

(Cover file)

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-1

APPEAL NO. AT-57/2018

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

Versus

M/s Daewoo Pakistan Express Bus
Services Limited.....Respondent

Date of Filing: 31.08.2018

Date of Hearing: 23.04.2019

Date of Order: 30.04.2019

Mr. Irfan Waheed, AC-SRB for the appellant.

Mr. Khurram Shahbaz Butt, Advocate for the Respondent.

ORDER

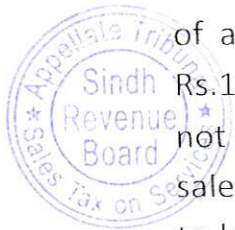
Justice (R) Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order in appeal No. 117/2018 dated 06.07.2018 passed by the Commissioner (Appeals-II) in Appeal NO. 246/2016 filed against the Order in Original No. 682/2016 dated 13.07.2016 passed by the Assistant Commissioner (Muhammad Yousuf Bukhari), SRB, Karachi.

1. In short, the facts of the case as stated in the order in original are that the respondent being a registered person provides and renders taxable services of advertisement on their invoices, premises, buses etc. falling under Tariff Heading 98.02 of the Second Schedule of the Sindh Sales Tax on Services Act, 2011 (herein after referred to as the Act).
2. The allegation against the respondent is that from the perusal of annual audited accounts it was observed that it has declared income from advertisement services amounting to Rs. 160,658,059/=,



116,929,950/= and 158,917,312/= during the tax periods from January, 2014 to December, 2014, January, 2013 to December, 2013 and January, 2012 to December, 2012 respectively, but has failed to declare the same with SRB. It was further alleged that respondent was provided an opportunity vide SRB's letter dated 08.02.2016 to explain its position. The respondent was also requested under section 52 (1) and 52 (2) of the Act to provide details of all services provided and taxes paid, but it had failed to provide the requisite information.

3. The Respondent was served with show-cause notice dated 26.02.2015 to explain as to why Sindh sales tax amounting to Rs.24,098,709/=, 18,708,792/= and Rs.25,426,770/= in respect of advertisement services of for the aforesaid tax periods may not be assessed under section 23 (1) read with section 23 (1A) of the Act along with default surcharge under section 44 of the Act and imposition of penalty under Serial No. 13 of the Table under section 43 of the Act of 2011.
4. It was further alleged that the respondent declared expenses of Rs.27,222,084/=, Rs.28,041,544/= and Rs.27,455,331/= on account of Royalty during the aforesaid tax periods, chargeable to Sindh sales tax @ 10% covered under the definition of "Franchise" as provided under sub-section (46) of section 2 of the Act read with Tariff Heading "8923.0000, of the Second Schedule of the Act. The respondent was also required to explain as to why Sindh sales tax amounting to Rs.2,722,708/=, 2,804,154/= and Rs.2,754,533/= in respect of Royalty for the aforesaid tax periods may not be assessed under section 23 (1) read with section 23 (1A) of the Act along with imposition of penalty under Serial No. 3 and 12 of the Table under section 43 of the Act of 2011.
5. It was further alleged that the respondent received taxable services of advertisement amounting to Rs.18,809,105/=, 21,055,985/= and Rs.17,653,088/= during the aforesaid tax periods, but the same were not declared with SRB and the respondent is required to pay Sindh sales tax amounting to Rs.9,202,908/= and an assessment is required to be made under section 23 (1) read with section 23 (1A) of the Act along with default surcharge under section 44 and imposition of



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penalty under Serial No. 3 of the Table under section 43 of the Act of 2011.

6. The respondent was also required to explain as to why penalty under Serial No. 2 of the Table under section 43 of the Act of 2011 may not be imposed for not filing the monthly tax returns for the period from July, 2011 to June, 2014.

7. On the date of hearing the representatives of the respondents appeared before the Assessing Officer and submitted that the registered office of the respondent is established in Punjab and the company is paying sales tax on the services in Punjab and submitted the copy of the sales tax returns filed with PRA.

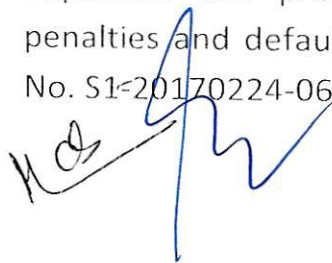
8. The respondent filed its detail reply and submitted that the respondent is providing advertisement services through City Bus services at Lahore and does not fall within the ambit of SRB. It was also stated that the respondent is providing different type of services and prior to amendment through Sindh Finance Act, 2013 only those advertisement services fall under the ambit of "Other Advertisements" which were like advertisement on web/internet etc. and none other than those of like web/internet at the relevant time were taxable. It was also stated that the respondent had started charging sales tax on some of the services w.e.f. 1.10.2013 and had been depositing the sales tax therefore the same services cannot be taxed twice. It was further stated that respondent is paying Royalty to M/s Daewoo International, Korea for the use of Logo and name "Daewoo". The registered office of the respondent is located in Punjab and the service provider/franchiser is a non-resident person, therefore, the respondent is charging and paying sales tax on Franchise Services in Punjab and charging of Sales Tax by SRB tantamounts to double taxation.

9. The Assessing officer passed order in original assessing the Sindh sales tax of Rs.5,666,043/= and penalty of Rs.283,302/= for the tax periods from January, 2014 to December, 2014 and Rs.1,182,960/= and penalty of Rs.59,148/= for the tax periods from January, 2013 to December, 2013 on account of taxable advertisement services

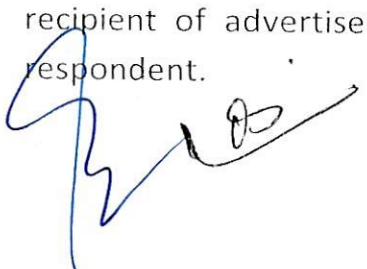


provided in Sindh by respondent to its clients and directed the respondent to deposit the same along with default surcharge.

10. The Assessing officer also passed order in original assessing the Sindh sales tax of Rs.157,113/= and penalty of Rs. &,857/= for the tax periods from January, 2014 to December, 2014 and Rs.108,440/= and penalty of Rs.868/= for the tax periods from January, 2013 to December, 2013 on account of taxable advertisement services received by the respondent in Sindh and directed the respondent to deposit the same along with default surcharge.
11. The said order of the Assessing Officer was challenged by the respondent by way of filing appeal before the Commissioner (Appeals), who allowed the appeal and direct the Assessing Officer to get the SST amount, which actually belongs to SRB transferred from PRA to SRB account, hence this appeal filed by the department.
12. Mr. Irfan Waheed the learned AC submitted that the SRB is aggrieved by the order of Commissioner (Appeals-II) by which while accepting that the tax amount belongs to SRB was deposited with PRA erroneously absolved the respondent from depositing the Sindh Sales tax with SRB and wrongly directed the Assessing Officer to get the amount of Sindh sales tax transferred from PRA to SRB instead of directing the respondent to deposit the amount of Sindh sales tax with SRB.
13. Mr. Irfan Waheed AC-SRB also submitted that at the appellate stage through re-conciliation it was established that the share of the Sindh was deposited by the respondent with PRA and the Commissioner (Appeals) was not justified in absolving the respondent from depositing the tax with SRB.
14. In para 2 and 3 of the written submissions Mr. Irfan Waheed, AC has disclosed the amounts which were already thrashed out by the then Assessing Officer and has no relevancy. Mr. Irfan Waheed further submitted that During appeal proceedings, the respondent accepted the charges of advertisement services received in Sindh and deposited the principal amount of Rs.174,493/- also including penalties and default surcharge, total sum of Rs.270,000/- vide CPR No. S1-20170224-0628-1211088.

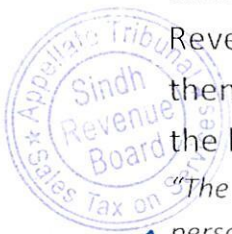


15. In para 2 of written submissions it was stated that despite providing taxable advertisement services tax has not been paid and in Pars 3 it was submitted that despite receiving and taxable advertisement services the same were not declared as purchases in annexure A of the monthly sales tax returns filed with SRB. Whereas, under section 9 of the Act, the liability of payment of Sindh Sales Tax on advertisement services lies upon the respondent being "Withholding agent" under clause (f) of sub-rule 2 of rule 2 of the Sindh Sales Tax Special Procedure (Withholding) Rules, 2014.
16. In continuation to the above submissions the learned AC further submitted that the respondent has admitted that it had deposited SST in PRA with regard to the advertisement services being rendered in the province of Sindh, therefore, it may be declared that sales tax amounting to Rs.6,849,003/- is inadvertently and incorrectly deposited in PRA and should be recovered and to be deposited in Sindh Government's head of account No."B-02384".
17. Mr. Khurram Shahbaz, the learned Advocate for Respondent submitted that appeal under section 61 of the Act was competently filed by the Officer of SRB, but the Tribunal cannot hear the appeal in view of the Notification dated 09.12.2014 by which the Appellate Tribunal was established and provides that Tribunal can heard appeals filed by or against Revenue Board. He also referred to the definition of Board provided under section 2(b) of Sindh Revenue Board Act, 2010.
18. Mr. Khurram Shahbaz has referred Para 6 of the Order in appeal and submitted that it was argued before the Learned Commissioner (Appeals) that the responsibility to withhold the tax in case of advertisement services under the relevant withholding rules lies on the service recipients. He submitted that it appears that the Commissioner (Appeals-II) has overlooked/ignored the said arguments and the legal position with regard to the liability of recipient of advertisement services for the purpose of taxing the respondent.



19. Mr. Khurram Shahbaz also submitted that during pendency of appeal before Commissioner (Appeals) a re-conciliation was prepared by the learned AC which is reflected in Para 11 of the Order-in-Appeal and matter has been resolved. He supported the order in appeal and submitted that if the respondent is directed to deposit the tax with SRB it amounts to double jeopardy and no law allowed imposition of double jeopardy.
20. We have heard the learned representatives of the parties and perused the record made available before us and the written submission filed by the learned AC.
21. From the order in original it appears that the Assessing Officer has not determined the specific Tariff Heading of Second Schedule under which the service involved in this case falls. The determination of Specific Tariff heading is essential for levying tax. Mere mentioning of main Tariff Heading 98.02 in the order in original is not sufficient and against the listing of specific taxable services. An attempt was made on the part of the AC that all services provided or rendered in relation to advertisement are taxable. This argument has no force and if the same is accepted the listing of specific services in the second schedule of the Act becomes redundant. If the intention of the legislature is to tax all services relating to advertisement the listing of specific services in second schedule is not necessary and one liner "all services provided or rendered in relation to advertisement" would be sufficient to tax the services relating to advertisement. The above questions was considered by a learned DB of High Court of Sindh in the reported case of Citibank NA versus Commissioner Inland Revenue and another, 2014 PTD 284, Justice Munib Akhtar, as he then was (now elevated to Supreme Court of Pakistan) speaking for the bench held as under:

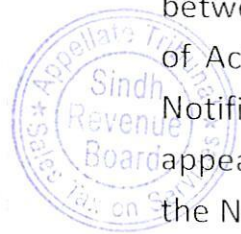
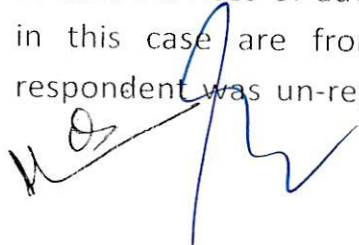
"The attempt by learned counsel to conclude from the enumeration of the persons that all the services provided by them were included in Heading No.98.13 cannot be accepted. This would render otiose the listing of specific services in the various sub-headings". Heading 98.02 "Advertisement" comprised of several services. Before levying of tax determination of specific



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service and tariff heading is very essential. Without first determining the specific service and Tariff Heading tax cannot be levied.

22. From the order in original it also appears that the Assessing Officer has not passed any order in respect of tax periods from January, 2012 to December, 2012, franchise services and the penalty for non-filing of monthly returns, though the same were included in the show cause notice and in the narration of the order in original.
23. Against the order in appeal the respondent has not filed any appeal before the Tribunal against the findings of the learned Commissioner (Appeals-II) that respondent had provided taxable advertisement service in the province of Sindh and from the province of Sindh and that the respondent endorsed that deposit of Sindh sales tax with PRA meaning thereby it do not disputed the findings of the Commissioner (Appeals-II) which attained finality as far as the respondent is concerned.
24. We will first deal with the legal objection raised by the learned Advocate for the appellant. It is true that the Notification Dated 9.12.2014 provides that the Tribunal can hear and decide appeals filed by or against SRB. However Section 61 (1) of the Act provides that where the tax-payer or the officer of the SRB objects to any order passed by the Commissioner (Appeals) SRB, including an order under sub-section (4) of section 58, the tax payer or officer may appeal to the Appellate Tribunal against such Order. The provision is very clear and gives right to tax-payer as well as to the officer of SRB to file appeal before the Tribunal. In case of any contradiction between the provisions of the Notification and the Act the provisions of Act being superior law will prevail and not the provisions of the Notification being subordinate law. The Tribunal is hearing the appeals under section 61 of the Act and not under the provisions of the Notification. The Tribunal can hear the appeals.
25. The respondent got voluntarily registration with SRB on 16.08.2014, before that it was an unregistered person providing and receiving taxable services of advertisement in Sindh. The tax periods involved in this case are from January, 2012 to December, 2014 (The respondent was un-registered person for the periods from January,

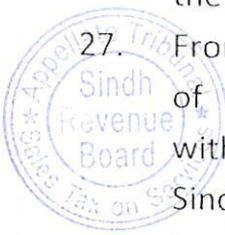
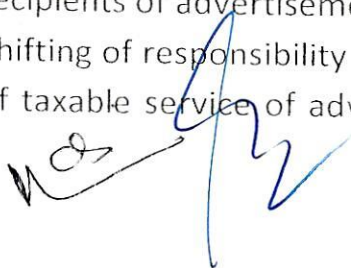


2012 to July, 2014 as it was registered on 16.08.2014). The Assessing Officer in para 17.2. of the order in original stated that under sub-rule (5) of 3 of Sindh Sales Tax Special Procedure (Withholding) Rules, 2011 (Hereinafter referred to as the Withholding Rules) read with clause (f) of sub-rule (2) of rule 1 of the Withholding Rules, the service recipient of the Advertisement services, who are registered with SRB/FBR for the sales tax purposes are defined as a withholding agent and were required to deduct and withhold Sindh sales tax with SRB. The respondent being the service recipient of taxable advertising services within Sindh is liable to withhold the entire amount of Sindh sales tax and to pay the same to SRB. The Assessing Officer has failed to mention any provision of law under which the respondent being a un registered service provider of taxable services of advertisement is liable to deduct and deposit Sindh sales tax with SRB as from the reasoning of the Assessing Officer in Para 17.2. it is the responsibility of the service recipients, who received the taxable advertising services in Sindh, to withhold the entire amount of Sindh sales tax and pay the same to SRB. The Assessing Officer also failed to mention the provision of law under which a provider of taxable services of advertisement deduct and deposit the sales tax with SRB.

26. The respondent has argued before the Learned Commissioner (Appeals) noted in para 6 of the order in appeal that the responsibility to withhold the tax in case of advertisement services under the relevant withholding rules lies on the service recipients. However it appears that the Commissioner (Appeals-II) has overlooked the said arguments and the legal position with regard to the liability of recipient of taxable services of advertisement.

27. From both order in original and order in appeal it appears that none of the forums below have attempted to enquire from the AC, withholding regarding the withholding and subsequent payment of Sindh sales tax to SRB on taxable service of advertisement provided in Sindh, despite that the forums below are aware about the recipients of advertisement services in Sindh.

28. Shifting of responsibility of depositing the Sindh Sales tax on provider of taxable service of advertisement in Sindh without backing of any



law and rule is an apparent illegality on the part of the forums below. The responsibility of payment of tax fixed by the Withholding Rules upon the recipients of advertising services in Sindh cannot be shifted upon the service provider of advertisement services at the whims of the Assessing Officer.

29. In view of the above discussions we are satisfied that the order in appeal is neither proper nor in accordance with the law and Withholding Rules and is not sustainable in law. We therefore, set aside the order in appeal and remand the case to the Commissioner (Appeals-II) to pass the fresh order after hearing the parties strictly in accordance with law and Withholding Rules. The Commissioner (Appeals) before passing the fresh order will first determine the specific Tariff Heading of second Schedule under which the services involved fall. The Commissioner (Appeals) will also decide that in case a taxable service has been provided in Sindh by an unregistered person who is liable to deposit the Sindh sales Tax with SRB. The Commissioner (Appeals) will also call report from AC, withholding regarding the deposit of sales tax if any by the service recipients mentioned in Para 2.2 of the order in appeal and Table I and II of the order in original.
30. The appeal is disposed of and the copies of the order be provided to the learned representatives of the parties.

(Agha Kafeel Barik)
TECHNICAL MEMBER

Karachi

Dated: 30.04.2019

Copies supplied for compliance:-

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

Copy for information to:-

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

(Justice[®] Nadeem Azhar Siddiqi)
CHAIRMAN

Certified to be True Copy

REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on

03/05/19

Registrar

Order Dispatched on

03/05/19

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Registrar