

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-1

APPEAL NO. AT-114/2018

The Assistant Commissioner, SRBAppellant

Versus

M/s Jadoon Flying Coach ServicesRespondent

Mr. Tashkeel Hussain, AC-SRB for appellant.

Mr. Muhammad Aqeel, ITP for respondent.

Date of Filing of Appeal: 30.11.2018.

Date of Hearing: 11.04.2019

Date of Order: 16.04.2019

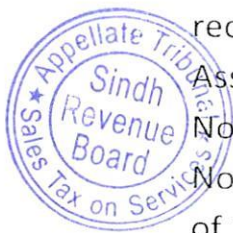
ORDER

Justice (R) Nadeem Azhar Siddiqi. This appeal has been filed by the appellant/department challenging the Order-in-appeal No. 192/2018 dated 04.10.2018 passed by the Commissioner (Appeals) in Appeal No. No. 281/2018 filed by the respondent against the Order-in-Original No. 641/2018 dated 21.06.2018 passed by the Assistant Commissioner (Mr. Muhammad Yousuf Bukhari), SRB, Karachi.



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01. In short, the facts of the case as stated in Order-in-Original are that the respondent got voluntarily registration with SRB under the service category of "Inter-City transportation or carriage of goods by road or through pipeline or conduit", tariff heading 9836.0000 of the Second Schedule of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) chargeable to Sindh sales tax effective from 01.07.2014.
02. The allegations against the respondent are that it had not filed sales tax returns despite the fact that the bank statement shows that consideration of Rs.142,460,186/= was received during the tax periods from July, 2016 to March, 2018. The respondent vide e-mail dated 16.03.2018 and letter dated 31.03.2018 was asked to comply the provisions of the Act, but no compliance was made.
03. A show cause notice dated 18.04.2018 was served upon the respondent to show cause why sales tax amounting to Rs.11,396,815/= may not be assessed and recovered along with default surcharge and penalties under serial No.2, 3, 13 and 15 of the Table of section 43 of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act).
04. The respondent did not file any written reply. The Assessing officer passed order in original by stating that "However they again failed to appear and submit any reply to the show cause notice. Therefore, the case has been decided on the basis of available information on merits". The Assessing officer determined Sindh sales tax in the sum of Rs.11,312,455/= @ 8% (based on credit amount of Rs.141,405,686/= received in the bank account) along with default surcharge. The Assessing officer also imposed penalties of Rs.565,623/= under serial No.3 of Table of section 43 of the Act, Rs.100,000/= under serial No.15 of Table of section 43 of the Act, Rs.70,000/= under serial No.2 of Table of section 43 of the Act, Rs.140,000/= under serial No.13 of Table of section 43 of the Act.

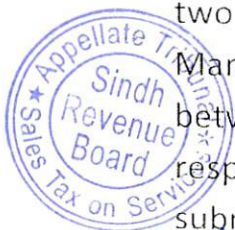


05. The respondent has challenged the order in original before Commissioner (Appeals) who allowed the appeal in favour of the respondent and directed SRB to refund the amount of Rs.650,000/= recovered by the department by attachment of bank account of the respondent during pendency of appeal before the Commissioner (Appeals), hence this appeal by the Department.

06. Mr. Tashkeel Hussain the learned AC-SRB for Appellant referred to para 8 of the Order-in-Appeal and submitted that the findings are erroneous. The relevant portion is reproduced as under.

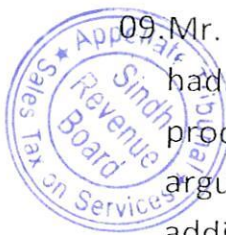
".....The appellant (respondent herein) provides transportation services to the Universities students, staff and faculty which is completely out of scope of tariff heading 9836.0000. Hence, the claim made by the respondent in the Order-in-Original falls way beyond the appellant's actual scope of work, and is therefore not tenable. The Assessing Officer fell in error in only considering the credit entries of the appellant's bank statement and not deciding the actual scope and nature of service provided or rendered by the appellant, which is necessary to divide under which tariff heading the services provided or rendered by the appellant falls".

07. Mr. Tashkeel Hussain further submitted that appellant has got voluntary registration under tariff heading 9836.0000 and is providing inter-city transportation service which is evident from its Web-site and placed on record down loaded material. He also submitted that appellant is also dealing in rent a car services under tariff heading 9819.3000. He then submitted that the Commissioner (Appeals) only on the basis of two invoices dated 02.11.2017 and 25.06.2018 and two agreements dated 14.04.2010 between Institute of Business Management and respondent and agreement dated 01.01.2018 between National University of Computer & Engineering Sciences and respondent has erroneously set aside the order-in-Original. He then submitted that the tax periods involved in this appeal are July, 2016 to March, 2018 and from the Bank statement the economic activity is fully proved.



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08. Mr. Tashkeel Hussain further submitted that the respondent is engaged in providing and rendering service of intercity transportation or carriage of goods by road or through pipeline or conduit tariff heading No. 9836.0000, which service is defined in section 2(98 B) of the Act, which was inserted in the Act effective from 07.07.2014 and was remained in abeyance till 31.12.2015 and from 1st January, 2016 the Sindh sales tax is payable. He then submitted that the bank statement of the appellant shows transactions of Rs.141,405,686/- involving Sindh Sales Tax of Rs.11,312,455/- on the reduced rate of 8%. He then submitted that since the registration of the respondent was under principle activity of transportation of carriage of goods tariff heading 9836.0000 the amount reflecting in the bank statement relates to such activity and was rightly taxed. He then submitted that even if the stance of the appellant is taken as correct it is providing rent a car services falling under tariff heading 9819.3000 (rent a car and automobile rental service as provided under section 2 (72 A) of the Act) and is liable to pay Sindh sales tax. He then submitted that respondent is providing rent a car services to its clients under contracts of transport and such transport services are covered under 9819.3000. He also referred two invoices attached with his report filed on 11.04.2019 and submitted that from those invoices it is clear that the respondent is providing rent a car services brought to tax net effective from 1st July, 2014, chargeable to Sindh Sales Tax @ 10% since inception.



09. Mr. Muhammad Aqeel learned ITP for respondent submitted that he had already filed his written arguments on 07.02.2019 and had also produced relevant documents on 26.03.2019 and is relying upon the arguments and documents in support of his contention. He in addition submitted that the respondent neither providing services under tariff heading 9836.0000 nor tariff heading 9819.3000 and actually providing pick and drop services to the students, and staff members of educational institutions. He then submitted that the cars/vehicles were never provided to the institutions but the same are plying on specific routs as provided by the institutions under the

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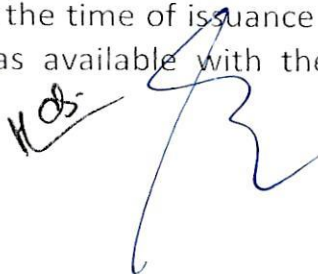
control of the respondent as the vehicles were driven by the drivers/staff of the respondent and at no point of time the control of sub vehicles were given to the staff of institutions.

10. Regarding the invoices attached with the report submitted by the AC on 11.04.2019 Mr. Aqeel submitted that in the two invoices neither the word rent or rental has been used nor the vehicles mentioned there in were provided on the basis of rental. He then submitted that the routes on which the said vehicles were plying were mentioned in the invoices.
11. We have heard the learned representatives of the parties and perused the record made available before us.

The show cause notice was issued and the assessment was made under Tariff Heading 9836.0000 "Inter-City transportation or carriage of goods by road or through pipeline or conduit" only on the basis of credit entries available in the bank statement of the respondent for the simple reason that the respondent got voluntarily registration under Tariff Heading 9836.0000. Though in the order in original the Assessing Officer stated that "However they again failed to appear and submit any reply to the show cause notice. Therefore, the case has been decided on the basis of available information on merits", but factually at the time of issuance of show cause notice as well as passing of order in original nothing was available with the Assessing Officer to connect the said entries in the bank statement with the providing or rendering of service under T .H. 9836.0000. The Assessing Officer passed order in original in haste without waiting for the reply of the respondent knowingly that the respondent was not providing the services under Tariff Heading 9836.0000 "Inter-City transportation or carriage of goods by road or through pipeline or conduit". From the documents produced before the Commissioner (Appeals) as well as before us it is apparent that the respondent was not engaged in providing or rendering services of Inter-City transportation or carriage of goods by road or through pipeline or conduit", tariff heading 9836.0000 of the Second Schedule of the Act. It appears that at the time of issuance of show cause notice no evidence or material was available with the Assessing Officer to determine the actual



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nature of services provided or rendered by the respondent. The issuance of show cause notice without supporting evidence is not warranted. In the reported case of Caretex V Collector Sales Tax and Federal Excise, 2013 PTD 1536, the Lahore High Court observed as under:

"Show cause notice is a foundational document which is to comprehensively describe the case made out against the tax payer by making reference to the evidence collected in support of the same. It is the narration of the facts in the show cause notice along with the supporting evidence which determines the offence attracted in a particular case. Show cause notice is not a casual correspondence or a tool or a license to commence roving inquiry into the affairs of the taxpayer based on assumptions and speculations but is a fundamental document that carries definitive legal and factual position of the department against the taxpayer." As far as the contention of learned AC is concerned that from the Web site of the respondent it appears that it is providing inter-city transportation service, suffice to say that it is not always necessary that if the web site contained a service it is actually provided or rendered.

12. The issuance of show cause notice and passing of the order in original only on the basis of entries in the bank statement without first properly determining the nature of service and without any other material available with the Assessing Officer connecting the entries of bank statement with the providing or rendering services mentioned in the Schedule 2 of the Act is not proper exercise of jurisdiction vested in the Assessing Officer. The assessment of tax only on the basis of entries available in the bank statement without any supporting material to link the said entries with providing or rendering service is illegal and cannot be sustained.



13. In the reported judgment of AL-Hilal Motors versus Collector Sales Tax, 2004 PTD 868 a learned DB of the Sindh High Court has held that *"It is established principle of the law of taxation that an assessee can be subjected to tax under a provision of law, which is unambiguous and clear. There is no room for any intendment and there is no presumption as to tax. In the absence of any deeming provision the Revenue is required to*

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establish that a transaction falls within the parameters of taxable supplies or in furtherance of any taxable activity, failing which the sales tax imposed on the basis of some assumption or presumption not warranted in law, shall always be struck down. In the present appeals it is apparent that except discovering certain cash-credits entries in the books of the appellants, the Revenue Officers have not been able to produce any material to show that the said amounts are in any way linked with the taxable supplies or with any taxable activities or represent an amount on account of any business activity”.

14. Though the above referred reported case is in respect of Sales Tax Act, 1990 but the principle is fully applicable in this appeal also. To levy tax the Assessing Officer is required to establish that a transaction falls within the parameters of taxable services in furtherance of any taxable/economic activity, failing which the sales tax imposed on the basis of some assumption or presumption is not warranted in law and shall always be struck down. In this appeal it is apparent that except the entries available in the audited financial accounts the Assessing Officer has not been able to produce any material to show that the said amounts are in any way linked with the taxable services or with any taxable activities.

15. The learned Commissioner (Appeals) in the order in appeal has held as under:

“9. The contention of the learned counsel of the Appellant has force that the Assessing Officer has not undertaken any exercise to determining the nature and value of service and the assessment order was passed only on the basis of the entries available in the bank statement. The SST should not be levied on the person or his income but on the taxable services provided by him within or from Sindh. It is not necessary that all entries in the bank statement reflect the consideration of taxable service. The duty of the Assessing Officer is to first determine the nature of service, then determine the value of service and then pass assessment order, which is lacking in this case. The assessment order which is not legal is amounts to without jurisdiction and void. Hence, it is crucial to reproduce below the sections 8, section 3 and section 4 of the Act, which read as under: (the sections have not been produced)



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10. A bare reading of the above provision shows that sales tax under the provisions of the Act would be chargeable when (i) a registered person (ii) provides taxable service (iii) in the course of commencement or termination of (iv) an economic activity. Therefore, amongst other things, twin condition of providing taxable service and economic activity must exist simultaneously. The expression "taxable services" and 'economic activity' both operate in their own fields. The quantum of tax liability is determined on the basis of the value of taxable service, but the liability to pay tax under the provisions of Act would arise only when such is made during the commencement or termination of an economic activity. It is clear by the judgments laid down by the Honorable Courts that there is no presumption as to tax. In the instant appeal, it is abundantly clear that the Respondent merely relied on the Bank statement of the Appellant and neglected the other important documents furnished by the Appellant. It is copiously evident from the plethora of the cases decided by the High Courts and the Apex Court that the whole aim and objective of the Legislature would be plainly defeated if the command to do thing in particular manner is not followed. It is of utmost importance that authority whilst deciding the case should follow the intention of the legislature and give importance to the words in the statute itself. If the words are capable of one construction, then it would not be open to the authority / courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act. The duty of the Assessing Officer is first determine nature of service, which is lacking in this case.



18. We have carefully considered the conclusion drawn by the learned Commissioner (Appeals) and found that no error has been committed and the learned Commissioner (Appeals) has rightly held that "The SST should not be levied on the person or his income but on the taxable services provided by him within or from Sindh. It is not necessary that all entries in the bank statement reflect the consideration of taxable service. The duty of the Assessing Officer is to first determine the nature of service, then determine the value of service and then pass assessment order, which is lacking in this case".

19. The learned Commissioner (Appeals) has also rightly held that "sales tax under the provisions of the Act would be chargeable when (i) a

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registered person (ii) provides taxable service (iii) in the course of commencement or termination of (iv) an economic activity. Therefore, amongst other things, twin condition of providing taxable service and economic activity must exist simultaneously. The expression "taxable services" and 'economic activity' both operate in their own fields".

20. Mr. Tashkeel Hussain then submitted that respondent is providing rent a car services to its clients under contracts of transport and such transport services are covered under Tariff Heading 9819.3000. He also referred two invoices attached with his report filed on 11.04.2019 and submitted that from those invoices it is clear that the respondent is providing rent a car services brought to tax net effective from 1st July, 2014, chargeable to Sindh Sales Tax @ 10% since inception. The show cause notice was issued only invoking Tariff Heading 9836.0000 and at the stage of pendency of Appeal before the Tribunal the same cannot be allowed to be altered. The show cause notice is a basic document and set the assessment proceedings in motion and it is necessary to confront the tax payer the grounds on the basis of which show cause notice was issued so that the tax payer may prepare his defence accordingly. The tax payer cannot be taken by surprise and cannot be condemned unheard. The deviation from Tariff Heading confronted in the show cause notice is violative of law laid down by the Honorable Supreme Court in the reported case of The Collector Central Excise and Land Customs and others versus Rahim Din, 1987 SCMR 1840 in which it is categorically held that "the order of the adjudication being ultimately based on a ground which was not mentioned in the show cause notice, the order was palpably illegal and void on the face of it". The initiation of proceedings under a particular Tariff Heading and its conclusion/termination on a different Tariff Heading that was never confronted to the tax payer cannot be lawful and cannot be allowed. Coming to know about the defect in the show cause notice the best course available to the department is to withdraw the earlier show cause notice and to issue fresh show cause notice, which course has not been adopted for the reason best known to the department and its officials.




M. Tashkeel Hussain

21. In the reported case of WAK Limited, Lahore versus Customs, Central Excise and Sales Tax Appellate Tribunal, 2018 PTD 253 the Lahore High Court in para 8 has held as under:

"Jurisprudence is now pretty settled on the point that show cause- notice is a serious business and is not a casual correspondence. Its purpose is to put the person on notice about the allegations for which the authorities intend to proceed against him and to give an opportunity to explain his position. This principle is rooted in the principles of natural justice and fair trial....."

22. In view of the above we are satisfied that the order in appeal is not suffering from any illegality and infirmity, resultantly we confirm the order in appeal and dismissed this appeal in limine having no merits. The copy of the Order may be provided to the learned representative of the parties.


(Agha Kafeel Barik)
Member Technical


(Justice[®] Nadeem Azhar Siddiqi)
CHAIRMAN

Certified to be True Copy

Karachi

Dated: 16.04.2019


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Copies supplied for compliance:-

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

Order issued on 18/4/19

Copy for information to:-

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

Order Dispatched on 18/4/19

Registrar