

(Covered file)

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD KARACHI

DB-I

APPEAL NO. AT-15/2018

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

Versus

M/s. Bata Pakistan Limited.....Respondent

Date of Filing of Appeal: 10.04.2018

Date of hearing: 13.08.2018

Date of Order: 16.08.2018

Mr. Turab Ali, AC-SRB for Appellant

Mr. Mehmood Arif Advocate for Respondent:

ORDER

**Justice<sup>®</sup> Nadeem Azhar Siddiqi:** This appeal has been filed by the appellant challenging the Order-in-Appeal No.24/2018 dated 10.02.2018 in Appeal No. 281/2016 passed by the Commissioner (Appeals) against the Order in Original No. 777/2016 dated 01.09.2016 passed by the Assistant Commissioner-05 (Ms. Anum Shaikh).

01. The facts of the case as mentioned in the Order-in-Original are that the respondent is registered with SRB under the category of Franchise



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Services falling under Tariff Heading 9823.0000 of the 2<sup>nd</sup> schedule of the Sindh Sales Tax on Service Act, 2011 (herein after referred as the Act) and chargeable to Sindh Sales Tax on Services @ 10%.

02. It was further stated in the order in original that perusal of Note 29 of the Annual Audited Financial statements for the year ended December, 2011 and December, 2012 of the appellant reveals that the appellant has paid an amount of Rs.185,771,500/= and Rs.421,549,000/= for the tax period July, 2011 to December, 2012 as trade mark fee and management services fee on account of franchise services received by appellant chargeable to Sindh Sales Tax amounting to Rs.18,577,150/= and Rs.42,154,900/= respectively.
03. It was alleged in the order in original that the appellant neither filed the Sindh sales tax returns nor deposited the Sindh sales tax for the aforesaid tax periods.
04. That a show-cause notice dated 19.04.2016 was served upon the respondent to explain as to why an amount of Rs.60,732,050/= may not be assessed and recovered under section 23 and 47 (1A) of the Act in addition to default surcharge under section 44 of the Act and penalties under serial No. 2, 3, 5, 6(d), 11, and 13 of the Table of Section 43 of the Act.
05. The respondent filed its reply dated 07.05.2016. In the reply the main contention of the respondent is that the Federal Government despite its press release has not withdrawn the Federal Excise Act, 2005, therefore the respondent has made the payment of FED to Federal Government and that the demand of provincial sales tax amounts to double jeopardy. It was also stated that all the three tax authorities i.e. FBR, PRA and SRB are playing havoc with tax payers. The respondent again filed a reply dated 18.05.2016 and contented that neither the trade mark license fee (TLF) was paid nor the managements services were used exclusively in the Province of Sindh. It was also stated that the SRB does not have right to claim sales tax on the portion of services used for any area outside



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the territorial jurisdiction of Sindh. It was further stated that the respondent having its retail outlets spread all over the country including AJ & K and a major portion of its products is exported out of the country and the demand of sales tax on the entire amount of TLF and on account of management services by SRB is patently illegal.

06. The Assessing Officer after hearing passed Order-in-Original determining the sales tax of Rs.60,732,050/= for the above tax periods along with default surcharge (to be calculated at the time of payment) and penalty of Rs.3,036,602/= under serial No. 3 of the Table under section 43 of the Act. The Assessing Officer also imposed penalty for non-filing of returns amounting to Rs.90,000/= plus Rs.100/= per day till the filings of returns.

07. The respondent challenged the said order of the Assessing Officer by way of filing appeal before the Commissioner (Appeals), who allowed the appeal hence the Department has now challenged the said order in appeal passed by the Commissioner (Appeals) before this forum.

08. Mr. Turab Ali the learned AC for the appellant submitted that show-cause notice was issued as the appellant has its registered office at Shahrah-e-Faisal, Karachi and the appellant is registered with SRB and has also a place of business at Sindh/Karachi (at PECHS. Tariq Road, Karachi) in terms of Section 2(64) of the Act from where the respondent is carrying on economic activity.

a) Mr. Turab Ali then submitted that the respondent has two agreements (a) Trade Mark user Agreement with Bata Brands, Luxembourg, which Agreement was signed at Lahore for Manufacturing of foot wear and the plant is situated at Lahore.

b) The 2<sup>nd</sup> Agreement is regarding Trade Mark License Agreement with Global Footwear Services (Pvt.) Ltd. Singapore for Management Services under which the respondent is receiving specialized services relating to manufacturing, retailing and marketing of foot wear and leather in Pakistan. He then referred to the Schedule attached to the Agreement where in number of specialized services are listed and



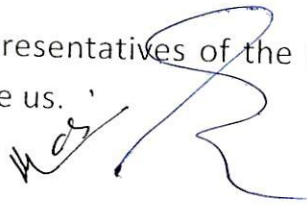
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submitted that the services received by the appellant falls within definition of franchise as provided under section 2 (46) of the Act.

09. Mr. Turab Ali further submitted that the appellant has challenged the portion of the order in appeal by which the Commissioner (Appeals) held that this case is within ambit of intellectual property services brought to tax net effective from 1<sup>st</sup> July, 2015. He then submitted that the contention of the department is that the service acquired by respondent under Agreement with Global Foot Wear, Singapore is also franchise services and falls within ambit of 2(46) of the Act and the Commissioner (Appeals) erroneously held that the service relates to intellectual property.

10. Mr. Mehmood Arif the learned advocate for respondent submitted that the appellant has conceded before the Commissioner (Appeals) that the respondent's arrangement and the place of business does not exist in Sindh and refer to para 4 of the order in appeal. Mr. Mehmood Arif has fully supported the findings of Commissioner (Appeals) and referred to clause (54A) (Intellectual Property Rights) and clause (54B) (Intellectual Property Service) of section 2 of the Act and submitted that the agreement is covered under the definition of "Intellectual Property Rights". He then submitted that the respondent has no office at Karachi and only for the purpose of Custom Clearance an office is maintained at Karachi with no economic activity. He then submitted that respondent has two manufacturing units, one at Batapur, Lahore and other is at Maraka, Multan Road, Lahore and both the agreements are in connection with manufacturing of foot wears which are manufactured at Lahore and not at Karachi and the services received or acquired under two agreements terminates at Lahore, Punjab and no tax on such services is payable in Sindh. He then submitted that since there is concession on the part of the appellant before the Commissioner (Appeals) this appeal is not maintainable.

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



12. The dispute is relating to franchise services acquired by the respondent from franchisees based abroad under two agreements. The contention of the respondent is that the services were acquired and used outside the territory of Sindh.

13. The learned Assessing Officer in his order dealt with the core issue involved in the appeal as under:

*"18. In view of the above facts, the articles of the both Agreements as referred above when read with the definition of franchise as provided under Section 2(46) of the Sindh Sales Tax on Services Act, 2011 clarifies that M/s Bata Brands S.a.r.l., Luxembourg and Global Footwear Services (Pvt.) Ltd. has granted right from Bata Pakistan Ltd. to use Trade Mark and other management services for the purpose to run the business in Pakistan against a fee or consideration known as Royalty and Management Services Fee in accordance with Global Footwear Services (Pvt.) Ltd. and Bata Brands S.a.r.l., Luxembourg standard and quality. Such services are covered under the definition of franchise services and chargeable to Sindh sales tax under section 8 read with tariff heading 9823.0000 of the Second Schedule to the Act-2011. Moreover, it is pertinent to mention that the registered person has not disputed that its Trade Mark License Agreement and Management Services Agreement are covered under the definition of franchise as envisage in section 2(46) of the Act, 2011.*

14. While recording the above findings the learned Assessing Officer has failed to consider the place where the respondent has acquired the services and where such services were used. It is not disputed that all the services acquired under two agreements are in context of manufacturing, retailing and marketing of foot wears. It is also not disputed that the plants of the respondent where the foot wears are manufactured are located at Lahore where such services were acquired and used for manufacturing foot wear. The other point is where the services were acquired for retailing and marketing the foot wears. The Assessing Officer has totally ignored this aspect of the case.

*W.S.*



15. The contention of the Department before the Commissioner (Appeals) recorded in para 3 of the order in appeal is reproduced as under.

"3. The respondent (appellant herein) apprised that there are 02 amounts involved i.e. the management fee and a fee against the intellectual property services. And further that there are 02 separate agreements against both of these services. And that both the amounts were treated as the considerations against the franchise services. Further submitted that the services of intellectual property were taxed from 1<sup>st</sup> July, 2015, but both, the franchise fee as well as the fee against the intellectual property services as are mentioned against the periods in question were taxed under the same tariff heading of franchise. Further added that based on the above submissions of the Appellant at para-2, he withdraws his claim against the tax imposed on the amount of fee received during the period in question".

16. The learned Commissioner (Appeals) in para 4 of his order dealt with the issue as under:

"4. In view of the foregoing facts and circumstances, it is apparent that the Appellant's arrangement and the place of business does not exist at Sindh. The agreements in both the case of services were also entered into at Punjab. That will mean that the services of franchise are being received at Punjab/ Lahore and not at Sindh. The Respondent also admitted the facts and has therefore surrendered the claim to the extent of the period in question. Therefore under the rules and law there are no further proceedings required in the Appeal".

17. The learned Commissioner (Appeals) while setting aside the order in original in para 5 of his order concluded as under:

"5. As far as the services of intellectual property rights are concerned, the same have been taxed from 1<sup>st</sup> July, 2015. In this regard this order will not influence in any manner, if the respondent starts any proceedings for assessment of the appellant for any onwards periods".

18. For levying tax it is essential that an economic activity was carried on that involves or is intended to involve the provision of service to another



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person. The Department has failed to establish that the franchise services were exclusively acquired within the territory of Sindh and such services were exclusively used for manufacturing of foot wear in Sindh. The Commissioner (Appeals) in para 5 of his order provided sufficient safeguard to the appellant.

19. However, we have noticed that both the forums below while recording their respective findings have failed to consider the written reply of the respondent filed on 18.05.2016 reproduced in para 7 of the order in original in its true prospect. The said reply is reproduced as under:

*"It is also apprised that the learned AC SRB has failed to appreciate that neither the trade mark licensee fee [TLF] was paid nor the managements services were used exclusively in the province of Sindh, therefore the demand of sales tax on the entire amount of license fee and payment made on account of management services by SRB, does not stand the test of judicial scrutiny. While raising the demand, the learned AC SRB has assumed that the trade mark was used and management services were consumed exclusively in the province of Sindh and this presumption is untrue, false and materially incorrect therefore any demand on the basis of a wrong presumption is liable to be withdrawn. SRB does not have right to claim sales tax on the portion of services used for any area outside the territorial jurisdiction of Sindh (emphasis supplied). The learned AC SRB had failed to appreciate that M/s Bata Pakistan Limited is a company having its retail outlets spread all over the country outside province of Sindh [in the province of Punjab, KPK, Balouchistan, Islamabad Capital Territory and AJK] whereas as a major portion of its products is exported out of the country therefore the demand of the sales tax on the entire amount of TLF and payment on account of management services, by SRB is patently unlawful hence the impugned show cause notice is liable to be withdrawn being void ab initio."*

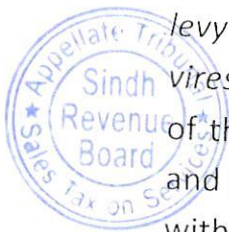
20. From perusal of the above portion of reply it appears that the contention of the respondent is that the services were not exclusively used in Sindh and SRB does not have right to claim sales tax on the portion of services used for any area outside the territorial jurisdiction of



*KCS*

Sindh. This means that some part or portion of services acquired under two agreements were used in Sindh in relation to manufacture, retail or marketing of foot wears. There was no discussion in the two orders on this point. Both the forums have not considered whether the portion of service used in Sindh can be taxed in Sindh. Section 3 of the Act provides providing of service in the course of economic activity, including in the commencement or termination of service. The respondent itself stated that its retail outlets spread all over the country outside province of Sindh [in the province of Punjab, KPK, Baluchistan, Islamabad Capital Territory and AJK]. It is also not disputed that the retail outlets of respondent spread over in the entire province of Sindh. It may be that the services acquired under two agreements were partly used in retailing and marketing the footwear in Sindh. It was the duty of the two forums below to consider this aspect of the case, which was not done.

21. The respondent has stated that the tax has been paid to FBR under the Federal Excise Act 2005. The Honorable High Court in the reported case of Pakistan International Freight & Forwarders Association Versus Province of Sindh and another, 2017 PTD Page 1, in para 64 has held that "64. ....With effect from 19.10.2010, the power to levy the tax vested exclusively in the Provinces, but by reason of clause (7) of Article 270AA, the Federation continued (insofar as this is concerned) to have the competence to collect the excise duty till 30.06.2011. When the 2011 Provincial Act came into force on 01.07.2011, those provisions of the 2005 Federal Act that related to the levy of excise duty on the rendering or providing of services became ultra vires the Constitution..... After the decision of the High Court of Sindh the payment made to FBR has no relevance and in case the tax is payable in Sindh and the same has been deposited with FBR or some other authority the same could not absolve the respondent from its liability to pay Sindh Sales Tax. In case any tax liability is established the respondent is liable to pay/adjust the same.



22. The learned advocate for the appellant argued that the services acquired under agreement with Global are covered under the definition


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of franchise service. The respondent submitted that the services acquired under agreement with global are covered under the definition of intellectual property. This point was not raised before the Assessing Officer. In the light of the conclusion drawn the finding on this point is not necessary.

23. In view of the above discussion both the order in original and order in appeal are set aside. The case is remanded to the Assessing Officer to enquire and hear the parties on the points (1) "whether the part or portion of services acquired by the respondent under agreement with Global were used in marketing and retailing the footwear in Sindh" and "whether the services acquired by the respondent under agreement with Global comes within the definition of franchise or intellectual property services".

24. The appeal is allowed. copy of the order may be provided to the learned representatives of the parties.

  
(Agha Kafeel Barik)  
TECHNICAL MEMBER

  
(Justice<sup>®</sup> Nadeem Azhar Siddiqi)  
Chairman

Karachi, Dated: 16.08.2018

  
Certified to be True Copy

REGISTRAR  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD

Copies supplied to:-

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

Copy for information to:-

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