

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-1

APPEAL NO. AT-37/2018

M/s Syed Azam Hussain Naqvi.....Appellant

**Versus**

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

Ms. Lubna Pervaiz, Advocate and Mr. Shafqat Zaman, Advocate for Appellant

Ms. Narmeen Qureshi, AC SRB for Respondent

Date of filing of Appeal: 30.05.2018

Date of hearing: 09.10.2018

Date of Order: 17.10.2018

ORDER

**Justice<sup>®</sup> Nadeem Azhar Siddiqi:** This appeal has been filed by the appellant challenging the Order-in-Appeal No.74/2018 dated 18.05.2018 passed by the Commissioner (Appeals) in Appeal No. 251/2016 filed by the Appellant against the Order-in-Original No. 696/2016 dated 18.07.2016 passed by the Deputy Commissioner (Mr. Abdul Rauf), SRB, Karachi.

01.The facts as stated in the order-in-original are that the appellant is engaged in providing services of construction/contractor tariff heading 9824.0000 and 9814.0000, of the Second Schedule of Sindh Sales Tax on Services Act, 2011 (herein after referred to as the Act) subject to tax Sindh sales tax effective from 1st July, 2011.

*Nadeem Azhar Siddiqi*

02. The allegations against the appellant in the order in original are reproduced as under.

- i) The withholding statement of the M/s Habib Sugar Mills, Nawabshah shows that it has received the taxable service and paid Rs.97,555,805/= involving sales tax of Rs.14,633,371/= to appellant during the tax periods from July, 2014 to June, 2015, but the appellant failed to pay the same to SRB by way of not getting registration and by not filing sales tax returns.
- ii) The Income Tax Returns of appellant filed with FBR for the year ending 30.06.2015 revealed that the appellant provided or rendered services of Rs.12,633,707/=, but has not paid sales tax of Rs.1,895,056/=.

03. The Department has also asked the appellant under section 52 of the Act to provide documents as mentioned in para 2 of the order in original for the purpose of making assessment order under section 23 of the Act.

04. A show-cause notice dated 10.03.2016 was issued to the appellant for assessment and recovery of tax for the periods from July, 2013 to June, 2015 along with default surcharge and penalty. The appellant submitted written reply and claimed exemption relating to the projects of commercial and industrial nature and construction and repair of roads for Habib Sugar Mills who has not withheld the Sindh Sales Tax.

05. In paragraph 6 of the order in original the details of services provided by appellant to M/s Habib Sugar Mills Pvt. Ltd have been categorized as under:


**Nature of Services**

**Value of Services**

- a. Excavation & Disposal of Silt from weir 01 of Water

Rs.30,245,029/-

Or contractual execution of work (tariff heading 9809.0000) Taxable Service.

*M/S*  


- b. De-Silting of water Rs.32,009,547/-  
Or contractual execution of work (tariff heading 9809.0000) Taxable Service.
- c. Construction of Brick Road Rs.35,061,178/-  
(Construction Services 9824.0000) taxable services but exempt vide Notification No.SRB-3-4/7/2013 dated 18.06.2013.
- d. Services Charges against wages / salary Rs.637,808/-  
(Tariff heading 9829.0000) taxable services.

06. Finally the Assessing Officer passed assessment order determining the value of service amounting to Rs.62,892,384/= involving Sindh sales tax of Rs.9,433,858/= along with default surcharge and penalty of Rs.471,693/= under Serial No.2 of the Table of section 43 of the Act.

07. The Appellant challenged the Order-in-Original by way of filing appeal before the Commissioner (Appeals) who dismissed the appeal, hence this appeal.

08. During pendency of appeal before this forum the learned AC, SRB filed Comments Dated 24.07.2018 supporting the orders of forums below. During pendency of appeal before us the appellant filed Summary of Bills dated 04.09.2018 specifying the nature of services provided by it, declaring the value of service as Rs.622,54,576/= involving sales tax of Rs.3,877,840/=. The learned AC has also filed Summary of (Bifurcated) Details of Services dated 04.09.2018. In the Observation part of the Report the learned AC submitted that no proof of payment has been provided, the amount on work orders and invoices are not matched as the work order do not show value of work, there is no agreement between the parties and disbelieved the version of the appellant that service of excavating and de-silting has been provided. The learned. AC also filed Report dated 13.08.2018 and submitted that the appellant is

*H.S.*



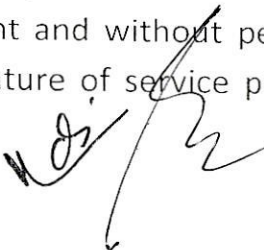
providing service of construction (9824.0000) and contractual execution of work (9809.0000).

09. On 24.07.2018 Mr. Shafqat Zaman, Advocate files a statement showing various services provided to M/s Habib Sugar Mills. According to this statement three types of services were provided i.e. De-silting, Labour & Manpower and Construction of Roads and submitted that out of the above three services de-silting tariff heading 9822.4000 was brought to the tax net effective from 01.07.2015 and the tax periods involved in this appeal are from July, 2014 to June, 2015 and the services cannot be taxed under tariff heading 9824.0000, 9814.0000 and 9809.0000. He then submitted that tax on construction of roads are exempted under Notification dated 18.06.2013 (available on court file at page No.23).

10. Ms. Narmeen Qureshi the learned AC filed para-wise comments and submitted that the services provided by the appellant to Habib Sugar Mills is covered under tariff heading 9809.0000 and was rightly taxed by the then Assessing Officer. She then submitted that the statement provided today by the learned advocate for appellant shows that there are other construction activities under the garb of de-silting.

11. On 04.09.2018 Mr. Shafqat Zaman, advocate submitted that dispute is in respect of services provided to M/s Habib Sugar Mills. He then submitted that service of excavation and disposal of silt was provided to M/s Habib Sugar Mills and the services does not fall within ambit of tariff heading 9824.0000 and 9809.0000 under which the tax was charged. He then submitted that de-silting is a specific service brought to tax net effective from 10.07.2015 under tariff heading 9822.4000. He then submitted that the 9809.0000 and 9824.0000 were erroneously invoked by the department.

12. In reply Ms. Narmeen Qureshi, AC submitted that the appellant is not providing relevant Agreement and without perusal of agreements it is difficult to determine the nature of service provided by the appellant.



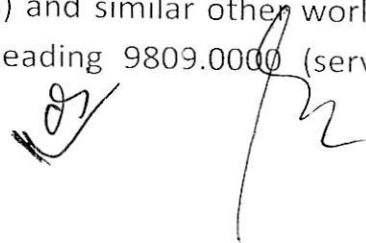
She then submitted that only the works order and invoices were provided.

13. On 09.10.2018 Ms. Lubna Pervaiz, Advocate while referring to page 5 of the order in original submitted that the dispute is in respect of Item No. (a) and (b) which was wrongly charged under tariff heading 9809.0000. She then submitted that excavation and de-silting service is a specific service brought to tax net effective from 10<sup>th</sup> July, 2015 and that at the relevant tax periods the services cannot be taxed. Ms. Lubna relied upon the reported order of this Tribunal in the case of APM Terminal reported as 2018 PTD (Trib.) 527 on the point that for invoking tariff heading 9809.0000 (service provided or rendered by persons engaged in contractual execution of work or furnishing supplies) it was necessary that both components i.e. work and supply are available in the contract or agreement.

14. Ms. Narmeen Qureshi, AC submitted that she relied upon her written submissions made earlier and also adopted her submissions earlier made before this Tribunal and supports both the order in original and order in appeal.

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

15. The Assessing Officer has taxed the appellant invoking Tariff Heading 9809.0000 (service provided or rendered by persons engaged in contractual execution of work or furnishing supplies). The dispute appears to be related to the actual nature of services provided by the appellant and its proper classification. Initially the Assessing Officer issued show-cause notice invoking Tariff Heading 9824.0000 (construction services) and 9814.2000 (contractor of building (including water supply, gas supply and sanitary works), electrical and mechanical works (including air conditioning), multi-disciplinary works (including turn-key projects) and similar other works. Finally the Assessing Officer invoked Tariff Heading 9809.0000 (service provided or rendered by

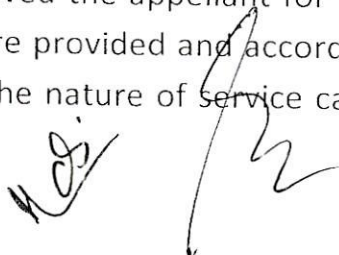




persons engaged in contractual execution of work or furnishing supplies) for assessment of tax. Since inception the appellant has provided the details of services provided by it to M/s Habib Sugar Mills but the Assessing Officer despite mentioning the services provided by the appellant in his order taxed the excavation, disposal of silt and de-silting of water under general tariff heading 9809.0000 without confronting the appellant in the show-cause notice. The Assessing Officer while taxing the appellant under tariff heading 9809.0000 has traveled beyond the contents of the show-cause notice and the appellant was taken by surprise. Once the Assessing Officer has come to the conclusion that the services provided or rendered by the appellant do not fall within the ambit of tariff headings under which the show-cause notice was issued the proper procedure was to drop the show-cause notice and to issue fresh show-cause notice invoking proper tariff heading. The services of excavation, disposal of silt and de-silting of water are neither covered under tariff heading 9824.0000 (construction services) nor under tariff heading 9809.000. For invoking tariff heading 9809.0000 it is necessary that both components i.e. execution of work and furnishing supplies are present in the contract/agreement. In the excavation and de-silting the component of work is present but the component of supplies is missing.

16. The tax was levied under Tariff Heading No 9809.0000 (contractual execution of work or furnishing supplies). The core issue involved in this appeal is the proper classification and nature of the services provided by the appellant. Unless the proper nature, scope and classification of services provided or rendered by the appellant is determined the question of levy of tax cannot be decided. It is an admitted position that the services which the appellant had provided or rendered are not listed in the First and Second Schedule of the Act and for that reason the department has taken shelter under a general Tariff heading 9809.0000 (contractual execution of work or furnishing supplies).

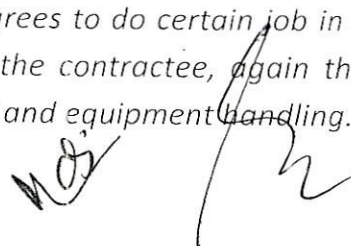
17. The learned AC disbelieved the appellant for the reason that only work orders and invoices were provided and according to learned AC without providing agreements the nature of service cannot be determined. This



appears to us a lame excuse. If the nature of service cannot be decided without producing agreements how the assessment was made under tariff heading 9809.0000. To us the work orders and invoices are sufficient to determine the nature of services provided or rendered. It is always not necessary to draw an agreement in writing. Oral agreement is also legal and proper.

18. The DB of this Tribunal In the Order of DC, SRB versus Byco Terminal (Appeal No. AT-14/2016) relying upon the earlier Order passed in APM Terminal Versus AC, SRB-VI, (Reported as 2018 PTD (Trib.) 527 has held as under:

*"The Tariff heading 9809.0000 is a general heading to cover contractual execution of work or furnishing supplies not falling in any other tariff heading. The benefit under Tariff heading 9809.0000 can only be taken if the service provided or rendered is not listed in the First or Second Schedule to the Act and provided under contractual execution of work or furnishing supplies. Tariff heading 9809.0000 has two components i.e. providing or rendering (1) contractual execution of work or (2) furnishing supplies. To attract 9809.0000 it is necessary that both the components are available in the contract or agreement. This argument finds support from the Exemption Notification No. SRB-3-4/7/2013 dated 18<sup>th</sup> June, 2013 which provides that "in relation to the work or supplies the total value of which does not exceed 50 Million rupees in a financial year subject to the condition that the value component of services in such contractual execution of work or furnishing supplies also does not exceed 10 million rupees. The exemption can only be claimed if in a contract both elements are present. Admittedly while providing services of storage, rental and equipment handling the respondent has not executed any work and has also not furnished supplies. It appears that the tax was charged under the first phrase of T.H. 9809.000 (contractual execution of work). For invoking first phrase it is necessary that the respondent has performed or executed some type of work involving physical and mental exertion to attain an end as defined in the Black's Law Dictionary, Tenth Edition, which is lacking in the Contracts of storage, rental and equipment handling. The works contract is an agreement which is a mixture of service of labour and transfer of goods. Under a works contract the contractor agrees to do certain job in execution whereof, certain goods are transferred to the contractee, again this aspect is missing in the contract of storage, rental and equipment handling.*

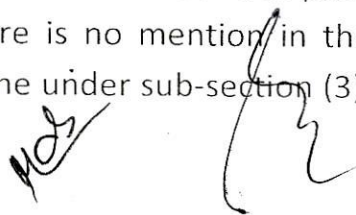




*The facts of case of APM Terminal are that the appellant in that case claim that it is engaged in providing and rendering services of containers and gensets handling/repair/maintenance and other allied services and that the services provided or rendered by the appellant are not specifically listed in the Second Schedule to the Act and are therefore not taxable. The facts of both these cases are similar. The Commissioner (Appeals) has rightly relied upon the earlier decision of this Tribunal in the case of APM Terminal.*

19. In view of the above discussion the appeal is partly allowed. The appellant is not liable to pay Sindh sales tax on the service of excavation and disposal of silt and de-silting of water. However the appellant is liable to pay sales tax on labour and man power service (Tariff heading 9829.0000) the value of which was determined by the Assessing Officer in the sum of Rs.637,808/= involving sales tax of Rs.95,671/=. If the appellant deposit Rs.95,671/= within fifteen days from the date of receipt of this order it is not required to pay penalty under Table 3 of section 43 of the Act and default surcharge under section 44 of the Act.

20. Before parting with the order we deem appropriate to point out the way in which the order in original was passed. The Assessing Officer on the top of the first page mentioned the dated as 18<sup>th</sup> July, 2016. On the first page in the column No.5 the Date of Judgment and Date of Issuance were mentioned as 15.06.2016 and 14.07.2016 respectively. In the body of order under his signature the Assessing Officer mentioned the date as 18.07.2016 (According to our understanding this is the date on which the order was announced): On the first page in column No.5 the date of issuance is mentioned as 14.07.2018, but on the top of the first page the date of issuance was mentioned as 18.07.2018 and on the last page the date on which the order was signed was mentioned as 18.07.2018. It clearly reflects that to bring the order in original within the time allowed under sub-section (3) of section 43 the fictitious date of judgment i.e. 15.06.2016 was mentioned in column 5. If the date of announcement is taken as 18.07.2016 the order was passed beyond 120 days and is bared by time as there is no mention in the order in original regarding the extension of time under sub-section (3) of section 23. (The appellant has



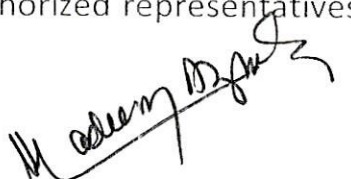


neither taken the ground that the order in original was time bared before us nor before Commissioner (Appeals). Furthermore the Assessing Officer is not allowed to first announce the order and then to write the same, even the Assessing officer cannot passed short order. The Assessing Officer is requires to announce order after recording reasons and signing the same.

21. To us SRB is a prestigious organization generating revenue from the people for the people and the Officers should avoid to indulge in such type of activism, (which in our view it is an act of unbecoming of an officer of a reputable organization and is a misconduct on the part of the officer) which will bring bad name to the organization. The Commissioner (Appeals) should have taken notice of this situation and reported the matter to the Board/Chairman for appropriate action.

22. The appeal is disposed of in terms of para 19 above. The copy of this order may be provided to the learned authorized representatives of the parties.

  
(Agha Kafeel Barik)  
Technical Member

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

Karachi, Dated: 17.10.2018

Copies supplied to:-

1. The Appellant through Authorized Representative.
2. The Assistant Commissioner, SRB, Karachi.

Copy for information to:-

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