

Current file

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-I

APPEAL NO. AT-30/2018

M/S Prolink Consulting (Pvt) Ltd.....Appellant

Versus

Assistant Commissioner, SRB, KarachiRespondent

Date of Filing of Appeal: 15.05.2018

Date of hearing: 20.08.2018, 10.09.2018, 09.10.2018 and 16.10.2018

Date of Order 19.11.2018

Mr. Arshad Siraj Memon, Advocate, Mr. Hamza Hashmi, Advocate, Mr. Hameer Siraj Memon, Advocate, Mr. Asif Ali, Advocate and Mr. Zain Shaikh, Senior Consultant for the Appellant

Ms. Ambreen Fatima, AC and Ms. Nida Noor, AC-SRB, Karachi for the Respondent

ORDER

Justice[®] Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order in Appeal No.63/2018 dated 05.05.2018 passed by the Commissioner (Appeals) in Appeal No. 142/2017 confirming the Order-in-Original No. 242/2017 dated 08.09.2017 to the extent of tax and default surcharge passed by the Assistant Commissioner (Ms. Nida Noor), SRB, Karachi.

01. In short, the facts of the case are that the Appellant is registered with SRB and is engaged in providing or rendering Service of Management



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Consultant (Tariff heading No. 9815.4000) of the Second Schedule of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to the Act of 2011) subject to levy of Sindh sales tax effective from 01.07.2013.

02. It was alleged in the order-in-original that in the audited financial statement the appellant declared total revenue of Rs.383,213,573/= earned during the tax periods July, 2013 to June, 2015 involving Sindh sales tax of Rs.59,172,920/=, which was not deposited; instead only a sum of Rs.937,990/= was deposited.

03. A show-cause notice dated 24.01.2017 was served upon the appellant to explain as to why sales tax amounting to Rs.58,234,930/= should not be assessed and determined and recovered along with default surcharge and penalty under Sr. No. 3 of Table under section 43 of the Act.

04. As per the order in original on the date of hearing, M/s Hyder & Company on behalf of registered person appeared before the Assessing Officer for hearing and stated that the registered person is managing consulting firm which provides a range or management consulting services including but not limited to HR Consulting, Executive Search Services, Compensation and Benefits Advisory, Organization Studies, Manpower Studies, Job Evaluation and Outsourced Services. He further stated that outsourced services are a sub-set of the more generic term Management Consultant and outsourced revenue, amounting to Rs.199,579,832/- for the year 2014-15 and Rs.151,430,335/- for the year 2013-14, as mentioned in the aforesaid audited financial statements, represents the charges billed to clients which were reimbursed and paid out on account of salaries, benefits, insurances, etc. of outsourced staff, hence, according to registered person the same were not chargeable to Sindh Sales Tax.

05. The registered person also submitted written response to the show cause notice vide M/s Hyder & Company letter dated 31st January, 2017, the relevant portion are reproduced hereunder for ready reference:

"i. Prolink Consulting (Pvt.) Limited is a Managing Consulting firm which provides a range of management consulting services including but not limited

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to HR Consulting, Executive Search Services, Compensation and Benefits Advisory, Organization Studies, Manpower Studies, Job Evaluation and Outsourced Services. It is emphasized that Outsourced Services are a sub-set of the more generic term "Manpower Consulting".

iii. During the year ended June 30, 2015, as disclosed in Note 10 of the audited accounts of the Company, ProLink earned outsourcing revenue of Rs.199,579,832/- representing charges billed to clients which were reimbursable, and paid out on account of salaries, benefits, insurances etc. of outsourced staff.

iv. EOBI dues received from clients were recorded separately as revenue for clarity. They do not attract Sales Tax as they are paid over to EOBI.

v. The fee element pertaining to outsourced services was classified as Management Consulting Services as it attracts Sales Tax. The fee element representing ProLink's earned revenue, was Rs.9,167,721/- in 2015 and Rs.12,692,885/- in 2014. Copy of audited accounts for 2015 is presented as Annex A.

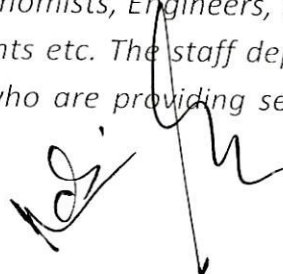
vi. Sindh Sales Tax due on the fee element in 2015 has been paid and e-filed as required.

vii. Please note that audited accounts of ProLink Consulting expressly disclose in Note 13 its number of staff as 1098 in 2014 and 1233 in 2015 out of which 1090 and 1225 are specifically listed as Outsourced Employees (Refer Annex A).

viii. No Sindh Sales Tax was levyable on amounts paid as salaries and benefits etc. of outsourced staff as these are specifically exempt as provided in Rule 42E.

The appellant also presented additional facts on 02.06.2017 before the Assessing Officer and submitted as under:

"The term "consultancy" denotes the provisions of specialist advisory services by professionals who are recognized experts in their fields of endeavor e.g. Lawyers, Economists, Engineers, Doctors, Financial Analysts, Management and HR Consultants etc. The staff deployed by ProLink at Allied Bank are low level employees who are providing services as Messengers and Drivers etc. By no



stretch of imagination can they be termed as "Consultants" or providing "Consultancy Services".

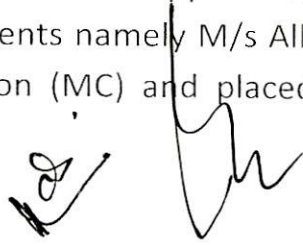
06. The learned AC in para 16 of the order in original held as under:

"16. A bare perusal of above mentioned definition reveals that the management services cover all services that are provided for the management of any business, organization or institution in any manner. It includes the person who renders advice, consultancy or technical assistance relating to conceptualizing, devising, development, modification, rectification, or up-gradation of any working system of such business, organization or institution. The registered person under the agreement signed with Allied Bank Limited has provided the services and not the person whereas in the Agreement signed with Mitsubishi Corporation. It had supplied staff leasing to them. The content mentioned at paragraph 12 above clearly depicts that the nature of services provided by registered person to Allied Bank Limited is not that of 'Labor and Manpower Service' instead he is acting as an advisory body as well as managing different departments of Allied Bank Limited. Thus the contention raised by the registered person is incorrect and not based on law and facts of the case.

07. The Assistant Commissioner passed assessment order (order-in-original) levying sales tax of Rs.58,934,230/= for short paid amount of sales tax along with default surcharge (to be calculated at the time of payment) and penalty of Rs.2,911,746/= under Serial No. 3 of Table of section 43 of the Act.

08. The Appellant challenged the Order-in-Original by way of filing appeal before the Commissioner (Appeals) who upheld the order in original to the extent of tax and default surcharge and further ordered that the appellant will only be liable to pay penalty in case it fails to pay the tax and default surcharge within 30 days from the date of receipt of the order, which order the appellant has challenged before this Tribunal.

09. On 18.05.2018 Mr. Arshad Siraj Memon learned Advocate for appellant submitted that the appellant had provided manpower supply services to its two clients namely M/s Allied Bank Limited (ABL) and M/s Mitsubishi Corporation (MC) and placed on record two statements showing the

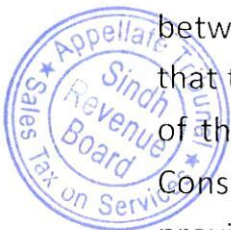


nature/job description of employees and value of services provided or rendered and submitted that the department has treated the services as of Management Consultant on the basis of Agreements, Invoices and objective clause of annual audited accounts. Mr. Arshad further submitted that Rule 42E (3) of the Rules read with Proviso provides that the salaries and allowances of labour and man power supplied by such persons to a service recipient, where reimbursed by services recipient on actual basis, shall be excluded from the value of service for the purpose of payment of sales tax. He then submitted that if the amount of actual reimbursement is excluded the appellant has discharged its tax liability.

Ms. Nida Noor the learned AC submitted that as per the Agreements and invoices the appellant is managing the house keeping department and other departments of the organizations and the objective clause of audited accounts provides that the appellant is a consultant and has provided consultancy services during the tax periods involved. She then submitted that appellant is liable to pay Sindh Sales Tax amounting to Rs.58,234,930/- along with default surcharge and penalties.

10. On 06.06.2018 Ms. Nida Noor AC filed para-wise comments along with photocopies of the documents and submitted that the contention of the appellant that it deals in providing man power services and is entitled to deduct salary and allowances from the value of service is not correct. She then submitted that perusal of various clauses of agreements between the appellant, Allied Bank and Mitsubishi Corporation show that the appellant is providing services in relation to management affairs of the company covered under tariff heading 9815.4000 (Management Consultants) read with sub-section (57) of section 2 of the Act and proviso of sub rule (3) of Rule 42E is not applicable.

Mr. Arshad Siraj, advocate submitted that first of all it has to be examined what type of employees were provided to service recipients. He then submitted that from the list of employees provided on the last date of hearing it is clear that menial/lower staff were provided and those lower staff cannot be said to be managing the business affairs of service recipients. Mr. Arshad Siraj further submitted that the learned



Officer while examining the invoices, which clearly reflect the position that man power services were provided falling under tariff heading 9829.0000 (Labour and Manpower Supply) read with sub-section (55A) of Section 29 of the Act read with Rule 42E of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules) has failed to examine the annexures attached with the invoices.

11. On 20.08.2018 Mr. Arshad Siraj advocate submitted that he has already filed written submissions and he adopts the same and submitted that main crux of his arguments is irrespective of the nature of the service for which the appellant was registered the department before levying tax is required to examine the substance of service actually provided or rendered by the appellant. He then submitted that the respondent even did not verify from the Allied Bank and Mitsubishi Corporation regarding the nature of services provided or rendered by the appellant to them. He then submitted that the substance of transaction has to be seen rather than the form and relied upon the reported case of Civil Aviation Authority vs. Data International, PLD 1993 Karachi 700. He also relied upon a DB order of this Tribunal in appeal No. AT-158/2017 dated 08.08.2016 (Tamizuddin vs. SRB). He then submitted that the burden is upon the revenue to establish chargeability of tax which burden has not been discharged. He then submitted that since the appellant is providing Labor and Manpower Services (Tariff heading 9829.0000) the appellant is entitled to deduct/exclude the actual reimbursement cost and referred to Rule 42E of the Rules, 2011.



12. Ms. Ambreen Fatima the learned AC for SRB submitted as under:

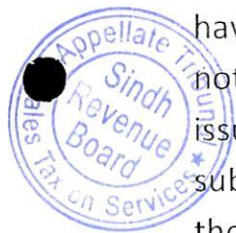
i. The rule of interpretation of written document has been provided in a reported judgment of High Court of Sindh in the case Bayer Pakistan Ltd. vs. Board of Revenue 2002 CLD 823 and submitted that the operative clause of the agreement has to be seen for finding out the substance of the document. The operative part is the object of the agreement and show the intention of the party for which such agreement was entered into.

ii. She then submitted that on examining the scope of services provided in the agreement of Mitsubishi Corporation and Allied

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Bank it appears that the services were provided in relation to Data Entry services, Technical Assistance Services, Management Support Services, Documents Handling services and other as provided in clause 1.2 of Allied Bank Agreement and Article 2 and Annexure A of Mitsubishi Corporation Agreement. The objective/operative clauses of Agreements do not support the appellant's contention that the services relating to labour and manpower supplies were provided. In fact clause 1.2 of both agreements shows that the appellant was appointed as Consultant.

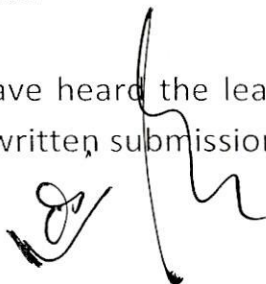
13. On 10.09.2018 Ms. Ambreen Fatima, AC-SRB for respondent filed written synopsis in support of her contention and submitted that scope of service provided by the appellant is covered under the definition of Management Consultant. She then submitted that in both the agreements the appellant was termed as Consultant and not Labor and Manpower Service provider. She then submitted that nowhere in the two agreements the service of providing labor and man power is mentioned. She then submitted that in both agreements it was not mentioned that appellant is entitled to reimbursement of expenses. She then submitted that in the invoices the words "fee" or "consultancy" have been used and that in the invoices reimbursement of expenses was not mentioned and specified. She then submitted that invoices were not issued in conformity with Rule 29 of SSToS Rules, 2011. She also submitted that in the annual audited accounts the principle activity of the company/appellant was mentioned as "Consultancy". She then submitted that in the annual audited accounts the receipts on account of reimbursement of expenses have not been separately mentioned and referred to the Note 10 of Audited Accounts ended June 30, 2015. She then submitted that perusal of agreements; invoices and annual audited accounts do not show any transaction in respect of labor and man power supply. She then submitted that the "Management Consultant" has been defined in Section 2(57) of the Act and perusal of definition of "Management Consultant" in other statutes is not required.



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14. On 09.10.2018 Mr. Arshad Siraj Advocate filed synopsis of his submission in rebuttal to the arguments advanced by the learned AC and submitted that substance of both the Agreements is supply of man power and labor to its clients and no management services/consultancy has been provided as alleged by the department. He then submitted that the agreement of Mitsubishi Corporation clearly spelled out that the services of menial staff were provided nothing to do with the management service or consultancy. He then referred to the Agreement with Allied Bank and submitted that from the list of labor supplied it is clear that none of these employees/staff is in a position to provide management/consultancy services and referred to Annexure "B1 to B4" of his written submission filed on 05.07.2018 and submitted that these documents were provided to the learned AC and was part of para-wise comments of AC dated 06.06.2018 which clearly reflects the nature of services provided by the appellant. He then referred to further chart of Nature of Services provided by the appellant, which is in confirmatory with the terminology used in the agreements. He then referred to clauses in the agreements which, deals with the reimbursement of salaries and cost. He then submitted that in the financial statements the total receipts including reimbursement cost has been shown as revenue and the salaries have been bifurcated under two heads i.e. salaries and allowances of the Company staff and salaries and allowance of outsource staff. For the purpose of calculation of Sindh Sales Tax, only the salaries and allowance of outsource staff had been taken and referred to Notes No.11, 12 and 13 of the Financial Statement for the year ended June, 2015 available along with comments of the learned AC. He then referred to annexures "C1 to C3" annexed with his submission and submitted that these are the attachments of invoices provided to the learned AC at the assessment stage which were not properly examined and considered. He then referred to the judgment for the purpose of clarifying the definition of Management and Consultancy Services.

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



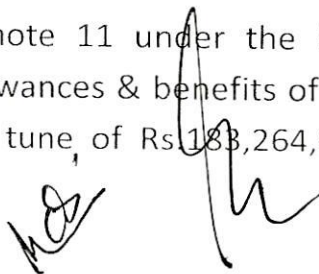
15. The dispute between the parties is whether the appellant has provided or rendered Labour and Manpower Service (Tariff heading 9829.0000) or Management Consultant Service (Tariff heading No. 9815.4000). The appellant has provided or rendered services to its two clients i.e. Allied Bank Limited (ABL) and Mitsubishi Corporation (MC) under two agreements. Since inception the contention of the appellant was that it has provided the service of "supply of labour and man power" and the contention of the respondent is that scope of specific performance of the services provided by the appellant as per agreements are in substance covered under the definition of "management consultant". The appellant has also provided the details of man power supplied to its two clients. The appellant has also provided the breakup of the services provided by it to ABL and MC which is reproduced as under:

	2013-2014	2014-2015
Consultancy Fee	Rs.841,900/=	Rs.2,541,974/=
Mitsubishi Corporation (MC)	Rs.862,740/=	Rs. 837,107/=
Fee of manpower services ABL	Rs.5,360,531/=	Rs.5,788,640/=
Reimbursement on account of Manpower supply services	Rs.162,023,259/	Rs.204,957,432/=

16. In the balance sheet for the year ended 2015 in Note 10 it has been shown as under:

10. Revenue Receipts	Rs.199,578,832	Rs.151,430,335
Outsourcing services	Rs. 5,377,600	Rs. 4,965,200
EOBI Outsourced Empl.	Rs. 9,167,721	Rs. 12,692,885
	Rs.214,125,153	Rs.169,088,420

17. In note 11 under the heading Administrative Expenses salaries and allowances & benefits of outsourced staff has been separately shown to the tune of Rs.183,264,935/= (2015) and Rs.147,054,980/= (2014). In




Note 13 the number of permanent employees and out sourced employees were separately shown.

18. To decide the controversy it appears necessary to peruse the two Agreements. The relevant clauses of the Agreement Between Mitsubishi Corporation and M/s Prolink Consulting (Pvt.) Ltd.

PREAMBLE

1. *The terms used herein have the following meaning for purposes of this Agreement:-*

1.1 *"Country" means the Islamic Republic of Pakistan*

1.2 *"Personnel" means the Consultant's personnel who will be seconded to Mitsubishi for performing assigned services by Consultants*

1.3 *"Services" means the scope of staff leasing services as defined in Article 2*

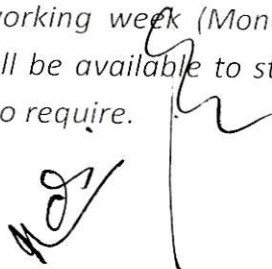
Scope of Services

2. *The Consultants may upon the written request of MC provide office materials. The number of Personnel for secondment by the Consultants will be determined by MC from time to time. Initially it has been agreed that the Consultants shall arrange and send 22 personnel who will be seconded to MC for performing administrative services. The scope of services will be as specified in the Consultant's proposal, which has been accepted by MC, attached as Annex A to this Agreement, forms an integral part of this Agreement. During the tenure of this Agreement, each of the staff provided by the Consultants shall at all times regarded as Consultants Personnel and such employee shall not represent himself as being an employee of MC, Consultants shall keep Mitsubishi Corporation completely indemnified in this regard.*

5. *Duties of the Consultant*

The Consultants shall ensure that:

(a) *The Services are performed through the Consultants Personnel on the basis of a 6 day working week (Monday through Saturday). The Consultant's Employee shall be available to stay late or to work on holidays whenever MC business so require.*



- (b) The Consultants Employee's deputed for the provision of the Services are suitably qualified and trained to perform the services;
- (c) During the tenure of this Agreement, the Consultant's Personnel devote the time, attention and skill required for the proper performance of Services to MC.
- (g) All Services are carried out with all reasonable skill and care;
- (i) The Consultant shall be exclusively responsible for paying the salary to the Personnel including all contributions under the Pakistan Labour Laws, the payment of its employees taxes, and other emoluments and providing the benefits to which each Personnel is entitled under his contract with the Consultant.
- (j) For the sake of clarity it is specifically provided that MC shall not be liable to any of the Consultant's Personnel for any salary or emoluments, or for the reimbursement of any expenses, or for any other amount on any other account.

Annex-A

SCOPE OF SERVICES

As a standard package, Prolink Consulting shall provide the following services to Mitsubishi Corporation:

- Development and relation of in-house system in terms of hardware, software and technical expertise for managing, maintaining and processing timely monthly payroll.
- Receipt and processing of monthly payroll transaction data
- Submission of simulated payroll based on data received for approval by Mitsubishi Corporation (if required by client)
- Maintenance of leave records of all applicable types
- Maintenance and timely deduction of all types of loans given to employees. The process will also cater for early off-set of loans requested by employees and approved by Mitsubishi
- Deduction and deposit of income tax, EOBI and other statutory deductions in government treasury
- Maintenance and record keeping of Provident Fund Contribution, Mitsubishi Corporation will not maintain the investment part of Provident Fund (After PF is setup at request of client)

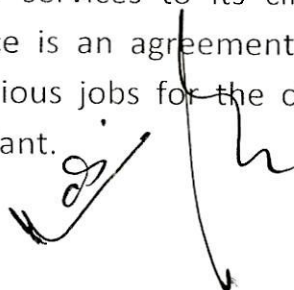
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- Calculation of monthly variable allowances and deductions, including calculation of overtime
- Preparation and submissions of Salary Reconciliation, complete audit trails of master and salary data for the month, and department-wise detail and summary reports (if requested by client)
- Bank advice to be addressed to bank manager along with remittance of salary into employee's bank account. Retention of bank accounts will be mandatory for all employees. However, cash payments will be arranged if agreed upon the Mitsubishi
- Processing of employee resignations and final settlements of account after formal handover of charge to an employee of Mitsubishi
- Record maintenance of salary increments, arrear calculation, transfers and promotions
- Maintenance of Performance Management records
- Arrangements for supply of chargeable liveries and ID cards, and insurance cover as requested by client

19. The agreements provide that "Personnel" means the "Consultant's personnel" who will be seconded to Mitsubishi for performing assigned services by Consultants. Services means the scope of staff leasing services as defined in Article 2. The agreement also provides scope of services and provides that the consultant may upon the written request of MC provide office materials. The number of Personnel for secondment by the Consultants will be determined by MC from time to time. Initially it has been agreed that the Consultants shall arrange and send 22 personnel who will be seconded to MC for performing administrative services. The scope of services will be as specified in the Consultant's proposal, which has been accepted by MC, attached as Annex A to this Agreement, forms an integral part of this Agreement. During the tenure of this Agreement.

20. From perusal of the above terms it clearly appears that the appellant is supplying man power services to its client and the agreement is in essence and substance is an agreement of supply of man power for doing or handling various jobs for the client through staff/employees provided by the appellant.




21. Agreement Between Allied Bank Limited and M/s Prolink Consulting (Pvt.) Ltd.

SERVICE AGREEMENT

1. Appointment

1.1 bank hereby appoints CONSULTANT as its non-exclusive service provider for rendering the Services on the terms and conditions mentioned herein. The provisions of this Agreement shall regulate the utilization of Services provided by OCNSULTANT to BANK, and shall not apply to any other BANK activity or business operation CONSULTANT shall provide the Services only through its regular employees, (hereinafter referred to as "CONSULTANT'S Employees")

1.2 The services include the following:

- a) House-keeping services;
- b) Data Entry and Management Services;
- c) Administrative and Office Support Services;
- d) Telecommunication Support Services;
- e) Cash Sorting Services;
- f) Customer Facilitation, Greetings Services & Call Centre Support Services;
- g) MIS Support Services;
- h) Technical Assistance Services;
- i) Logistic Support Services;
- j) Documents Handling Services; and
- k) Any other services in relation to above

1.3 Unless otherwise required by the President / Chief Executive of Bank, the services in connection with this Agreement shall only be performed in Pakistan and State of Azad Jammu & Kashmir.

1.4 All CONSULTANT'S Employees to be sent to the Bank for the execution of this Agreement shall be subject to the approval of the Bank. If for any reason the Bank does not approve any CONSULTANT'S Employee, CONSULTANT shall immediately ensure that a replacement is sent to the Bank, ensuring that the execution of the Agreement is not disrupted or delayed.

3. Duties of CONSULTANT



3.1 CONSULTANT shall ensure that:

- a) The Services are performed through CONSULTANT'S Employees on the basis of a 6 day working week and 48 hours per week' however, if required by the Bank, CONSULTANT may require its employees to work during any weekends and / or public holidays, in order to enable CONSULTANT to provide the services, which require the presence of CONSULTANT'S Employees.
- b) CONSULTANT'S Employees deputed for the provision of the Services are suitably qualified and trained to perform the Services.
- c) It employs such number of persons as may be required for carrying out and discharge of the CONSULTANT'S obligations, duties and responsibilities and for providing adequate, effective and efficient Services. All such persons shall be directly employed by CONSULTANT, who shall as employer be directly and solely responsible for all such employees and personnel and for the payment of their wages, salaries and other benefits.

3.2 CONSULTANT shall be exclusively responsible for paying the salary and other emoluments and providing the benefits to which each CONSULTANT'S Employee is entitled under his contract with CONSULTANT. For the sake of clarity it is specifically provided that Bank shall not be liable to any CONSULTANT'S Employees for any salary or emoluments, or for the reimbursement of any expenses, or for any other amount on any other account. All claims made by CONSULTANT'S Employees shall be dealt with exclusively by CONSULTANT. None of the CONSULTANT'S Employees shall be entitled to seek employment of Bank merely on the ground that he / she had been engaged by CONSULTANT during the tenure of this agreement or was engaged by CONSULTANT for the provision for the Services to Bank.



3.3 CONSULTANT will ensure maintaining a contractual liability insurance coverage in respect of all of CONSULTANT'S Employees against direct / indirect pecuniary losses to BANK or its customers which might result from act of dishonesty or frauds by the CONSULTANT'S Employees in the course of employment with the CONSULTANT and in the course of rendering services to the BANK where their services are assigned subject to a maximum claim as follows:

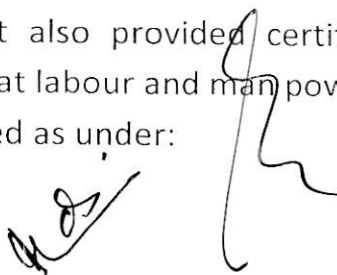
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22. Clause 1.1 of the agreement provides that the appellant shall provide the Services only through its regular employees. Clause 1.2 provides the purpose for which the services are required. Clause 1.4 provides that all consultant's employees to be sent to the Bank for the execution of this Agreement shall be subject to the approval of the Bank. Clause 4 of the Agreement provides the duties of Consultant and 4.1 provides that the consultant ensured that the Services are performed through CONSULTANT'S Employees on the basis of a 6 day working week and 48 hours per week' however, if required by the Bank, CONSULTANT may require its employees to work during any weekends and/or public holidays, in order to enable consultant to provide the services, which require the presence of consultant employees. The agreement further provides as under. d) CONSULTANT'S Employees deputed for the provision of the Services are suitably qualified and trained to perform the Services. e) It employs such number of persons as may be required for carrying out and discharge of the CONSULTANT'S obligations, duties and responsibilities and for providing adequate, effective and efficient Services. All such persons shall be directly employed by CONSULTANT, who shall as employer be directly and solely responsible for all such employees and personnel and for the payment of their wages, salaries and other benefits. Clause 3.5 provides that consultant shall be exclusively responsible for paying the salary and other emoluments and providing the benefits to which each consultant's employee is entitled under his contract with consultant.

23. Perusal of the above terms of the Agreement clearly reflects that man power services were provided and the agreement is in essence and substance is an agreement of supply of man power for doing or handling various jobs for the client through staff/employees provided by the appellant.

24. The appellant also provided certificates from ABL in support of its contention that labour and man power services were provided, the same are reproduced as under:

Allied Bank Limited



Dated: 31.01.2017

To Whom It May Concern

This is to certify that Allied Bank Limited has been obtaining outsources services from M/s Prolink Consulting (Pvt.) Limited under Outsourced Services Contact executed on January 1, 2009 as amended thereafter.

As on December 31, 2016, the total number of staff (requisitioned from time to time as needed) outsourced by Prolink Consulting under the various service desk / categories specified in the contract and their accompanying designations are summarized below:

S. NO.	CATEGORIES AS PER CONTRACT	DESIGNATION	NUMBER OF STAFF DEPLOYED	TOTAL STAFF
1	House-keeping services	Messenger	1163	1163
2	Data Entry and Management Services	-		-
3	Administrative and Office Support Services	Officer Filing / Project Officer Compliance	8/18	26
4	Telecommunication Support Services	Telephone Operator / Telephone Technician	4/3	7
5	Cash Sorting Services	Cash Sorter	19	19
6	Customer Facilitation, Greetings Services & Call Centre Support Services	Recreationalist / Secretary	6/4	10
7	MIS Support Services;			-
8	Technical Assistance Services	A/C Technician / Electrician / Generator Operator / HVAC Mech. / HVAC Operator / Plumbers	20 / 30 / 16 / 4 / 3 / 14	87
9	Logistic Support Services;	Driver	32	32
10	Documents Handling Services			-
11	Any other services in relation to above	Carpenter	13	13
Total No. of Employees Deployed				1357



Karimullah
Unit Head-VM/BC
Human Resources Group

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Date: 30.01.2017

To Whom It May Concern

This is to confirm that our Contract with M/s Prolink Consulting (Pvt.) Limited requires Prolink to provide different support services. This term covers Messengers, Drivers and other support staff for House Keeping Services.

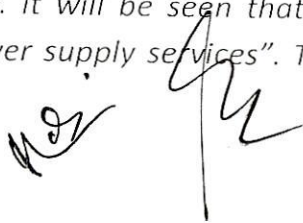
Karimullah
Unit Head-VM/BC
Human Resources Group

25. The Commissioner (Appeals) in the order in appeal discussed the issue as under:

"7. Having reproduced the relevant clauses of the Agreement first and the foremost question which is going to the root of the cases is to determine that whether the services in question are the services of "management consultant"? In this regard the activity is required to be studied from the above parts of the agreements and is required to be read with the definition of management consultants as is contained at section 2(57) of the Act, 2011. The same is reproduced as under:-

"(57) management consultant" means a person engaged, either directly or indirectly, in providing of services in connection with the management of any business, organization or institution in any manner and includes a person who renders advice, conceptualizing, devising, development, modification, rectification, or up-gradation of any working system of such business, organization or institution."

As a matter of fact the Appellant's name is "Prolink Consulting (Pvt.) Ltd. who voluntarily registered for providing the Management Consultant Services and is also paying the tax based on its own assessment by construing as such that a certain portion of services falls in the category of management consultants. The Note 1 of the financial accounts for the year ended June, 2015 is also explanatory of the fact that the Appellant is engaged in the consulting business. It will be seen that it does not say "revenue from the labour and manpower supply services". The services to be provided (as are listed above)

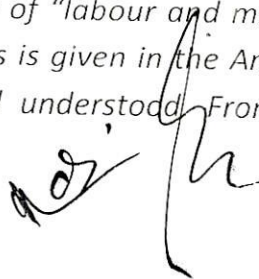


are such that involve an expertise for rendition and completion. Those are to be taken for the present purpose as they are in fact and cannot construed in any other manner of any other way. Further to the above, the perusal of both the Agreements reveals that the Appellant has also been termed and understood as a "Consultant" in both the agreements. The study of the description of services in both the Agreements (respectively) will reveals that such are;

- The services pertaining to development and retention of in-house system in terms of hardware etc., software & technical expertise for managing, maintaining and processing timely monthly payroll, receipt of processing and submission of simulation thereto, maintenance of leave records, loan records, off-set of loans, income tax record, EOBI record, provident fund record, monthly variables, salary reconciliation record, audit trails, bank advice, resignation process and final settlement, transfer promotion, performance management records, ID cards and insurance records etc., and
- The house-keeping services, data entry and management services, administrative and office support services, telecommunication support services, cash sorting services, customer facilitation, greeting services and call center support services, MIS support services, technical assistance services, logistics support services, documents handling services, and any other service in relation to these services".

The bare study of the description reproduced above will show that those services are directly connected to management affairs of the service recipients and are for development of working systems as such. And in absence of the Appellant those services were to be provided by the recipients themselves for running their system and management. In such a clear position of facts, the Agreements and the position of law it can be very safely drawn and understood that the definition given at Section 2(57) is clearly attracted and the services in their very nature are the "services of management consultants" those classified at tariff heading 9815.4000 of the 2nd Schedule of the Act, 2011.

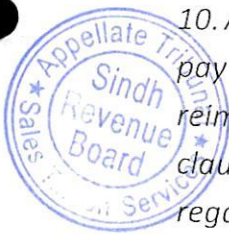
8. In order to respond to the 2nd question as to whether the services fall in the category of "labour and manpower supply services" firstly, the nature of services as is given in the Annexure A of MC's Agreement is required to be read and understood. From reading the listed services from top to



bottom it will be seen that the services are for development and retention of in-house system in terms of hardware etc., software & technical expertise for managing, maintaining and processing timely monthly payroll, receipt of processing and submission of simulation thereto, maintenance of leave records, loan records, off-set of loans, income tax record, EOBI record, provident fund record, monthly variables, salary reconciliation record, audit trails, bank advice, resignation process and final settlement, transfer promotion, performance management records, ID cards and insurance records etc. From reading the above displayed Annexure A it will reveal that under the Agreement the Appellant has to provide the above discussed services (emphasis supplied). And for providing those services listed above, the Appellant has to deploy its own employees. The study of Annexure A will further show that nowhere in the context or meaning the term labour and manpower supply has been used.

9. If the situation is such that the Appellant has to employ its own staff, then the tagged question will be that who is the sole employer and is responsible for payment of salaries and expenses of the employees for performance of such services. In this regard clause 5(i) is relevant. It says that it is the Appellant who has to pay the salaries to the personnel, including all contributions, taxes, emoluments & benefits and the MC will not be liable to payment of salaries. This clause is also explanatory of the fact that it is the Appellant who is the employer under such contract of employment and there is no contract of 3rd party nature.

10. Another tagged question will be that if the Appellant has to employ and pay salaries to the employees, then whether the Appellant is entitled to any reimbursement as such of their salaries and allowances etc. In this regard clause 5(j) and (k) are important. Clause 5(j) categorically says clarifies that regarding the employees of the Appellant there shall be no reimbursement of any expenses or for any other amount on any other account. Further to that the Clause 5(k) says that all the claims pertaining to personnel / employees are to be settled by the Appellant himself. In the circumstances it appears that in fact their salaries and allowances etc. are not to be reimbursed but payment as whole as against the services provided is to be made by the service recipient. In fact it is the Appellant who is the employer and is responsible for payment of salaries and allowances of them under clause 5 of the contract and not the MC. And in this regard the Appellant is entitled to reimbursement of total costs incurred on employment for



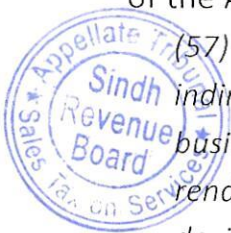
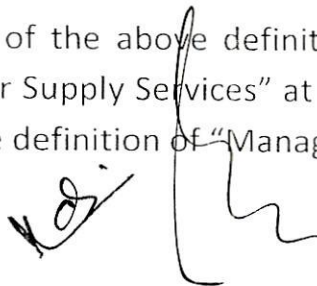
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performance of services on actual basis in terms of clause 4 of the Agreement. As a matter of fact these 02 elements can be quantified and separated. It cannot be said that such payment pertains to the salaries and allowances as such. It will further be seen and understood that the total cost of employment in a month is the benchmark to measure remuneration or margin of profit. The discussion above mentioned will reveal that the reimbursement does not as such pertain to the salaries and allowances, but a payment against the package of services purchased as whole including the reimbursement for other liabilities of the Appellant.

26. Apparently the Assessing Officer and Commissioner (Appeals) were impressed by the terms "Consultant" used in the two agreements and that the appellant has got registration under the category "Management Consultant", but did not consider the substance and purpose of the Agreements. Forums below also failed to consider the category of the staff/manpower supplied to clients under two agreements and failed to appreciate that such type of man power cannot provide "Management Consultancy Services". The term "Labour and Manpower Supply Services" (Sub-section (55A) of Section 2 of the Act Tariff Heading 9829.0000) and "Management Consultant" (Sub-section (57) of Section 2 of the Act Tariff Heading 9815.4000) are two separate and distinct services. Even if the appellant is registered in one category and providing and rendering other service the tax can only be levied on the basis of actual services provided by it and not on the basis of services under which it has got registration. The 'Management Consultant' has been defined in sub-section (57) of section 2 of the Act, 2011, and read as under:

(57) "management consultant" means a person engaged either directly or indirectly, in providing of services in connection with the management of any business, organization or institution in any manner and includes a person who renders advice, consultancy or technical assistance relating to conceptualizing, devising, development, modification, rectification or up gradation of any working system of such business, organization or institution.

27. Bare perusal of the above definition clearly reflects that the "Labour and Manpower Supply Services" at any stretch of imagination cannot be included in the definition of "Management Consultant".



28. The labor and man power supply service has been defined in sub-section (55A) of section 2 of the Act, 2011, and read as under:

(55A) "labour and manpower supply services" includes the services provided or rendered by a person to another person, for a consideration, for use of the services of a person or an individual, employed, hired or supplied by him;

29. From the above definition it is clear that the activity of providing staff/employees to work for the client is covered by the above definition. From comparing the nature of services as mentioned in the two agreements from the above two definitions quoted above it appears that the substance of the services provided or rendered by the appellant to ABL and MC is in essence of service of labor and manpower supply. The learned AC in para 16 of order in original has observed that "whereas in the Agreement signed with Mitsubishi Corporation, it had supplied staff leasing to them". Despite observing this the tax was levied under Management Consultant Service (Tariff heading No. 9815.4000).

30. The learned counsel also argued that the registration of the appellant under the category "Management Consultant" under tariff heading 9815.4000 was wrong from the very beginning. Immediately after realizing this mistake it moved an application to the department to rectify the mistake and register it under the category of "Labour and Manpower Supply" under tariff heading "9829.0000". The department did not make any response to its request and the application was not given any heed. Mr. Arshad Siraj the learned counsel submitted necessary evidence in support of his argument, whereas Ms. Nida the learned D.R. did not refute his claim. This point is well secured by the learned counsel and proves the bonafide of appellant's claim that it was rendering services of labour and manpower supply and its registration under a different category was an initial mistake which was not rectified by SRB despite best efforts on the part of the appellant.

31. From reading the two agreements another impression appears that the two clients of the appellant outsourced its departments to be run through the staff/employees of the appellant/contractor. This is a practice in the market to appoint employees through contractor or to



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appoint employees on contract basis and this is being done to avoid certain liabilities of staff and employees. Although, the superior courts have deprecated the practice of employing the staff through contractors or to appoint them as temporary on permanent post, but the practice is going on and the two agreements are the example of such practice.

32. In the reported judgment in the case of Habib Insurance Limited versus Commissioner of Income Tax (Central), Karachi PLD 1985 Supreme Court Page 109, it has been held that *"It is true as contended by the learned counsel for the appellant that in Revenue cases one must look at the substance of thing and not at the manner in which the account is stated"*. In the other reported judgment in the case of Civil Aviation Authority, Karachi versus M/s DATA International (Data Baggage House), Karachi, PLD 1993 Karachi Page 700 *"it has been held that "Settled proposition of law, however, is that when there is a written instrument regarding the transaction, its substance is to be looked into for the purpose of determining whether it is a lease or license"*. In another reported judgment in the case of Bayer Pakistan (Pvt) Limited versus Board Of Revenue, 2002 CLD Page 823 (DB, Karachi) is has been held that *"It is well-established that where there is a written instrument relating to a transaction between parties, one must look at its substance and not at its form for the purpose of determining its true nature"*. In the reported judgment in the case of Dr. Abdul Hakim Abrash versus ACE Securities (Pvt) Ltd. 2009 CLC 731 (DB, Karachi) relying upon the judgment of Supreme Court in the case of Rasheedur Rehman Khan versus Mian Iqbal Hussain, PLD 2006 SC Page 418 it has been held that *"it is settled principle of law that documents must be considered as a whole and intention of the parties to be discovered from the contents of the document meaning thereby substance of the documents must be kept in mind and not form of the document"*. Mr. Arshad Siraj also argued that third party has no right to intervene into the contract freely entered between two parties and relied upon the reported judgment in the case of Commissioner of Income Tax, Peshawar Zone Versus M/s Siemen AG 1991 PTD Page 488 (Supreme Court of Pakistan) it has been held that *".....when two contracting parties agree to do some-thing by a mutual valid contract or intend doing so, and it is not prohibited by Islam, a third*



Arshad Siraj

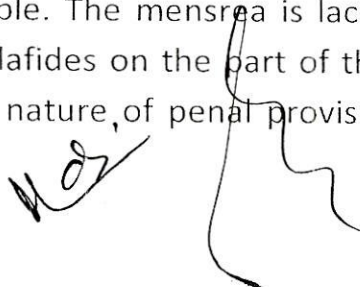
party, like the Income Tax department or for that matter the Court has no power to modify either the contract or with what they intend to do with it".

33. It is now well settled point of law that while construing an instrument/document whole document is to be read and considered to ascertain the scope and object of the instrument/document. It is also now well settled principle of law that for determining the true purpose of the instrument/document one must look into its substance and not the form. In the reported judgment in the case of Kamran Industries versus Collector of Customs, PLD 1996 Karachi Page 68 a Honorable DB of Sindh High Court has held that "That a statute/instrument/document is to be read as whole, and an attempt has to be made to reconcile various clauses for a rationale meaning, while avoiding redundancy to any part thereof.

34. In view of the above discussion the appeal is allowed and order in original and order in appeal are set aside. The appellant is liable to be taxed under Tariff Heading 9829.0000 (Labour and Manpower Supply) and is entitled to the benefit of Rule 42E (3) of the Sindh Sales Tax on Services Rules, 2011.

35. The learned advocate for the appellant under cover of Statement dated 16.10.2018 filed Reconciliation and Summary 2013-14 and 2014-15 for the purpose of calculation of tax. However it appears appropriate that the learned AC may verify the correctness of the Reconciliation and Summary and to calculate the tax in terms of para 34 above and will inform the appellant within ten days from the date of receipt of the copy of this order and the appellant will deposit the tax within fifteen days from the date of receipt of the demand. In case the appellant fails to pay the tax within above stipulated time it will also requires to pay default surcharge.

36. The appellant is not liable to pay penalty as there was a contest between the parties regarding the Tariff Heading under which the tax was payable. The mensrea is lacking and the department has failed to prove malafides on the part of the appellant. The superior Courts have held that nature of penal provisions is quasi criminal and existence of

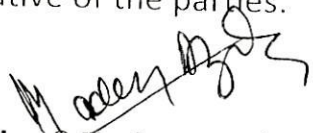


mensrea is mandatory condition for levying such penalty, Commissioner Income Tax versus Habib Bank (2007 PTD 901 DB, SHC).

37. The appeal is disposed of in the above terms. The copy of this order may be provided to the learned representative of the parties.


(Agha Kafeel Barik)

TECHNICAL MEMBER


(Justice Nadeem Azhar Siddiqi)

CHAIRMAN

Karachi

Dated: 19.11.2018

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.

Certified to be True Copy


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