

(Guard file)

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD

Appeal No.AT-44/2018

M/s Madiha Danial Appellant

VERSUS

Assistant Commissioner, SRB, Karachi Respondent

Mr. Nadeem Iqbal, Advocate For the Appellant

Mr. Waqas Zaidi, Assistant Commissioner, SRB, Karachi For the Respondent

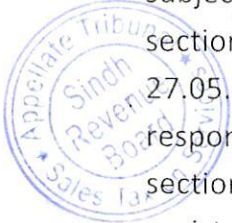
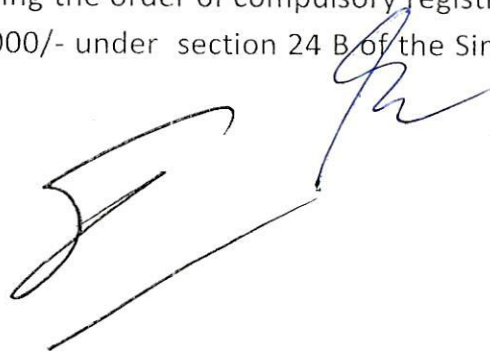
Date of hearing 15.08.2018

Date of Order 16.08.2018

ORDER

Mr. Agha Kafeel Barik: This appeal has been filed by an individual against the order of Commissioner (Appeals) dated 28.05.2018 whereby he dismissed the appeal for non-prosecution. In his order the Commissioner has recorded that the hearing of appeal was fixed 20 times from the date of filing but none appeared before him and only adjournments were being taken. Finally it was fixed on 28.05.2018 on which date none attended and so he dismissed it for non-prosecution. The facts of the case are as under:

2. The Deputy Commissioner unit-22 SRB, on the basis of information that the appellant had rented out her property to one Mr. Ali Asghar w.e.f. July, 2015 and as such provided taxable services of renting of immovable property services which is subject to Sindh Sales Tax under tariff heading 9806.3000, as per definition under section 2 (72 C) w.e.f. 01.07.2015, issued a show cause notice under section 24 B (2) on 27.05.2016, requiring the appellant to get registered under section 24 B. As there was no response the Deputy Commissioner SRB passed an order under section 24 B read with section 43 (1) on 20.06.2016 whereby he ordered that if the said person gets voluntarily registered by 27.06.2016 there would be no penalty; otherwise penalty of Rs. 100,000/- would be imposed. As apparent from record the said person failed to comply with the order, resulting in finalizing the order of compulsory registration under section 24 B and also penalty of Rs. 100,000/- under section 24 B of the Sindh Sales Tax on Services Act, 2011.



3. The appeal of the said person was dismissed for non-prosecution by the Commissioner (Appeals), as discussed above. Hence this appeal before us.

4. Mr. Nadeem Iqbal Advocate and learned A.R., submitted that he had moved an application for adjournment before the Commissioner (Appeals) on 28.05.2018 and it was duly received on the same date; he presented copy of the receipted letter in the SRB on 28.05.2018. But as he said that the Commissioner (Appeals) ignored it and dismissed the appeal for non-prosecution on the same date i.e. 28.08.2018.

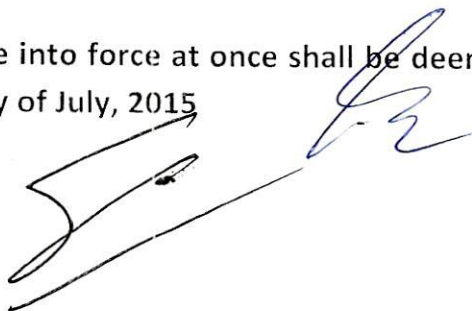
5. The learned A.R. argued that dismissal-in-default was not justified and cited a judgment of Sindh Court reported as 90 Tax 276/2004 PTD 2839 dated 21.07.2014 in the case of Salamat Saleem vs. S.O. Wealth Tax and argued that while passing an ex parte order the appellant authority should consider it on merits and should not dismiss it for non-prosecution, as the learned Commissioner (Appeals) did in this case.

6. Arguing on merits the learned A.R. submitted that the Sindh High Court has declared the entry under tariff code 9806.3000 as ultra-vires in various constitutional petitions CP No.D-2421/2016 and others vide its consolidated order dated 18.08.2017. Hence the orders of the officers below may be declared as illegal and be set aside. He stated that impugned order of Commissioner (Appeals) was an unjudicious act as the honorable Sindh High Court had already declared entry No. 9806.3000 as ultra-vires vide its judgment dated 18.08.2017 whereas the Commissioner (Appeals) passed order on 28.08.2018 when the order of Sindh High Court was in the field.

7. Mr. Waqas Ali Zaidi Assistant Commissioner, SRB who appeared for the SRB argued that the renting services were brought in the tax net by inserting entry No. 9806.3000 w.e.f 10.07.2015. He submitted that while the said entry was declared ultra-vires by the honorable Sindh High Court on 18.08.2017, in a subsequent move the Provincial Assembly of Sindh passed an amendment bill on 21.02.2018 titled as "Sindh Sales Tax on Services. (Amendment) Act, 2018" which was assented on 04.04.2018 and gazetted on 11.04.2018. Through this Act levy of Sindh Sales Tax on "renting of property" has been validated with retrospective effect with the following substituted provisions of law.

"1.(1) This Act may called the Sindh Sales Tax on Services (Amendment) Act, 2018.

(2) It shall come into force at once shall be deemed to have taken effect on and from 1st day of July, 2015



2. In the Sindh Sales Tax on Services Act, 2011 hereinafter referred to as the Act in section 4 in sub section (1) for Clause (b), the following shall be substituted:-

(b) An activity of supply or provision of movable or Immovable property by way of lease, rent license or other similar arrangement; and”.

3. In the said Act, in section 84, the full-stop at the end shall be replaced by a colon and thereafter the following proviso shall be added:-

“Provided that the levy and collection of sales tax on renting of immovable property services on any date on or after the First day of July, 2015 shall be deemed to be and shall always be deemed to have been validly levied and collected, notwithstanding anything contained in this Act or any law for the time being in force or any judgment, decree or order or any court”.

8. The learned AC-SRB further submitted that amendment as per SST (amendment) Act, 2018 is retrospective from 01.07.2015. Hence he argued that any legal infirmity in the order of the AC-SRB has been removed and revalidated and now the judgment of the High Court has no effect on the impugned orders of the officers below. The learned AC argued that since it was retrospective in nature and effective from 01.07.2015 it was fully applicable upon the instant case.

9. After hearing both the sides my observations are as under:

(1) Various provisions of law on renting of immovable property as per entries made originally w.e.f 10.07.2015 are as under:

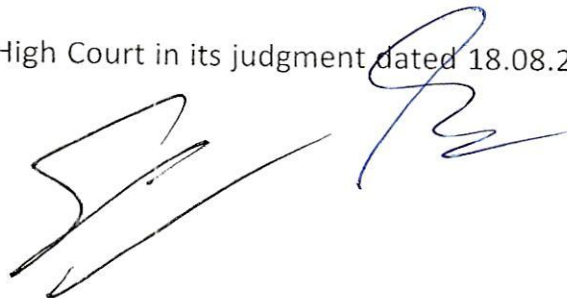
(2) Definition of renting of properties

[Section 2 (72 C) “renting of immovable property services” means any service provided or rendered, to any person by another person, by renting of immovable property as defined in clause (72B) of this section, or any other service in relation to such renting for use as offices or factories or in the course of furtherance of business and commerce.]

(3) Tariff heading 9806.3000 brought w.e.f. 10.07.2015 [9806.3000 Renting of immovable property services]

(4) Amendment as per amendment Act, 2018, as quoted at Para 7 above effective from 01.07.2015.

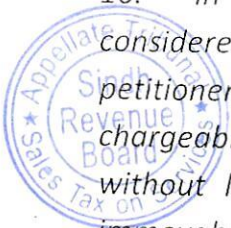
(5) The learned Sindh High Court in its judgment dated 18.08.2017 decided the issue as under.



14. ".....Mere renting of immovable property by a landlord to a tenant for consideration (rent), does not involve any element of service, or taxable service or economic activity as defined under the Sindh Sales Tax on Services Act, 2011, therefore the intention of the respondents as expressed through impugned Show Cause Notices in the instant matters, to bring the renting of an immovable property under the charge of sales tax on services is misconceived in fact and law. Moreover, unless, the renting of Immovable property is part of business, profession, calling, trade or undertaking of any kind, of a person, the same cannot otherwise, be treated as economic activity involving any provision of service to another person, therefore, cannot be considered as taxable service, chargeable to tax under Sindh Sales Tax on Services Act, 2011.

15. The cumulative effect of hereinabove statutory provisions shows that unless an activity involves the provision of providing service by a registered person in the course of economic activity from his registered office or place of business in Sindh, then such economic activity cannot be considered as a taxable service for the purpose of charging sales tax on services under Section 3 read with Section 8 of the Sindh Sales Tax on Services Act, 2011. Careful examination of the provisions of Section 2(72C) further reveals that the term renting of immovable property services has been defined as "any service provided or rendered to any person by another person, or any other service in relation to such renting for use as offices or factories or in the course or furtherance of business and commerce". We are of the considered opinion that mere letting out an immovable property by a landlord to a tenant on rent, does not involve any element of providing any taxable service in terms of Section 3, therefore, it is not taxable in terms of Section 8 of the Sindh Sales Tax on Services Act, 2011. Provincial Legislature cannot levy or impose any charge of tax on the amount received towards rent under the Sindh Sales Tax, provided by or rendered by a person to another person.

16. In view of hereinabove facts and circumstances of the case, we are of the considered opinion that the impugned notices issued by the respondents to the petitioners, while treating the renting of immovable property as taxable services, chargeable to tax under Sindh Sales Tax on Services Act, 2011, have been issued without lawful authority. It is hereby declared that mere letting out of an immovable property by the landlord to tenant on rent for consideration does not involve any element of providing any taxable services, therefore, the amount of rent received by the landlord from the tenant cannot be subjected to tax, while invoking the provision of Section 2(72C) read with Tariff heading 9806.3000 of



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First Schedule and Part-B of the Second Schedule to the Sindh Sales Tax on Services Act, 2011. Accordingly, above petitions are allowed in the aforesaid terms along with listed applications.

- (6) A Bench of this Appellate Tribunal has decided the issue in favor of the taxpayer in the case of Yousuf Adil in appeal No AT-37/2017 decided on 03.01.2017 as under.

"9. The renting of immovable property (Tariff heading 9806.3000) was brought to tax vide Sindh Finance Act, 2015 through insertion of sub-section (72B) and (72C) in section 2 of the Sindh Sales Tax on Services Act, 2011. The said amendments were challenged before the Honorable High Court of Sindh in a number of Constitution Petitions. The said Constitution Petitions bearing No.2421/2016 and others (Youngs Private Limited versus Province of Sindh and Others) were came up for hearing before the Court 08.05.2017 and was decided vide judgment dated 18.08.2017 (quoted as per para 9 above).

In view of the above and relying upon above judgment of the Honorable High Court of Sindh this appeal is allowed. Both order in original and order-in-appeal are set aside"

- (7) However, it is noted that Sindh Sales Tax (amendment) Act, 2018 dated 04.04.2018 which has retrospective effect from 01.07.2015 had not come into force at the time of hearing and decision of appeal No.AT-37/2017 dated 03.10.2017 by the Appellate Tribunal.
- (8) The order of Commissioner (Appeals) was not a judicious order as he had enough material to decide the appeal on merits instead of dismissing the same for non-prosecution.
- (9) In view of the above facts on record my findings are as under:

i) The renting of immovable property services was brought to Sales tax net w.e.f.10.07.2015. Hence the order of registration under section 24B by the officer concerned passed on 20.06.2016 was very much according to law. Subsequently, the Honorable Sindh High Court vide its judgment dated 18.08.2017, cited above declared sales tax on renting of immovable property as illegal. Meanwhile the Commissioner (Appeals) took up the appeal of the said person, but instead of deciding it on the ratio of the decision of Honorable Sindh High Court he dismissed it for non-prosecution on 28.05.2018. In the case of Yousuf Adil in appeal No. AT 37/2017 the Appellate Tribunal, SRB rightly allowed tax payer's appeal on 03.10.2017, respectfully following the

judgment of the Sindh High Court, which was in the field. However, subsequently through amendment in Sindh Sales Tax on Services Act, 2011, vide Notification dated 11.04.2018 an amendment in the relevant law has been made retrospectively from 01.07.2015 (reproduced above). It is pertinent to note that not only this amendment takes effect retrospectively from 01.07.2015, but also gives it cover against "any judgment, decree or order of any court". Thus I am of the considered opinion that through this amendment the registration under section 24B read with tariff code 9806.3000 in this case before me has been validated.

10. In view of the above findings while the order of Commissioner (Appeals) dismissing appeal for non-prosecution and not deciding on merits is set aside, the order under section 24 B of the AC Unit-22 dated 26.06.2016 is hereby confirmed. The AC-SRB vide his order of 26.06.2016 not only registered the said person under section 24B but also imposed penalty of Rs.100,000/- under section 43(1). While I confirm order under section 24B which is in order as per provisions of law on the subject, I find that there is no element of mens rea in this case. Thus I hereby order the penalty of Rs.100,000/- to be set aside and penalty of Rs.10,000/- only is imposed for the default of not getting voluntarily registered, under section 24 A as was the requirement of law for the time being in force and validated by the legislature.

11. Appeal is disposed of as above.


(Agha Kafeel Barik)
TECHNICAL MEMBER

Karachi

Dated: 16.08.2018

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.


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