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# BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

## DB-I

## APPEAL NO. AT- 12 /2018

M/s A. R. Ruman (Pvt.) Ltd.
Karachi.....................................................................................Appellant

**Versus**

Assistant Commissioner-05, SRB,
Karachi.....................................................................................Respondent

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| Date of filing of Appeal: | 22.03.2018 |
| Date of hearing: | 12.12.2018 |
| Date of Order: | 25.01.2021 |

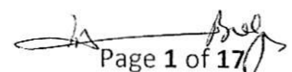
Mr. Adnan Siddiqui, Advocate and Ms. Sidratul Muntaha, Advocate for Appellant alongwith Mr. Hasan Jamil, Manager of the Appellant

Mr. Naeem Iqbal, Mr. Waseem Iqbal, Mr. Nasir Advocates for respondent alongwith Mr. Zameer Khalid, Commissioner (Legal), Mr. Zain Manzoor, AC, Ms. Uzma Ghory, AC-DR, Ms. Anum Shaikh, AC, Mr. Liaquat Ali Bajeer, AC, and Mr. Darban Ali, SSTO for SRB.

## ORDER

**Justice ® Nadeem Azhar Siddiqi:** This appeal has been filed by the appellant challenging the Order-in-Appeal (OIA) No.129/2017 dated 02.11.2017 passed by the Commissioner (Appeals) in Appeal No. 06/2017 filed by the appellant against the Order-in-Original (OIO) No. 894/2016 dated 29.12.2016 passed by the Assistant Commissioner (Ms. Nida Noor), Unit-6, SRB, Karachi.

01.The brief facts of the case as stated in the OIO were that appellant got itself voluntarily registered under principal activity of "Software or IT-

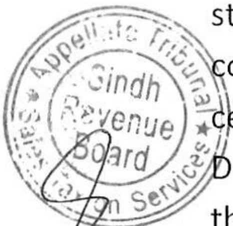


based System Development Consultant" (Tariff Heading 9815.6000) of Second Schedule to the Sindh Sales Tax on Services Act, 2011 (herein after referred to as the Act) chargeable to Sindh Sales Tax (SST).

02. The allegations against the appellant in the OIO were that from the perusal of the audited financial statement of appellant for the periods from September, 2013 to June, 2014 it appeared that the total revenue of registered person during these tax periods was Rs.50,162,989/=. However the appellant declared total value of Rs.3,171,171/= only against Annexure "C" of the sales tax returns submitted with SRB for the same tax periods. It was also alleged that the SRB through its various letters provided opportunity to the appellant to submit cogent and plausible reasons along with documents/evidence for non-payment of SST on value of service amounting to (Rs. 50,162,989/00 - Rs.3,171,171/= 46,991,818/=). The appellant submitted few documents in response to the letters issued to it but failed to justify short declaration of value of Rs.46,991,818/=, on which SST was payable at Rs.7,518,691/=.

03. The appellant was served with a Show-Cause Notice (SCN) dated 18.16.2016 to explain as to why the short paid SST of Rs.7,518,691/= may not be assessed and recovered under section 23 and 47 (1A) (a) of the Act along with default surcharge under section 44 of the Act and penalties under Serial No. 3, 6 and 15 of the Table of section 43 of the Act.

04. The appellant in response to SCN filed written reply dated 13.07.2016 stating therein that it was engaged in IT related business which mainly comprised of sales and purchase of IT equipment viz-a-viz providing certain taxable services in the ambit of "Soft Ware or IT-based System Development Consultant" (Tariff Heading 9815.6000). It was also stated that as regards sale and purchase of IT equipment the appellant was complying with the provisions of the Sales Tax Act, 1990 (STA, 1990) with FBR. The appellant further stated that it's turnover for the year included revenue/sales of IT equipment, and such rendering of taxable services



during the financial year was Rs.50,162,989/= out of which the service provided or rendered and reported to SRB was Rs.3,172,316/=.

05. It appeared from the OIO that the appellant had provided invoice wise breakup of the total amount confronted in the SCN and their corresponding purchase orders. However the Assessing Officer (AO) did not accept certain purchase orders, for the reasons recorded by him in the OIO. The AO passed the OIO levying SST at Rs.7,207,029/= alongwith default surcharge and penalty of Rs.360,351/= under serial No.3 of the Table of section 43 of the Act.

06. The Appellant challenged the OIO by way of filing appeal before the Commissioner (Appeals) who dismissed the appeal for non-prosecution; hence the appellant has challenged the OIA before this Tribunal.

07. The learned advocate for the appellant submitted that the appellant was wrongly assessed as Software Development Consultant under Tariff Heading 9815.6000, whereas the appellant was a System Integrator and involved in sale of hardware and software. The appellant was paying sales tax to FBR, according to its core function. He submitted that levying of sales tax on total turnover including sale of goods was beyond the jurisdiction of SRB. He further submitted that the Tariff Heading 9815.6000 only provided for software or IT based system development consultants and not for sales of hardware and software. He further submitted that the FBR through E-mail informed the appellant that software was considered as supplies and chargeable to 17% sales tax under section 3 of the STA, 1990. He mentioned that an amount of Rs.5,482,738/= related to the payment of Sales Tax under STA, 1990 and there was overlapping of laws and SRB was claiming tax without bifurcating the sales of goods and services. He submitted that in the OIO there was no allegation against the appellant that it has not paid tax or committed default in payment of tax.

08. The learned advocate for the appellant further contended that OIA was time barred since appeal was filed before Commissioner (Appeals) on

01.02.2017 and the OIA was passed on 02.11.2017 dismissing the appeal for non-prosecution without any justification. He relied upon the reported judgment in the case of Super Asia Din Muhammad V/s Collector of sales tax 2017 SCMR 1427 on the point that the OIO cannot be passed beyond the period 180 days, whereas in the instant case the OIO was passed on 194th day.

09. The learned advocate for the respondent Malick Naeem Iqbal disputed the assertion of the appellant and submitted that the OIA was passed within specified time after excluding the adjournments obtained by the representative of the appellant.

10. The learned advocate for the respondent further submitted that the appellant was providing services in relation to soft-ware licensing, soft-ware support and soft-ware renewal involving sales tax of Rs.7,207,029/=. He further submitted that the core business of appellant was providing connectivity/net-working services by means of supply of cables/wiring and software licensing and such activity was covered under Tariff Heading 9815.6000 (Software or IT based system development consultant). Furthermore the appellant was also engaged in providing services as IT based system development consultant, which included software licensing, software renewal, study of system already installed at the clients premises, tracking services, software up gradation and software implementation.

11. The learned advocate for respondent further submitted that SST was levied as Value Addition Tax (VAT mode) thus such tax was to be charged on gross value (service as well as goods involved in providing taxable services) subject to adjustment of tax already paid relating to outright sale or counter sale of equipment. He further submitted that the pith and substance of the matter was providing service and the cost of goods was thus part of service. The learned advocate for the appellant relied upon the following case laws:-

i) Association of Builders and Developers, 2018 PTD 1487 relevant para 39-40 page 1519 & 1520. (On the point of Dominant Factor was a recognized factor).

ii) Pakistan International Freight Forwarders Association, relevant para 49 page 43-44. (Principal of Pith and Substance). In case of dispute the court was required to see the pith and substance of transaction as both the laws had to exist together.

iii) 1999 PTD 3421- Kolkata HC relevant page 3423- last para-relating to exemption. Predominant object was to be seen and considered.

iv) S. Imtiaz Ali V/s Chairman Income Tax Appellate Tribunal, 2019 SCMR 1034. (Dominant factor in tax matter was Pith and substance).

v) Pakistan Telecom Mobile, 2017 PTD 2296- relevant Para 34.

vi) Income Tax Report (India) volume 159 page 01- page-06 (predominant factor-whether the organization is charitable or profitable).

12. We have heard the learned representatives of the parties and perused the record made available before us and the written arguments filed by the learned representatives of the parties.

13. The tax has been charged under Tariff Heading 9815.6000 (Software or IT-based System Development Consultant) of Second Schedule to the Act. The plea of the appellant since inception was that it had dealt in sale and purchase of IT related equipment. However for sale of goods it had deposited sales tax with FBR and for the services it had deposited the SST with SRB. The plea of the department was that the SST was payable on the gross amount received (cost of services plus cost of goods). However, after hearing the parties at length we have framed the following point:-

**"Under what provision of Sindh Sales Tax on Services Act, 2011 read with Entry No. 49, of the Part I of the Fourth Schedule of**

**the Constitution, 1973 the SRB is claiming/demanding Sindh Sales Tax on the component of goods or supplies".**

14. The phrase Software or IT-based System Development Consultant was not defined in the Act. The learned AC has given his own meaning and interpreted the said phrase in para 10 and 11 of the OIO as under:

"10.*As regards to 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 the tariff heading 9815.6000 of the Second Schedule of the 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 9815.60000".*

*"11.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 transitioning the system to its support staff and end users".*

*"12.Broadly, there are four types of system development processes that help make projects more likely to succeed.*

*. Systems development life cycle (SDLC)*
*. Rapid application development (RAD)*
*. Object-oriented system development OOD)*
*. Extreme Programing (EP)"*

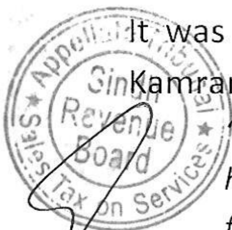
15. It appears from the above interpretation that the learned AC by using the term "Includes" has enlarged the definition of "Software or IT-based

System Development Consultant". The AC has no legal authority to enlarge the definition by using the word "include" or by using the deeming clause since such authority is only vested in the legislature. The main dispute is regarding the sale (as described by the appellant) or licensing (as described by the respondent) of software developed by others. The learned AC in para 11 of OIO had held as under:-

> *"It includes the internal development of customized system as well as the acquisition of software developed by third parties, with or without alteration".*

It is not understandable that how the simple sale and purchase of software developed by third parties without element of service has fallen within the ambit of providing or rendering service. The words used in a statute are to be interpreted keeping in view the purpose of the statute. The Sindh Sales Tax on Services Act, 2011 was enacted to provide the levy of a tax on services provided, rendered, initiated, received or consumed in the province of Sindh. The preamble of the Act provide as under:

> *"Preamble.—WHEREAS in accordance with the Constitution of the Islamic Republic of Pakistan, 1973 the imposition, administration, collection and enforcement of the taxes on services is the prerogative of the provinces".*
>
> *"Whereas it is expedient to provide for the levy of a tax on services provided, rendered, initiated, received [, originated, executed] or consumed in the Province of Sindh and for all matters incidental and ancillary there to or connected herewith.*




It was held in the reported judgment of Director General FIA versus Kamran Iqbal, 2016 SCMR, 447 as under:-

> *"indeed, preamble to a Statute is not an operative part thereof, however, as is now well laid down that the same provides a useful guide for discovering the purpose and intention of the legislature. Reliance in this regard may be placed on the case of Muree Brewery Company Limited v Pakistan through Secretary Government of Pakistan and others (PLD 1972 SC 279). It is equally well established principle that while interpreting a, statute a purposive approach should be adopted in accord with the objective of the Statute and not in derogation to the same".*

It is clear from the preamble of the Act that only "services" can be taxed under it. Moreover, by no stretch of imagination simple sale and purchase of software could be taxed without any element of service. The right to levy tax on services was delegated to the provinces under Eighteenth Constitution Amendment by creating an exception in Entry No. 49 of Part I of the Federal Legislative List, Fourth Schedule. The said entry 49 reads as under:

> *"49. Taxes on the sales and purchase of goods imported, exported, produced, manufactured or consumed [, except sales tax on services].*

It is evident from Entry No. 49 that by an exception the provinces could tax the services only and such entry did not cover the taxing of sale and purchases. In the reported judgment of Sindh High Court in the case of Pakistan International Freight & Forwarders Association 2017 PTD 1, in relation to Entry No. 49, it was held as under:-

> *"58. In our view, the "exception added to entry No. 49 is not a "true" exception. Rather, it is an independent provision in its own right. It has two primary effects. Firstly, and most importantly for present purpose, it recognizes expressly on the constitutional plane that a taxing power in respect of taxing event of rendering or providing of services vests in the Provinces.*

It is therefore clear from above para of the decision that the provinces are vested with power to tax the rendering or providing of services. In its recent judgment the High Court of Sindh in the case of Sami Pharma and others versus Province of Sindh and others, C.P. No. D- 5220/2017, held as under:-

> *"12. The principles of delegated legislation are very clear and hardly require any reiteration. They are intended to enforce law and not to override it. In brief, they entitle the delegate to carry out the mandate of the legislature.......".*

16. In view of above decision it is evident that the learned AC has stretched the meaning/definition of the phrase "Software or IT-based System Development Consultant" to levy SST which was not a proper and correct approach. The general rule is that words used in a statute must first be given their ordinary and natural meaning (PLD 1990 SC 68). It is only when such an ordinary meaning does not make sense then resort

can be made to discover other appropriate meaning (PLD 1963 SC 137). It is a well-recognized principle of interpretation of statutes that a fiscal enactment should be construed strictly and whenever there is an ambiguity, the benefit of doubt should be given to the citizen/taxpayer. Again if two equally reasonable constructions are possible then construction favorable to citizen/taxpayer should be preferred.

17. 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 of IT-based systems. This means that a person has developed IT-based system by his efforts. Moreover, if a person simply deals in purchase and sale of IT-based software without any development and without element of service, ~~thus~~ than the same is not covered by the phrase "Software or IT-based system development consultants". The learned AC has erroneously on the basis of self-designed interpretation has included "acquisition of software developed by third parties with or without alteration" in the definition.

18. The appellant has also provided invoice wise breakup of the total amount confronted in the SCN and the copies of purchase orders. The AO has ignored the purchase orders on the excuse that the same were not appropriately signed and stamped by the officials. The AO in the OIO stated that notice to the recipient of service of appellant were issued for verification but has failed to mention the result of such verification. The AO also bifurcated the invoices relating to sales of goods and invoices relating to services but has only considered those invoices which suited the respondent for the purpose of charging SST. The AO has also enlarged the meaning of phrase "Software or IT based system development consultants" (T.H. 9815.6000) in the following words:

> *"It includes the internal development of customized system as well as the acquisition of software developed by third parties, with or without alteration".*

19. The learned AO in OIO had submitted that Tariff Heading 9815.6000 was the sub-heading of Tariff Heading 98.15 which reflects the "services provided or rendered by professional and consultants etc." and all the services provided or rendered by such persons are taxable. Even if the contentions of the Learned AC were considered correct only the component of services provided or rendered could be taxed and not sale of goods or cost of supplies. This point was considered by the Sindh High Court in the case of Citi Bank NA versus Commissioner Inland Revenue, 2014 PTD 284 at page 295 wherein it was has held as under:-

> *"It will be seen that this description only listed the persons who were to provide the services enumerated under heading 98.13. This would satisfy only the first requirement of the definition in section 2(16a), since banking companies and NBFIs were listed in the description. However, this had nothing to do with the services that were actually liable to duty. The attempt by learned counsel to conclude from the enumeration of the persons that all the services provided by them were included in heading No. 98.13 cannot be accepted. This would render otiose the listing of specific services in the various sub headings".*

Section 3 of the Act provides that a taxable service is a service listed in the Second Schedule to the Act, and for taxing any service it is mandatory that the same should be listed in the Second Schedule to the Act.

20. The learned AC failed to appreciate that the Sindh Sales Tax on Services Act, 2011 was levied only on service and not on sale of goods or supplies. Sub-section (79) of section 2 of the Act provides as under:-

> *"service or services means anything which is not goods or providing of which is not a supply of goods and shall include but not limited to the services listed in the First Schedule of the Act.*

It is clear from the definition of service that the sales and supply of goods cannot be claimed as service or part of service and tax cannot be levied thereon. Explanation is attached to sub-section (79) of section 2 of the Act which provides as under:-

*"A service shall and continue to be treated as service regardless whether or not providing thereof involves any use, supply or consumption of any goods either as an essential aspect of such providing of service".*

It is evident from the above explanation that the service is not to be treated as part of use, supply or consumption of goods. Similarly the use, supply or consumption of goods cannot be treated as part of service for the purpose of determining the value of service. The purpose of explanation is to facilitate proper understanding of a provision of law and to serve as guide line and not to enlarge the meaning of provision of law. In the reported judgment in the case of Pakistan International Freight Forwarders Association, 2017 PTD 1 it has been held as under:-

> "58. *In our view, the "exception" added to entry No. 49 is not a true exception. Rather, it is an independent provision in its own right. It has to two primary effects. Firstly, and most importantly for present purpose it recognizes expressly on the constitutional plane that a taxing power in respect of the taxing event of rendering or providing services vests in the provinces.......................................The Constitution recognizes a division of taxing power and that is all. The real effect of the "exception" is to "shift" the taxing power in relation to the taxing event of rendering or providing of services from the Federation to the Provinces.*

> "59. *The second effect of the "exception" though not directly relevant for present purpose, may also be adverted to. Entry 49 is concerned with; inter alia, the sale of goods. The taxing power in relation thereto vests solely in the Federation. The taxing power in relation to the rendering or providing of services now vests solely in the Province"..................*

In the same judgment in para 61 it has been held as under:-

> *"61..............................The 18th Amendment, by inserting the "exception" into entry No. 49 radically altered the position. The taxing power in relation to the aforesaid taxing event was "shifted" and "transferred" to the Provinces and now vests in them alone. This*

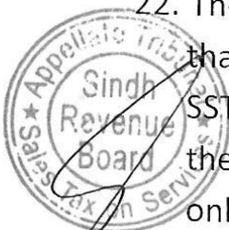
*follows also from the constitutional principles noted above, namely that under the scheme of our Constitution there is only a division of taxing power and not a sharing thereof, and that for two taxing powers to have the same taxing event can mean only that the taxing powers are also the same.*

21. In the light of the above decision it is clear that there are two taxing powers. The taxing power relating to goods vests in the Federation and the taxing power relating to services vests in the Provinces and both cannot share the same powers. The Provinces can neither levy tax on goods nor can claim the goods as part of service for the purpose of levying SST. In the reported case of Ummatullah Versus Province of Sindh. PLD 2010 K 236 it has been held that as under:-

*"It is a settled principle of law that what cannot be done directly cannot be done or allowed to be done indirectly. It is also trite principle of law; what is not possessed can neither be conferred nor delegated."*

The Supreme Court in the reported judgment of SRB Versus Civil Aviation Authority, 2017 SCMR 1344 has held as under:-

*"37. .......Whilst the provincial legislatures are independent, they must operate within the sphere allotted to them and within their prescribed limit. Neither the Federation nor the provinces should invade upon the rights of the other nor encroach upon the other's legislative domain".*




22. The contention of the learned advocate for the respondent is misplaced that in providing taxable service if the goods were used or consumed the SST was payable on the gross value including the services provided and the goods used. We had already held that the Provincial Legislature is only authorized to levy SST on services. This view gain support from the recent judgment the High Court of Sindh in the case of Sami Pharma and others versus SRB, CP-D No. 5220/2017 and In para 9 of the judgment it was held as under:-

*"9......................but it needs to be appreciated that such <u>authority to impose tax is only on services and not on goods or otherwise (Emphasis</u>*

supplied). It is only the quantum of service rendered or supplied which can be taxed by Province. By no stretch of imagination either by rules or otherwise, it can be extended to any other goods or amount which is not falling within services (Emphasis supplied).

23. The contention of the learned advocate for the respondent that the cost of the goods was part of services in determining the value of services has no force. Section 5 of the Act provides for value of taxable services. It is provided in this provision that value of a taxable service is 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 excluding the amount of sales tax under this Act, provided that in case the consideration for a service is in kind or is partly in kind and partly in money, the value of the service shall mean the open market price of the service as determined under section 6 of the Act. However, this provision does not provide for adding the cost of goods in determining the value of taxable services.

24. The most important provision is enumerated in section 8 of the Act which provides for scope of tax. This provision provides that subject to the provisions of this Act, there shall be charged, levied and collected a tax known as sales tax on the value of a taxable service at the rate specified in the Schedule in which the taxable service is listed. Subsection (2) of section 8 of the Act then provides the authority to the Board or the Government for fixing a higher or lower rate of tax as may be specified through Notification. This provision also does not provide for taxing the goods if used in providing taxable services.

The charging section does not provide for inclusion of the cost of goods if the same is used in providing taxable services. Regarding pith and substance the Supreme Court in the reported case of SRB V CAA as quoted supra held as under:-

> *"37..............The pith and substance of the legislated subject is to be examined to determine in whose legislative sphere a particular subject comes under. And above all a reasonable interpretation which does not produce impracticable results should be adopted".*

The pith and substance of the matter is that if there are two taxing powers both cannot exercise their powers simultaneously and they have to act in their own jurisdiction. Thus demanding SST by SRB on the cost of goods is not legally justifiable.

25. The AO had finalized the assessment on the basis of entries available in the audited financial statement for the tax periods September, 2013 to June, 2014 and determined the value of service to Rs.50,162,989/= and levied SST of Rs.7,207,029/=. The AO while assessing the tax neither determined the nature or value of service properly nor made any independent exercise to separate the sale of IT equipment and software and the services rendered by the appellant. The assessment of tax was determined by the AO only on the basis of entries available in the audited financial statement without any supporting material to link the said entries with providing or rendering of such service. Therefore assessment of tax is on this account is illegal and cannot be sustained.

26. 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 as under:-

> *"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 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".*

27. The above referred case is although in respect of Sales Tax Act, 1990 but the principle is fully applicable to the instant appeal. Since while levying the SST the AO was required to establish that a transaction fall within the parameters of taxable services and was in furtherance of any

taxable/economic activity. However, since he has failed to determine this aspect the sales tax imposed on the basis of some assumption or presumption was not warranted in law and the same needs to be struck down. It is apparent in the instant appeal that except the entries available in the audited financial accounts the AO has not been able to produce any material to show that the said amounts were in any way linked with the taxable services/activities.

28. The Commissioner (Appeals) has not decided the appeal on merits and dismissed the same for non-prosecution. The learned advocate for the appellant had challenged that the order in appeal was time barred. We have called report regarding consuming of time in finalization of appeal. The learned Commissioner (Appeals) submitted the report and also attached summary of time lapsed and time sought by the appellant. The relevant portion of the Report is reproduced as under:

> *"The appeal was filed on 01.02.2017 and the OIA was passed on 21.11.2017 hence a total number of 275 days lapsed on date of order of Commissioner (Appeals). In the meantime the statutory time of 120 was to reach on 16.09.2018 as the reconciliation was in process. Therefore, in order to ascertain the documents thereto the time was extended for 60 days on 16.09.2018. But the date of extension in para 2 of the OIA was written inadvertently as 26.09.2018 instead of 16.09.2018. The appellant has sought total adjournments of 121 days. By deleting such 121 days the statutory days lapsed appears as 154 days. From these facts it appears that the order in appeal was passed with in extended period of 160 days. The order sheet and also the Appellant's applications/letters seeking adjournments are attached as Annexure A and B.*

29. The learned Commissioner (Appeals) under sub section (5) of section 59 of the Act can passed order within 120 days. He can also extend the time for further 60 days which was done on 16.09.2018. However, while computing time for 120 days the learned Commissioner (Appeals) can exclude the time taken through adjournments by the appellant. The learned Commissioner (Appeals) has excluded 121 days in this regard thus it appears from the report that the order in appeal was not time barred.

30. The learned Advocate for appellant submitted that OIO was also time barred and no reason of extension was assigned and communicated to the appellant. The SCN was issued on 18.06.2016, whereas the OIO was passed on 29.12.2016. In para 07 of the OIO learned AO has extended time for sixty days and excluded 14 days on account of time taken by appellant. The OIO was passed on 194th day out of which 14 days was excluded on account of time obtained by appellant leaving balance of 180 days. The OIO under sub section (3) of section 23 of the Act can be passed within 120 and the learned AO can extend 60 days for completing the proceeding. In computing 120 days the learned AO can exclude the time taken through adjournments by the appellant. The learned AO has excluded 14 days in this regard thus it is apparent that the OIO was passed within time.

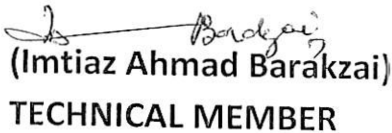
31. The Learned AC cited the Order of Tribunal in the case of ORACLE, bearing Appeal No. AT-32/2017. The same has distinguishable facts. The allegation in that case was the taxpayer was engaged in application, licenses, consulting and education services on information system. In the referred case from the documents available on record it was established that the Oracle was not simply selling/licensing the software, but under the distribution agreement between Oracle CAPAC Services, an Irish Company (OCAPAC) and Oracle System Pakistan (Private) Limited (ORASUB) it could do any modification to the programs and documentations created by or for ORASUB. Under another clause of the agreement ORSAUB had the right to develop its own technology. Whereas, in the instant case it was not alleged that the appellant had done modification in the software. It was held in para 21 of the case of ORACLE, Appeal No. AT-32/2017 dates 01.11.2017 as under:-

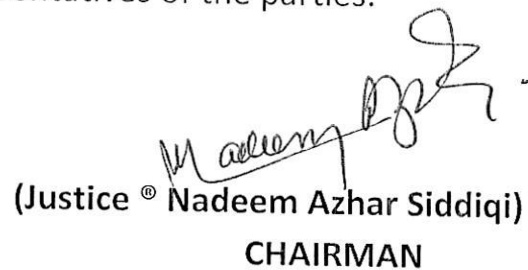
> "21..................................*Thus what is seen, that the appellant stands fully involved in development/modification of the software and develops its own technology known as ORASUB Technology on 'work for hire basis' for implementation of the Agreement. This evidently shows that the appellant has the expertise in its field and is liable to not only compatibly implement the agreement but is licensed to develop its own technology and also authorized to sub-license the same and the Oracle products*".

No such facts and material were available in the instant case wherein the department has failed to establish that the appellant was providing any development and modification in the soft-ware sold or licensed.

32. In view of the above discussions we are of the view that SRB is not entitled to demand tax on the component of goods or supplies, consequently the appeal is allowed and both OIO and OIA are setaside. The case is remanded to the learned AO/AC for passing fresh order after making proper inquiries regarding providing or rendering of services and separating the sale of hardware and software from levy of SST. The AO/AC should provide proper right of hearing to the appellant before passing the fresh order.

33. The appeal is disposed of in the above terms. The copy of the order may be provided to the authorized representatives of the parties.





**(Imtiaz Ahmad Barakzai)**
**TECHNICAL MEMBER**

**(Justice ® Nadeem Azhar Siddiqi)**
**CHAIRMAN**

Karachi
Dated: 25.01.2021

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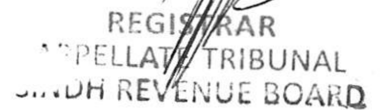

Order issued on 22/02/2021
Registrar

Order Dispatched on 22/02/2021
Registrar