0000 to 9824.0000 in respect of services provided by Muhammad Younus Ghanchi on the pretext that he was registered with FBR for Income Tax and not for Sales Tax. Thus they could not sell the goods to the respondent. The AC had also opposed the reduction of tax by Commissioner (Appeals) in respect of Tanveer Ahmad from Rs.1,900,654/= to Rs.1,477,138/= on the same pretext that he was registered with FBR for Income Tax and not for Sales Tax and they could not sell goods to respondent and that the services were received in Financial Year (FY) 2107 and payment was also made in FY 2017. The condition of exemption during that year was that the turnover should not exceed 4 million in a Financial Year. The arguments of the learned AC that the services providers were registered with FBR for Income Tax purposes and could not sale goods to the service recipients has no force. The Tariff Heading has to be applied on the basis of actual nature of services provided or rendered and not on the basis of registration with FBR. Apparently the learned AC is opposing the change of Tariff Heading by Commissioner (Appeals) as he wants to charge more tax on the respondent then due.

18. The argument of learned AC that the Commissioner (Appeals) erroneously treated the value of contract/project as the turnover of service providers to provide relief under SRB Notification dated

18.06.2013 amended on 28.06.2016 has force. In the amended Notification Dated 28.06.2016 in relation to Tariff Heading 9809.000 for the Tax periods from July, 2016 onwards the condition was that "whose annual turnover does not exceed 4 million rupees in a financial year. Whereas in relation to Tariff Heading 9824.000 for the Tax periods from July, 2016 onwards the condition was that "construction work undertaken by a person whose annual turnover does not exceed 4 million rupees in a financial year". For providing exemption under the SRB Notification dated 18.06.2013 amended on 28.06.2016 it was mandatory for the Assessing Officer as well as the Commissioner (Appeals) to enquire into the turnover of the service provider during a financial year and if such amount exceeded 4 million rupees no exemption was available to him.

19. This aspect of the case was neither considered by the AO in the OIO for the reason that OIO was passed ex parte and apparently no material was available with the AO for ascertaining the actual facts except his guess work. The Commissioner (Appeals) while allowing benefit of Notification had not enquired about the turnover of the service providers. The Commissioner (Appeals) erroneously failed to apply the conditions of exemption, which was mandatory. It is now well settled law that grant of concession in the nature of exemption from payment of taxes are to be given a rigid interpretation against the tax payer and in favour of the taxing power as held in the reported case of Hashwani Hotels Limited versus Government of Pakistan, 2007 SCMR 1131. It was also settled law that the person getting concession in the nature of exemption must satisfy that all conditions for such exemption were met and once such compliance is made than the exemption available to a person under the law cannot be taken away by the concerned authorities at their discretion. This view was held in the reported case of Commissioner of Income Tax versus M/s River Side Chemicals (Pvt) Ltd., 2207 SCMR 1139. It was thus, imperative for the Commissioner (Appeals) to satisfy the conditions of the exemption notifications before extending the benefit.

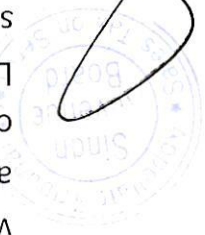
20. Our observations before parting with this order are however as under:-

85

defence.

any action so that it may take appropriate and proper provide proper opportunity to the taxpayer before taking necessary to mention relevant sub-section in the SCN to also does not mention the relevant sub-section of 47. it is sub-section (1) and (1A) of section 47 of the Act. The SCN matter does not contain the allegations as mentioned in as prescribed by law or not at all." The SCN in the instant done in a certain manner must be done in the same manner settled proposition of law that a thing required by law to be Lamps, 2001 SCMR 838 it has been held that "It was well case of Assistant Collector Customs versus Khyber Electric and would be defective and against the law. In the reported and would not be in consonance with the requirement of law are not stated in the notice, the notice would be vague, and specific and proper particulars. If such specific particulars misstatement, fraud, forgery, false or fake documents with allegations of collusion, abatement, deliberate attempt, of section 47 of the Act the notice should contain the However, if the notice is to be issued under sub-section (1A) of section 47 of the Act the notice should contain the allegations of inadvertence, error or miscalculation. under sub-section (1) of the Act the notice should contain section 47 of the Act is that if the notice is to be issued sub-section has been prescribed. The requirement of notices as different grounds for service of notice in each section 47 of the Act are distinct and separate type of Show cause notices under sub-sections (1), (1A) and (1B) of

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(i) The manner in which the OIO was passed is highly objectionable. The SCN was issued on 02.02.2018 and the OIO was passed on 23.02.2018. Apparently proper opportunity of hearing was not afforded to the appellant by the AO and the OIO was passed in undue haste. The Respondent in the Appeal before Commissioner (Appeals) had agitated this issue but no findings was recorded.

(ii) Show cause notices under sub-sections (1), (1A) and (1B) of

21. In view of the above discussions the OIA is set aside. The appeal is

remanded to Commissioner (Appeals) who is directed to enquire into the applicability of Notification dated 18.06.2013 amended vide Notification dated 28.06.2016. Moreover he should also examine the effect of non-mentioning of relevant sub-section on the merits of the case in the light of reported case of Assistant Collector Customs versus M/s Khyber Electric Lamps, 2001 SCMR 838 and to pass fresh OIA within sixty days from the date of receipt of copy of this Order after providing proper opportunity of hearing to the parties. Levying of further tax or refund of tax already deposited is subject to outcome of the fresh OIA. During pendency of appeal before the Commissioner (Appeals) no coercive action for recovery of tax dues on the basis of OIO will be initiated against the respondent.

22. The copy of order may be provided to the learned representatives of the parties. File of Appeal No. 50/18 may be returned to Commissioner (Appeals) alongwith copy of this order.

Imtiaz Ahmed Barakzai  
Member Technical

Justice (R) Nadeem Azhar Siddiqi  
Chairman

Karachi, Dated: 10.06.2020

Copy for compliance:

- 01. The appellant through authorized Representative.
- 02. The Commissioner (Appeals), SRB, Karachi

Copy for information to:-

03. The Assistant Commissioner (Unit- ), SRB, Karachi.

04. Office Copy.

05. Guard File.

REGISTERED  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD

Certified to be True Copy

Order issued on

Order Dispatched on

24/06/2020  
24/06/2020

Registrar

Registrar