

(Current file)

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-I

APPEAL NO. AT- 14 /2018

M/s Shezan Services (Pvt.) Ltd.....Appellant

Versus

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

APPEAL NO. AT- ~~10~~ /2018

Assistant Commissioner, SRB, Karachi.....Appellant

Versus

M/s Shezan Services (Pvt.) Ltd.....Respondent

Mr. Haroon Aziz, ITP for Appellant

Mr. Turab Ali, AC - SRB for Respondent

Date of hearing 12.03.2019

Date of Order 19.03.2019

ORDER

Justice[®] Nadeem Azhar Siddiqi: Appeal No. 14 /18 as been filed by the appellant/tax payer challenging the Order-in-Appeal No.41/2018 dated 08.03.2018 passed by the Commissioner (Appeals) in Appeal No. 27/2017 filed by the Appellant against the Order-in-Original No. 52/2017 dated 02.03.2017 passed by the Assistant Commissioner (Ms. Anum Shaikh) SRB, Karachi. Appeal No. 20/18 has been filed by the department/respondent challenging the same order-in-appeal as stated above.



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We intend to dispose of the above two appeals by this common order as the facts and law point involved in both the appeals are same.

01. The facts of the case as mentioned in the Order-in-Original are that the appellant is registered person and has provided taxable services of Franchise, Tariff Heading No. 9823.0000 of the Second Schedule of the Sindh Sales Tax on Service Act, 2011 (herein after referred as the Act), chargeable to Sindh sales tax @ 10% for the tax periods from July, 2011 to June, 2014 (Thirty Six Months).

02. It was alleged in the Order-in-Original that the appellant has a Franchise Agreement namely "Agreement" dated 31.01.2011 signed between M/s Shezan Services (Private) Limited having office at Karachi and M/s Shezan International Limited having office at Lahore. The perusal of the said agreement reveals that M/s Shezan International will pay a royalty to appellant for the use of trade mark at the rate of 1% of net sales. It was also alleged that scrutiny of Annual Audited Accounts for the years ended June, 2012, June, 2013 and June, 2014 reveals that the appellant received the royalty income amounting to Rs.50,608,978/=, Rs.56,520,746/= and 62,497,290/= for these years respectively on account of franchise services chargeable to Sindh Sales Tax at the rate of 10% total amounting to Rs.16,962,702/=, which the appellant failed to deposit. It was further alleged that the appellant failed to e-file monthly sales tax e-returns for the tax periods July, 2011 to June, 2014.



03. That a show-cause notice dated 30.08.2016 was served upon the appellant to explain as to why short paid tax amounting to Rs.16,962,702/= may not be assessed and recovered along with default surcharge under section 44 of the Act and penalties under serial No. 2, 3, 6(d) 11, 12 and 13 of the Table of Section 43 of the Act.

04. The appellant filed its reply dated 26.09.2016 wherein it was stated that the appellant has provided complete breakup of franchise fee chargeable to Sindh Sales Tax and the tax paid thereon. It was also stated that the appellant has acquired rights to use the trade mark for

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manufacturing and sale of product locally (all over Pakistan) and internationally through export.

05. The Assessing Officer after various hearings and detailed discussion has passed Order-in-original determining the sales tax liability of Rs.12,587,197/= along with default surcharge and penalty of Rs.629,359/= under serial No. 3 of the Section 43 of the Act. The Assessing Officer also imposed penalty of Rs.180,000/= for non-filing of monthly sales tax returns for the periods July, 2011 to June, 2014 plus Rs.100/= per day till the date on which returns are filed.

06. The Appellant challenged the Order-in-Original by way of filing appeal before the Commissioner (Appeals) who passed order in appeal dated 08.03.2018 directing the appellant "to provide factory/industry wise details of gross sales to the extent of industries/factories located in Sindh". The Commissioner (Appeals) has waived the penalties imposed by the Assessing Officer.

07. Mr. Haroon Aziz the learned Representative of the appellant submitted that in this appeal the Commissioner (Appeals) without creating any demand has directed the appellant to provide factory/industry-wise details of gross sales, to the extent of industries/factories located in Sindh. He submitted that the basis of the Franchise Agreement is 1% of the net sales and not gross sales. He also submitted that although no demand has been created, but the Commissioner (Appeals) neither allowed the appeal nor dismissed it and for that reason this appeal was filed. He then submitted that the appeal has also been filed due to contradictions in the order in appeal. He referred to the following passages from the order in appeal.

- i) Para 2 of the order in appeal. "And that at Sindh there is "mineral water plant" of the appellant. Mr. Haroon Aziz submitted that the franchise agreement was not for water plant.
- ii) Para 6 of the order in appeal. "I am able to infer that the activity at Sindh is to the extent of "mineral water plant" only. Mr. Haroon Aziz submitted that the franchise agreement was not for water plant.



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- iii) Para 9 of the order in appeal. "The value of services will be the 1 % of gross sales of "mineral water plant" or any other industry in Sindh and the appellant will be required to disclose the gross sales from the produce in Sindh". Mr. Haroon Aziz submitted that the franchise agreement was not for water plant.
- iv) Para 11 of the order in appeal. Therefore, if any tax pertaining to the services provided in Sindh has been paid by the appellant at FBR the same will be a valid payment. Mr. Haroon Aziz submitted that no payment of Sindh was made to FBR.
- v) Para 12 of the Order in appeal. "The payment at the FBR or PRA cannot be deemed and accepted as the payment at SRB. The appellant may get the tax refunded from FBR and PRA based on the above criterion if after final evaluation as per the above criterion given it appears that excessive tax or a tax of Sindh has been paid a FBR or at the PRA". Mr. Haroon Aziz submitted that no payment of Sindh was made to FBR or to PRA.

08. Mr. Turab Ali, the learned AC submitted that the Commissioner (Appeals) has only directed to provide factory/industry-wise details of gross sales, to the extent of industries/factories located in Sindh which is not correct as the appellant is liable to deposit sales tax with SRB on the basis of total receipt from all over Pakistan as the services were provided from the registered office in Sindh.



09. Mr. Haroon Aziz submitted that as per statement for financial year 2013-14. the total production in Sindh, irrespective of sales in other provinces have been mentioned amounting to Rs.1,412,752,066/-, out of which after deducting discount and sales tax net sales come to Rs.1,212,481,963/- upon which the Royalty @1% comes to Rs.12,124,820/- against which Sindh Sales Tax comes to Rs.1,212,482/- against which a sum of Rs.1,594,863/- was deposited.

10. Mr. Haroon also filed the statement for the financial year 2012-13 and 2011-12 and according to the statements more tax than payable was deposited with SRB. He then submitted that the Sindh Sales Tax on

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Services was neither levied on income nor sales tax but it was levied on providing services and in Sindh the production on the basis of services in Sindh is the criteria for levying Sindh Sales Tax. He then submitted that the appellant has its offices located at (i) Karachi (Sindh) (ii) Lahore (Punjab) and (iii) Peshawar (KPK) from where the services were provided to the franchisee and in terms of sub-section (3) of Section 3 of the Act all three are separate legal entities and the SRB cannot claim Sindh sales tax on the basis of production in other provinces. He then submitted that the Agreement between the appellant and its principal is regarding use of Trade Mark owned by appellant. The franchisee has three factories located in Sindh, Punjab and KPK and the other factories located outside Sindh are producing and selling goods by using the Trade Marks and are paying sales tax on services to their respective provinces. He placed on record the photocopy of Agreement dated 31.01.2011 entered into between the appellant and Shezan International Limited and submitted that this agreement is still in field.

11. Mr. Turab Ali, learned AC submitted that the head office of the appellant is situated at Karachi, (Sindh) and the agreement was also signed at Karachi and the service of franchise was provided by the appellant at other locations outside Sindh and the tax is payable in Sindh. He then referred to sub-Rule (iv) of Rule 36 of the old rules and submitted that since the franchiser i.e. the appellant is located at Karachi (Sindh) the Sindh Sales tax on the basis of Agreement is payable in Sindh. He then referred to sub-section (3) of Section 3 of the Act and submitted that this section applies only when the services are taxable in terms of sub-section(2) of Section 3 of the Act, whereas the services in this appeal are taxable in terms of sub-section(1) of section 3 of the Act.

12. Mr. Haroon Aziz submitted that the other two offices of appellant were duly registered with PRA & KPKA and the appellant is paying tax and has already provided evidence to the Department in this regard.

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13. Mr. Turab Ali, AC-SRB for respondent filed reconciliation statement based on the directions of Commissioner (Appeals) in order in appeal dated 08.03.2018, as follows.

"In respect of the data submitted by M/s Shezan Services (Pvt.) Ltd. in pursuance of para 14 of the Order-in-Appeal No.41/2018 dated 8th March, 2018, it is respectfully submitted that the data in column titled "SRB PRODUCT WISE SALES" represents the sales of the products produced at franchisee's factory located in Sindh. Accordingly, based on the said data calculation of SST as per the directions of Commissioner (Appeals) is as hereunder:-

	2011-12	2012-13	2013-14	Total
Gross Sales of the products produced in Sindh	1,079,178,369	1,333,304,777	1,412,752,066	3,825,235,212
Royalty @ 1%	10,791,784	13,333,048	14,127,521	38,252,352
SST @ 10%	<u>1,079,178</u>	<u>1,333,305</u>	<u>1,412,752</u>	<u>3,825,235</u>
Less SST paid	1,232,336	1,548,506	1,594,863	4,375,705
SST payable / Overpaid	(143,158)	(215,201)	(182,111)	(550,470)

2. However, the above calculation is without prejudice to the grounds of appeal pleaded before the Honorable Appellate Tribunal, SRB, by the undersigned in appeal titled Assistant Commissioner (Unit-21), SRB vs Commissioner (Appeals) and another.

(TURAB ALI)
Assistant Commissioner (Unit-21)"



14. Mr. Turab Ali, AC submitted that since the appellant is a franchiser having office at Karachi, Sindh the services of franchise is provided in Sindh and the tax is to be paid to SRB and the order of Commissioner (Appeals) is erroneous in this regard and not sustainable.

15. Mr. Haroon Aziz submitted that the appellant had deposited tax in Sindh and other provinces on the basis of sale in that province, whereas the Commissioner (Appeals) has directed to pay Sindh Sales Tax on the basis of production in Sindh. He then submitted that Agreement provides that franchise fee is to be calculated and paid on the basis of 1 percent of net

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sales which means gross sales minus discount & incentive to traders and sales tax and excise duty. He then submitted that since there is an agreement between the franchiser and franchisee the provision of the same will prevail and not the findings of the Commissioner (Appeals), which is against the agreement.

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

17. The contention of the appellant is that it has three offices located at Sindh, Punjab and KPK and the franchisee M/s Shezan International has also three factories at Sindh, Punjab and KPK and the appellant is paying sales tax on services on the basis of franchise fee received in the respective province. The contention of the learned AC is that since the head office of the appellant is situated as Karachi, Sindh and the franchise agreement was also signed at Karachi the appellant is liable to deposit Sindh sales tax on the basis of total sales in other provinces also.

18. The appellant franchiser has its registered office at Karachi and has two offices at Punjab and KPK. Same is the position of Shezan International which has three factories situated at Sindh, Punjab and PKK. The agreement provides that the royalty is payable @ 1% of the net sales and "net sales" has been defined as gross sales minus discount and incentives to trade and sales tax/excise duty. The appellant is paying sales tax on services to three provinces according to the net sales and there is no dispute in this regard.



19. The trade mark of the appellant is used for manufacturing products and sale by M/s Shezan International which has three factories in three provinces. The appellant has also three offices in those three provinces. It is not disputed that the appellant is not depositing sales tax with other two provinces. The Sindh claims total sales tax on the basis that appellant has its registered office at Sindh and the agreement was also entered into at Sindh. This approach of the SRB is not correct and is against the provision of law. Sub-section (3) of section 3 of the Act

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provides that for the purpose of sub-section (2) where a person has a registered office in Sindh and another outside Sindh, the registered office or place of business in Sindh and that outside Sindh shall be treated as separate legal persons. This provision is very clear that the three offices of the appellant are separate legal persons and the sales tax is payable on the basis of net sales in that province. Sub-section (1) of section 1 of the Act provides that a taxable service is a service listed in the second schedule of the Act, which is provided by a registered person from his registered office or place of business in Sindh. From this provision it is clear that the appellant is liable to deposit sales tax with SRB on the services which were provided from the registered office in Sindh and not from the other offices situated at Punjab and KPK.

20. Mr. Turab Ali submitted that sub-section (3) of Section 3 of the Act applies only when the services are taxable in terms of sub-section (2) of Section 3 of the Act, whereas the services in this appeal are taxable in terms of sub-section (1) of section 3 of the Act. This argument is misplaced. Sub-section (2) of section 3 provides that a service that is not provided by a registered person shall be treated as taxable service if the service listed in the Second Schedule of the Act and (a) is provided to a resident person (b) by a non-resident person in the course of an economic activity, including in the commencement or termination of the activity. This sub-section applies if the services are provided by a non-resident person to the resident person. In this case the appellant is a registered person providing franchise services to a resident person from its office in Sindh. Sub section (2) of section 1 was amended effective from 10th July, 2015 and provides (2) that "A service that is not provided by a registered person shall be treated as taxable service if the service is listed in the Second Schedule of the Act and [is provided to a resident person by a non-resident person in the course of economics activity]. From this amendment it is also clear that sub-section (2) of section 3 of the Act deals with the services provided to a resident person by a non-resident person.



21. As per sub-section (3) of section 3 of the Act the franchise services were provided by the appellant from its three office located in Sindh, Punjab

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and KPK (all three offices as per sub-section (3) of section 3 are separate legal persons) to three factories of Shezan International located at Sindh, Punjab and KPK and the appellant has rightly deposited sales tax with three Provinces at the rate of 1% of the net sales as provided in the agreement.

22. The Commissioner (Appeals) in Para 9 of the order in appeal has held that "The value of services will be the 1 % of gross sales of "mineral water plant" or any other industry in Sindh and the appellant will be required to disclose the gross sales from the produce in Sindh". This finding is against the specific provision contained in the agreement which provides payment of franchise fee on the basis of net sales. In this case both the appellant and Shezan International are bound by the contents of the agreement and third party has no right to interfere.

23. The Commissioner (Appeals) in Para 11 of the order in appeal held "Therefore, if any tax pertaining to the services provided in Sindh has been paid by the appellant at FBR the same will be a valid payment" and in Para 12 of the Order in appeal the Commissioner (Appeals) held that "The payment at the FBR or PRA cannot be deemed and accepted as the payment at SRB. The appellant may get the tax refunded from FBR and PRA based on the above criterion if after final evaluation as per above criterion given it appears that excessive tax or a tax of Sindh has been paid a FBR or at the PRA". These two findings are contrary with each other. These findings are also contrary with the conclusion drawn by the Commissioner (Appeals) in para 14 of his order, which reads as under:

"In view of the findings recorded above and reasons given therein the appellant is directed to provide the factory/industry-wise details of gross sales, to the extent of industries/factories located in Sindh, to the respondent, within a period of fifteen days of the receipt of this order. The respondent is given a time of fifteen days (thereafter) to work out the value and tax as per the above given criterion. The appellant is further directed to pay the amount of tax so worked out within a further period of further 15 days. This all exercise is to be completed within 45 days without fail. The appeal is disposed of in the above terms. Order accordingly".



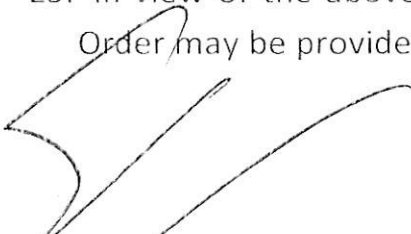
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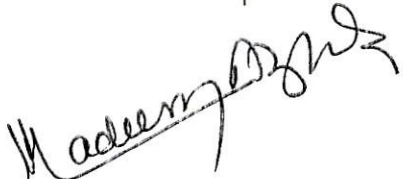
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From the concluding para it appears that the appellant is liable to pay sales tax on the basis of gross sales in Sindh, which is not in consonance with the terms of agreement.

24. In view of the above discussions the appellant as per term of the agreement is liable to pay franchise fee on the basis of net sales in Sindh and this will form the value of service for the purpose of payment of Sindh sales tax. From the Reconciliation submitted by the learned AC it appears that the appellant has deposited more tax than it is liable to deposit.

25. In view of the above both the appeals are dismissed. The copy of the Order may be provided to the learned representative of the parties.


(Agha Kafeel Barik)
TECHNICAL MEMBER
Karachi
Dated: 19.03.2019


(Justice[®] Nadeem Azhar Siddiqi)
CHAIRMAN


Certified to be True Copy

Copies supplied for compliance:-

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

Copy for information to:-

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


Per REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on 19-03-2019


Per Registrar

Order Dispatched on 21-03-2019


Per Registrar