

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-1

APPEAL NO. AT-21/2018

The Assistant Commissioner, SRBAppellant

Versus

M/s Sindh Transmission and Dispatch (Pvt) Limited.....Respondent

Mr. Malik Naeem Iqbal, Malik Waseem Iqbal and Malik Altaf, Advocates alongwith Mr. Irfan Sohu, AC, Mr. Ghulam Mustafa, AC and Mr. Sanjay Kumar, AC-SRB for appellant.

Mr. Malik Rashid Iqbal, advocate for respondent.

Date of Filing of Appeal: 26.04.2018.

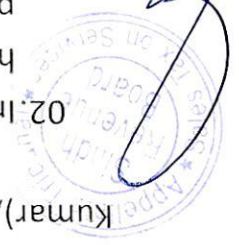
Date of Hearing: 11.02.2020

Date of Order: 20.03.2020

ORDER

Justice (R) Nadeem Azhar Siddiqi. This appeal has been filed by the appellant/department challenging the Order-in-Appeal (AIO) No. 34/2018 dated 02.03.2018 passed by the Commissioner (Appeals) in Appeal No. 163/2017 filed by the respondent against the Order-in-Original (OIO) No. 303/2017 dated 08.11.2017 passed by the Assistant Commissioner (Mr. Sanjay Kumar), SRB, Karachi.

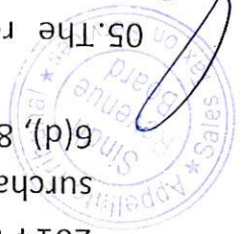
02. In short, the facts of the case as stated in OIO are that the respondent had e-signed up with SRB as a withholding agent and during the tax periods July, 2015 to June, 2016 it had acquired the taxable services of



03. The allegations against the respondent in OIO are that it had failed to withhold the Sindh Sales Tax (SST) amount and also failed to declare the services procured from M/s Technomen in their monthly withholding statements. It was also alleged that during the scrutiny of the record available with SRB it was revealed that during the tax periods July, 2015 to June, 2016 M/s Technomen rendered taxable services to respondent amounting to Rs. 564,641,586/= involving Sindh Sales Tax (SST) of Rs. 79,049,822/= . However, in the withholding statement the respondent only declared Rs. 8,076,305/= and remaining amount of Rs. 70,937,517/= was neither declared nor deposited with SRB.

04. A show-cause notice (SCN) dated 20.03.2017 was served upon the respondent to show cause as to why sales tax amounting to Rs. 70,973,517/= may not be recovered under provisions of section 47 of the Act, read with Sindh Sales Tax Special Procedure (Withholding) Rules 2014 (hereinafter referred to as Withholding Rules), along with default surcharge under section 44 of the Act and penalties under Serial No. 3, 6(d), 8 and 11 of Table under section 43 of the Act.

The respondent submitted its reply through M/s Jalils Ahmad and Company, Chartered Accountants in which it was stated that the respondent was receiving three bills/invoices from service provider on account of imported goods, local goods and services and after deducting 20 percent (one fifth) on all the bills the tax on imported goods and local goods were deposited with FBR and tax on services was deposited with SRB.



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06. Finally the OIO was passed for the tax periods July, 2015 to June, 2016 levying SST at the sum of Rs.70,973,517/= along with default surcharge and penalties amounting to Rs.149,044,386/= under serial No. 3, 6(d), 8 and 11 of the Table of section 43 of the Act.

07. The respondent/taxpayer challenged the OIO before Commissioner (Appeals) who allowed the appeal in its favour, hence this appeal by the Department.

08. The learned AC-SRB submitted the following arguments:-

(i) The dispute was in respect of payment of SST on supply of material/ goods as neither the recipient nor the provider had deposited tax with SRB and the contention of respondent that General Sales Tax (GST) was paid to FBR was erroneous and misconceived as the SST was payable on the gross amount of invoices including cost of material/goods used in providing or rendering taxable services.

(ii) The agreement for supply of goods and services was one and same and was covered under Tariff Heading 9809.0000 and the "Contractual execution of work or furnishing supplies" and the amount could not be bifurcated. Thus the SST on the gross amount of invoice was payable to SRB.

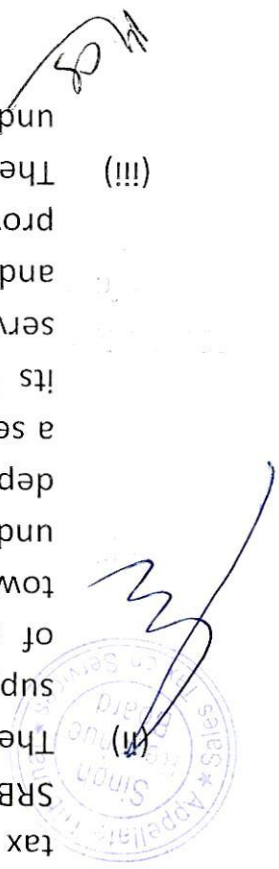
(iii) The services falling under Tariff Heading 9809.0000 were

taxable as composite service. He submitted that the total value of services received by the respondent was to the tune of Rs.564,641,586/- out of which the component of service was Rs.252,431,470/- and component of supplies/goods was Rs.312,475,374/-. The respondent had paid an amount of Rs.6,472,532/- on account of SST on the component of service only. (The OIO shows that the respondent had deposited a sum of Rs.8,076,305/-). It was further submitted that the amount of withholding for other tax periods was wrongly included and the respondent was required to withhold tax on the entire amount of supplies and services and to deposit the same with SRB, which was not done.

- (iv) The Respondent was a service recipient and had e-signed up as withholding agent and the service provider was not discharging its tax liabilities properly.
- (v) The respondent had deducted Income Tax under Section 153 (1) (c) of Income Tax Ordinance 2001 on payments against execution of contracts to M/s Technomen and the department had worked back gross value of the contract for the purpose of levying Sindh Sales Tax.
- (vi) The tax was levied under Tariff heading 9809.0000 since the amount of supplies and services could not be bifurcated whereof for the purpose of payment of SST on services the total amount of contract was to be taken in to consideration.
- (vii) While taxing a service the tax was to be paid on the composite value of goods & services and such dominant purpose was to be seen.

09. Mr. Malik Rashid Iqbal, the learned advocate for the respondent make the following submissions:-

- (i) The Respondent was a service recipient and under Withholding Rules was only liable to withheld one fifth (20 percent) of the tax amount shown in the invoices and to deposit the same with SRB.
- (ii) The service provider had issued two separate invoices, one for supply of goods/materials and other for providing or rendering of services and the respondent has discharged its liability towards payment of Sales tax under Sales Tax Act, 1990 and SST under the Act. He placed on record the statement showing deposit of SST with SRB and submitted that the respondent was a service recipient and not service provider and had discharged its liability by withholding one fifth (20 percent) of SST on services shown in the invoices and deposited the same with SRB and remaining 80 percent of SST was passed on to service provider who deposited the same with SRB.
- (iii) The respondent is a service recipient and assessment order under section 23 and 47 of the Act cannot be passed against it.

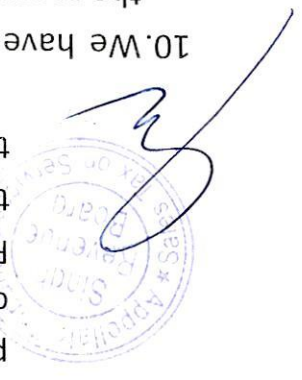


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12. The learned AC in para "F" of Grounds of Appeal submitted as under:-

11. It is not disputed that the respondent is a service recipient/withholding agent and is liable to deduct and deposit one fifth (20 percent) of the tax amount reflected in the invoices on account of service component and remit balance 80 percent to the service provider for payment to SRB.

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



the respondent.
the Commissioner (Appeals) had rightly allowed appeal filed by Financial Act, 2016 applicable from 18th July, 2016 onwards thus deals with the withholding of tax was inserted vide Sindh pointed out that sub-section (1B) of Section 47 of the Act, which recipient/withholding agent under section 47 of the Act and whether an assessment order could be passed against a services It was submitted that the main question in this matter was that

(v)

hence the assumption made by the department had no merits. (1) (b) of the Ordinance, 2001 pertained to rendering of services Ordinance, 2001 was for supply of goods whereas section 153 submitted that that section 153 are 153 (1) (a) of the specific for either rendering of services or supply of goods. He Section 153 (1) (c) of Income Tax Ordinance, 2001 was not record.

(iv)

He also submitted that the service provider has charged sales tax on the invoices relating to the services and the respondent had withheld one fifth (20 percent) of the tax. However, the service provider has deposited sales tax on goods under the Sales Tax Act, 1990 with FBR and the details have been provided thus the respondent had also fulfilled its obligation of withholding sales tax under the Act of 1990 and deposited the same with FBR. The relevant documents were placed on

"It has been found during the reconciliation made as per the instructions of the Commissioner (Appeals), SRB that the value of services alleged in the OIO amounting to Rs.564,641,586/= include the value of service amounting to Rs.252,431,470/= on which due sales tax on services has been paid with SRB by service recipient as well as by service provider. Therefore, the service provider is now required to pay Sindh Sales Tax of Rs.38,374,168/= on the remaining value of services amounting to Rs.312,475,374/= with SRB besides corresponding penalties amounting to Rs.80,585,752/= along with default surcharge".

13. The only point requires consideration is whether an assessment order can be passed against service recipient levying tax beyond one fifth (20 percent) against it, if yes under what provision of law.

14. The respondent is service recipient of services under Tariff Heading 9809.0000 "Contractual Execution of Work or Furnishing Supplies". The actual services acquired by the respondent were erection/stringing of electric transmission lines. According to the reconciliation filed on 12.02.2019 by the AC the value of component relating to service worked out at Rs.221,198,387/- out of which SST amounted to Rs.30,967,773/- Tax at the rate of 20 percent (one fifth) would thus work out to Rs.6,193,554/-. Against this amount the respondent had deposited an amount of Rs.6,472,531/- and M/s Technomen has deposited its 80% share amounting to Rs.24,504,219/-.

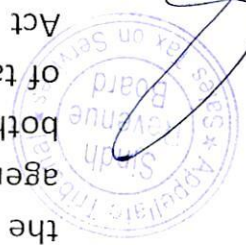
15. The dispute is in respect of SST on supplies made by Technomen to respondent on which tax was paid to FBR @17%. The value of supplies shown in the reconciliation report filed on 12.02.2019 has been shown at Rs.267,072,970/-. However if SST is applicable on this amount it would work out to Rs.37,390,216/-.

16. The dispute before the learned Commissioner (Appeals) was as to who was liable to deposit the Sindh Sales Tax. The learned Commissioner (Appeals) in para 6 of order in appeal resolved this issue by holding that the service provider was liable to pay 80 percent of the tax after collecting the same from the service recipient and on the other hand the

service recipient was required to withhold one fifth (20 percent) of the tax and to deposit the same with the exchequer. In para 11 of the order in appeal the learned Commissioner (Appeals) has concluded as under.

"As is discussed above in Para 6 and 7 liability to pay is not with the service provider, who is neither under assessment in this order nor does the Respondent have jurisdiction over the construction services or over the services of contractual execution of work. In absence of such jurisdiction the service provider cannot be treated in to any other category. The service recipients/Appellant who is a depositor as per law cannot be assessed as such leaving behind the service provider who is to charge, collect and to pay the amount of tax. The service provider can be assessed on gross value or on the values of services as the case may be, as per rules. And such a liability to pay of service provider cannot be enforced upon the depositor/ service recipient/Appellant" (respondent herein).

17. We have carefully examined the findings of the learned Commissioner (Appeals) and find that the conclusion drawn was in consonance to the Withholding Rules, The order under section 47 and section 47 (1A) of the Act cannot be passed against the service recipient/withholding agent beyond one fifth (20 percent) of tax mentioned in the invoice. In both the above provisions the words "person liable to pay any amount of tax or charge" have been used with reference to section 9 (1) of the Act which "provides that where a service is taxable by virtue of sub-section (1) of section 3, the liability to pay the tax shall be on the registered person providing the service". The prime responsibility for payment of tax is on service provider. The Board in exercise of its power vested in it under section 13 (2) of the Act framed Withholding Rules. Relevant provision is sub rule (3) of rule 3 of Withholding Rules which provides that the withholding agent shall deduct an amount equal to one-fifth (20 percent) of the total amount of sales tax shown in the sales tax invoice issued by a registered person and shall make payment of the balance amount to service provider. In the instant case the withholding agent/service recipient had discharged its obligation under the withholding rules by depositing one fifth (20 percent) of the tax amount shown in the invoices.



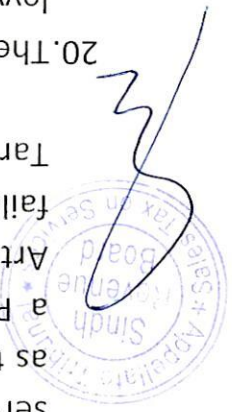
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18. The Learned AC while taxing service and supplies attempted to take shelter under section 18 of the Act. The said provision provides joint and several liabilities of persons where the tax is unpaid. In the instant case no amount of tax had remained unpaid. Furthermore no assessment order can be passed under section 23 (1) of the Act against a service recipient as section 23 (1) of the Act deals with registered person and the respondent being a service recipient cannot be treated as service provider and the tax not levied or short levied to the extent of one fifth (20 percent) can only be recovered under section 47 of the Act.

19. The dispute before this forum is that SRB is seeking Sindh Sales tax on services on the supplies/material/goods acquired by the respondent from service provider on the pretext that Tariff Heading 9809.0000 allows it to tax both services and supplies. The AC was directed to point out relevant provisions of the Act which allow SRB to collect tax on services as well as supplies/goods. The learned Advocate as well as the learned AC was also required to show from the Constitution that a Provincial Assembly is authorized to tax supplies/goods in view of Article 49 of the Fourth Schedule of the Constitution. Both of them have failed to point out any provision in this regard and only submitted that Tariff Heading 9809.0000 covered both the service and supplies.

20. 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.



From the simple reading of the preamble of the Act it is clear that only component of providing and rendering "services" can be taxed by Provincial Assemblies and by no stretch of imagination the goods/supplies can be taxed by SRB.

21. Section 5 of the Act is another important provision which deals with the value of service and provides that;

"the value of taxable service is (a) 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". From bare reading of this provision it is clear that the cost of supplies/goods used in providing or rendering taxable services is outside the domain of SRB and tax on the portion of supplies/goods cannot be levied by it.

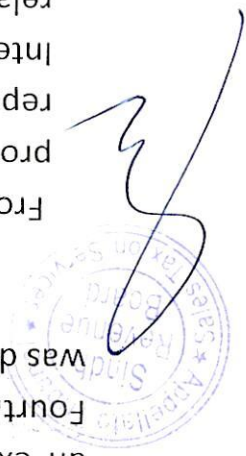
22. The 18th Amendment was enacted in the Constitution of Islamic Republic of Pakistan, 1973 (hereinafter referred to as the Constitution) whereby an exception in Entry No. 49 of Part I of the Federal Legislative List, Fourth Schedule was created through which right to levy tax on services was delegated to the Provinces. 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].

From reading Entry No. 49 it appears that by an exception the provinces can only tax the services and not the goods/supplies. 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 has been held and the relevant portion are reproduced 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. (Emphasis supplied).

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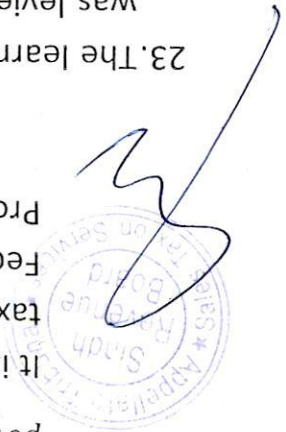


From the definition of service it is clear that sales and supply of goods cannot be claimed as service or part of service and tax cannot be services listed in the First Schedule of the Act.

"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

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

It is thus clear from the above quoted passages that there are two taxing powers. The taxing power relating to goods vests in the Federation and taxing power relating to services vests in the Provinces and both cannot share such powers.



"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".

"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 paragraph 59 of the judgment it was held as under:-
"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".

levied. An 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".

Even from this explanation it is clear that goods are not to be treated as part 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 and scope of provision of law. In the reported judgment in the case of Chief Administrator of Auqaf versus Kara alias Karan Illahi, PLD 1991 SC 596, it has been held as under:-

"It may be observed that an explanation is usually appended to a section, to clear the ambiguity and explain the meaning of the words used therein. Unless compelled by the language, the explanation should not be construed to enlarge the scope of the section to which it is added".

24. The Sales Tax Act, 1990 was promulgated by the Federal Legislatures for the purpose of levying tax on sale, importation, exportation, production or manufacture or consumption of goods. The said law is still in field. Even if the Provincial Legislature tries to levy the tax relating to Sales Tax on goods the same cannot be done in view of Article 143 of the Constitution, which provides as under:-

"Inconsistency between Federal and Provincial Laws- If any provision of an Act of a Provincial Assembly is repugnant to any provision of an Act of Majlis-e-Shoora (Parliament) which Majlis-e-Shoora (Parliament) is competent to enact, then the Act of the Provincial Assembly, shall whether passed before or after the Act of the Provincial Assembly, shall prevail and the Act of the Provincial Assembly shall, to the extent of the repugnancy, be void".

25. In view of presence of Sales Tax Act, 1990 in the field, Sindh Province can neither levy service tax on sales of goods nor can claim the goods as part of service for the purpose of levying Sindh Sales Tax on Services.



Such law even if levied would be void in view of provision of Article 143 of the Constitution.

26. We have carefully examined the findings of the learned Commissioner (Appeals) in para 6, 7, and 11 of OIA and find the same in confirmatory with the Withholding Rules. We have already held that assessment order cannot be passed against a service recipient under section 23 of the Act.

27. In this matter the show cause notice was issued and OIO was passed under section 47 of the Act and the total liability for payment of tax was shifted on service recipient without any specific provision of law. Whereas service provider was actually liable to pay tax in terms of section 9 of the Act. The OIO levying the entire amount of tax payable against the service recipient cannot be passed under section 47 of the Act. The words used in section 47 are that "any tax or charge has not been levied or has been short-levied, the person liable to pay any amount of tax". The recipient was liable to pay one fifth (20 percent) of the amount of SST reflected in the invoice and not the full amount.

28. In the light of the above discussions is held that an assessment order cannot be passed against service recipient levying tax beyond one fifth (20 percent) and the order for payment of entire amount of SST upon the respondent/service recipient is ab initio void and illegal. It was further held that the respondent was not obliged to deposit SST with SRB on furnishing of supplies or goods. Thus this appeal is dismissed. 29. The copy of the order may be provided to the learned representatives of the parties.

(Imtiaz Ahmed Barakzai)
Member Technical

(Justice® Nadeem Azhar Siddiqi)
Chairman

Certified to be a true and correct copy
Sindh Revenue Board
Appellate Tribunal
Registrar

Karachi
Dated: 20.03.2020

13/04/2020
Registrar

Order issued on 13/04/2020
Page 12 of 13

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- 4. The Commissioner (Appeals), SRB, Karachi!

Copy for information to:-

- 3. The respondent through authorized Representative.
- 2. The Assistant Commissioner (Unit-), SRB, Karachi!
- 1. Malik Naeem Iqbal, Advocate for appellant.

Copy for compliance:

