

(Ground side)

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-I

APPEAL NO. AT- 75 /2018

M/s AL-Khalid Agencies for Waste Management.....Appellant

Versus

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

✓ APPEAL NO. AT-97/2018

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

Versus

M/s AL-Khalid Agencies for Waste ManagementRespondent

Mr. Aga Faquir Mohammad, Advocate for Appellant.

Mr. Irfan Ahmad Sohu, AC- SRB for Respondent.

Date of filing of Appeal: 03.10.2018.

Date of hearing: 16.01.2019.

Date of Order: 21.01.2019

ORDER

Justice ® Nadeem Azhar Siddiqi: The appeal mentioned at number 1 has been filed by the appellant/tax payer challenging the Order-in-Appeal



No.163/2018 dated 13.09.2018 passed by the Commissioner (Appeals) in Appeal No. 55/2018 filed by the Appellant against the Order-in-Original No. 90/2018 dated 01.03.2018 passed by the Assistant Commissioner (Mr. Irfan Ahmad Sohu) SRB, Karachi.

The appeal mentioned at number 2 has been filed by the respondent/department challenging the same Order-in-Appeal No.163/2018 dated 13.09.2018 passed by the Commissioner (Appeals) in Appeal No. 55/2018 filed by the Appellant against the Order-in-Original No. 90/2018 dated 01.03.2018 passed by the Assistant Commissioner (Mr. Irfan Ahmad Sohu) SRB, Karachi.

Both the above appeals are disposed of with this common Order as the facts and points of law involved are same.

01.The facts of the case as mentioned in the Order-in-Original are that the appellant is registered with SRB under the Tariff Heading 9822.2000 (Maintenance or Cleaning Services) of the 2nd schedule of the Sindh Sales Tax on Service Act, 2011 (herein after referred as the Act) and chargeable to Sindh Sales Tax on Services @ 10%.

02.It was alleged in the Order-in-Original that the appellant has provided taxable service of Janitorial Services/Maintenance or Cleaning Services valued to Rs.33,934,800/= to M/s Sindh Solid Waste Management Board (hereinafter referred to as SSWMB) during tax periods of June-2017, October-2017 and December-2017 involving Sindh Sales Tax of Rs.3,393,480/= out of which an amount of Rs.678,696/= was deducted by SSWMB as Withholding Agent and deposited the same with SRB.

03.It was also alleged that the respondent through advisory notices dated 31.10.2017, 13.11.2017, 23.11.2017, and 07.12.2017 reminded the appellant for voluntarily payment of SST but appellant failed to comply.

04.That a show-cause notice dated 07.02.2018 was served upon the appellant to explain as to why Sindh Sales Tax amounting to

Rs.2,714,784/= may not be assessed under section 23 of the Act and recovered under along with default surcharge under section 44 of the Act and penalties under serial No. 3, 6(c), 6 (d) and 8 of the Table of Section 43 of the Act, may not be imposed.

05. The appellant filed its reply dated 14.20.2018 (13.02.2018) through its advocate. In the reply it was stated that the appellant is not providing any of the economic activities defined under section 2 (56A). It was also stated that the economic activity of the appellant is providing services of lifting and disposal of all types of garbage/solid waste and includes but not limited to domestic/commercial, garbage, rubbish, tree cutting of any condition and from dry, semi dry or wet as well as debris mixed garbage and inseparable from it using manual force and machinery.

06. The Assessing Officer passed Order-in-Original invoking Tariff Heading 9822.3000 (Janitorial Service) determining the sales tax of Rs.2,714,784/= along with default surcharge and penalty of Rs.135,739/= under Table No.3 of Section 43 of the Act, penalty of Rs.2,714,784/= under Table No. 6(c) of Section 43, penalty of Rs.2,174,784/= under Table No.6 (d) of Section 43 of the Act and penalty of Rs.2,174,784/= for tax fraud under Table No.8 of Section 43 of the Act of the Act.

07. The appellant challenged the said order of the Assessing Officer by way of filing appeal before the Commissioner (Appeals), who while dismissing the appeal changed the Tariff Heading from 9822.3000 to 9822.2000 (maintenance or cleaning services) and also upheld the imposition of default surcharge and penalties.

05.10.2018

08. Mr. Aga Faquir Muhammad Advocate submitted that appellant is providing service of removal of solid waste from streets and other open areas, which activity is neither covered by tariff heading 9822.200 (maintenance or cleaning services) nor tariff heading 9822.3000 (janitorial services) and referred to sub section (56 A) of Section 2 of the

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Act and submitted that no definition of Janitorial service is provided in the Act. He then submitted that the Assessing officer levied tax under tariff heading 9822.3000 (Janitorial Services) whereas the Commissioner (Appeals) has levied tax under tariff heading 9822.2000 (maintenance or cleaning services). He then submitted that neither the appellant has charged Sindh Sales Tax on its invoices nor the service recipients have passed on the Sindh Sales Tax to appellant. He then submitted that the recipient of service (SSWMB) has deposited Sindh Sales Tax due to the notice issued by SRB to them. He also challenged that order-in-appeal is time barred.

23.10.2018

09. The Commissioner (Appeals)-II has filed report dated 18.10.2018 regarding the time consumed in finalizing of appeal. Mr. Aga Faquir Muhammad disputed the report submitted by Commissioner (Appeals)-II and submitted that he had only obtained one adjournment.

13.11.2018

10. Mr. Irfan Sohu submitted that the recipients of service (SSWMB) after withholding 20% of tax has deposited the same with SRB, however, the service provider (appellant) has not deposited any amount with SRB despite receiving 80% of tax amount from recipient of service i.e. Sindh Solid Waste Management Board.

11. Mr. Aga Faquir Muhammad in rebuttal submitted that the appellant has not received any amount of tax from the recipient of service (SSWMB) and placed on record copies of invoices and photocopies of cheques.

13.12.2018

12. Mr. Aga Faquir Muhammad Advocate submitted that he had already filed written arguments and will rely upon the same. In addition he submitted that the adjournments were taken by the tax payer/appellant has to be excluded under sub section (4) of Section 49 of the Act, but the adjournments which were taken by the department representative cannot be excluded.

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Mr. Waqar, AC submitted that as per the record the order in appeal was passed on 71st day and the same is within time. In the calculations the AC has excluded the adjournments obtained by both the parties. From the details provided by learned Commissioner (Appeals) it appears that the dates/days on which the case was partly proceeded were also excluded treating the same as adjournments.

16.01.2019

13. Mr. Aga Faquir Muhammad submitted that he had already filed written arguments and will adopt the same, subject to rebuttal if any. He submitted that the appeal was not disposed of within the mandatory time frame provided in sub-section (5) of section 59 of the Act, 2011. He then submitted that the Commissioner (Appeals) has not recorded in writing, the reasons for passing the order beyond 120 days or extending the period for passing the order in appeal. He then submitted that as per agreement between the appellant and SSWMB the economic activity of the appellant is lifting of backlog of garbage and its transportation from Districts East/Korangi/Malir to landfill sites. He then submitted that the Assessing officer issued advisory notices to the appellant to pay sales tax on providing Janitorial services, which activity was not performed by the appellant. He then submitted that the learned Commissioner (Appeals) misread and misconstrued the definition of maintenance or cleaning services as the service related to repair, maintenance and cleaning and the specialized service consist of the services mentioned in the definition clause and nothing could be added. He also challenged the imposition of default surcharge and various penalties and submitted that the same are not applicable.

14. Mr. Irfan Sohu-AC submitted re-conciliation report and submitted that re-conciliation was prepared on the basis of invoices provided by the appellant for the relevant tax periods. He also placed on record the information received from Sindh Solid Waste Management Board regarding passing on the tax to the appellant.

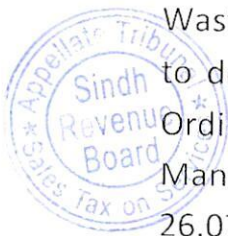
15. Mr. Irfan submitted that the assessment order was rightly passed under tariff heading 9822 3000, but the Commissioner (Appeals) erroneously

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changed the tariff heading to 9822.2000. He submitted that from the definition of Maintenance or cleaning services it is clear that the same is only applicable in relation to service of repair, maintenance and cleaning and by no stretch of imagination the janitorial services can be included in it. He then submitted that as per clause 1.15 of the agreement between appellant and SSWMB the amount mentioned in the invoices are inclusive of all taxes and incidental charges and for that reason the appellant has not separately charged the Sindh Sales Tax in the invoices. He then referred to clause 2.4 of the agreement and submitted that according to this clause the rates and prices mentioned in the tender is inclusive of all taxes including SRB tax. He then submitted that SSWMB has deducted 20% of the invoice amount and deposited the same with SRB and passed on the 80% of the tax amount to the appellant who failed to deposit the said amount with SRB.

16. Mr. Irfan Sohu further pointed out clause 1.7 of the agreement and Bill of quantities attached with the agreement and submitted that from the job description it is clear that the appellant is performing the janitorial services and was rightly taxed. He then submitted that since the definition of janitorial service is not available in the Act the plain dictionary meaning will apply and relied upon the definition of janitorial services available on the website of US LEGAL, (Google). He then referred to a letter dated 29.06.2017 of FBR addressed to Sindh Solid Waste Management Board which provides that the SSWMB was advised to deduct and deposit tax under section 153 (1)(c) of the Income Tax Ordinance, 2001 against payment to contractors of Sindh Solid Waste Management (Janitorial Services). He also referred to letter dated 26.07.2016 addressed by Syed Rizwan Ali, Deputy Commissioner, Unit-20 to the Principal Officer, SSWMB informing SSWMB that being the service recipient of "Janitorial Services" it has to act as a withholding agent. He then submitted that appellant is required to produce withholding certificate for SSWMB.

17. Mr. Aga Faquir Muhammad in exercise of right of rebuttal submitted that the service provided by the appellant is neither covered under tariff heading 9822.2000 nor covered under tariff heading 9822.3000. Mr. Aga



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submitted that Sindh Solid Waste Management Board under the pressure of SRB is deducting tax, which was not objected by the appellant for the reason that in case of objection SSWMB will stop giving work to the appellant. He then submitted that under the clauses of agreement the appellant is not bound to pay tax which is not applicable to it and if some tax has been paid erroneously same is not binding as there is no estoppel against law. He then referred to clause 2.4 of the agreement and submitted that SRB tax is not levied on service provider and under section 9 of the Act read with the rules the service provider can pass on the burden of tax upon the service recipient and that the service recipient cannot pass on its liability upon the service provider. He then submitted that janitorial services include cleaning of building and premises and this job is not included in the agreement. He then submitted that job of the appellant is to lift the garbage/solid waste and to dump the same on the designated place.

18. Mr. Irfan Sohu submitted that SRB has not pressurized Sindh Solid Waste Management Board and other contractors of Sindh Solid Waste Management Board are voluntarily paying tax on the similar nature of service.

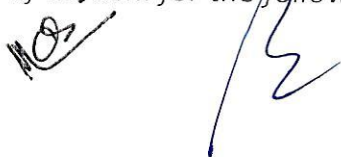
We have heard the learned representatives of the parties and perused the record made available before us.

19. The first point involved in this appeal is whether the services provided by the appellant is taxable, if yes, under which tariff heading i.e. 9822.3000 (Janitorial Services) or 9822.2000 (Maintenance or Cleaning Services).

20. To proceed further it is advantageous to examine the job description provided in the agreement between appellant and SSWMB. The job description provided in the agreement between the appellant and SSWMB is as under:

Clause 1.1 Invitation of tenders

.....having sufficient experience /resources in Lifting, Transportation and disposal of Solid Waste from various DMCs to landfill sites of Karachi for the following assignment of work.



"Lifting of Backlog of Garbage (Solid Waste) and its Transportation and Disposal from Garbage Transfer Stations of DMC East, DMC Korangi, and DMC Malir to landfill sites (Gond Pass and Jam Chakro).

Clause 1.7 Scope of work.

The work under this contract comprises of lifting, transportation, and disposal of all types of garbage/solid waste (excluding hazardous waste) and includes but not limited to domestic/commercial garbage, rubbish, shrub, tree cutting of any condition and from (dry, semi dry or wet) as well as debris mixed with garbage and inseparable from it etc., from Garbage Transfers Stations of DMC East, DMC Korangi and DMC Malir area to landfill sites (Gond Pass/Jam Chakro), including loading/unloading haulage/transportation and weightage from the designated weighbridges.

Clause 1.8 Eligibility Criteria (Please refer to page No. 4 for Minimum Eligibility Criteria)

a) Registration with FBR (NTN)

b) Registration with Sindh revenue Board (SRB):

Note: This is a service contract for "Intra City Transportation" for which no SRB Tax is applicable at present. But Government may impose Service Tax on this service at any time or may demand Service Tax by declaring it "Janitorial service"; hence registration with SRB is mandatory....."

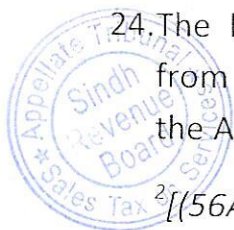
21. From the scope of contract it appears that the job of the appellant comprises of lifting, transportation, and disposal of all types of garbage/solid waste from the areas of DMCs East, Korangi and Malir to landfill sites and not to provide janitorial services or maintenance or cleaning services.

22. The Assessing Officer levied tax by invoking Tariff Heading No. 9822.3000 (Janitorial Services). Since the expression janitorial services is not available in the Act, 2011 the plain dictionary meaning is to be considered. The expression Janitorial Service is also not available in the Oxford Advanced Learner's Dictionary, International Student Edition. The meaning of the word "Janitor" available on Google means custodian, porter, cleaner or caretaker and is a person who cleans and maintains buildings such as hospitals, schools and residential accommodation. The other meaning is one who keeps the premises of building (such as an

apartment or office) clean, tends the heating system and makes minor repairs. The word "Janitor" defined in Feroze Sons Concise English to English and Urdu Dictionary as "Door Keeper", (darban, pehraydar, chowkidar). The meaning of expression "Janitorial services" available on Google provides that service relate to commercial property cleaning, including professional offices, educational, medical and industrial business cleaning. Some commercial services can include maintenance of property management service. The meaning of the word "Janitorial" provided in the USLEGAL web site provided by the learned AC provides that a Janitorial Contract is a contract entered by Janitorial Companies to provide variety of cleaning services for commercial business. They may change the trash, clean restrooms, and vacuum floors or perform any number of other tasks involved in keeping a building clean.

23. From the perusal of the above definitions it appears that the janitorial services is confined to clean the buildings and not to lift and transport the garbage from the streets and other open areas. As per section 3 of the Act a taxable service is a service listed in the second schedule of the Act. The lifting and transportation of garbage from one place to other is not listed in the second Schedule as a specific service. From perusal of clause 1.8 it is clear that at the time of execution of agreement there was no tax levied in this regard.

24. The learned Commissioner (Appeals) has changed the Tariff Heading from 9822.3000 to 9822.2000 (Maintenance or Cleaning Services), which the Act defined as under:



²[(56A) **"maintenance or cleaning services"** means the services provided or rendered in relation to repair, maintenance and cleaning, including specialized cleaning services such as disinfecting, exterminating or sterilizing, of—

- (i) Office equipment, office buildings, commercial or industrial building and premises thereof;
- (ii) Commercial complexes including multiplexes, shopping complexes, office complexes, exhibition centers, apartment or residential complexes; and

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(iii) *Factories and the plants or machinery or equipment of such factories and, elevators, escalators, tanks or reservoirs of such factories or of office or commercial or industrial buildings or commercial complexes,*

But does not include such services in relation to agriculture, horticulture, animal husbandry, and dairy farming;]

25. The Learned Commissioner (Appeals) while changing the Tariff Heading from 9822.3000 to 9822.2000 has held as under:

*"The above definition is a hybrid definition in a sense that first part starts with the word "means" and second part enlarge the scope of "in relation to maintenance and cleaning" because the word "include" has been used by the legislature. The former part provides that maintenance or cleaning services means the services provided in relation to cleaning including specialized cleaning services such as disinfecting, exterminating or sterilizing of premises. There is no denial that the appellant has provided aforesaid services and received the consideration from its client in relation to or in furtherance or maintenance or cleaning. The latter part starts with "including" which means the scope of "in relation to specialized cleaning services" has been enlarged by the legislature and there are plethora of judgment of superior courts of Pakistan wherein it has been held that the word 'include' is generally used in interpretation of clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute and when it is so used words or phrases must be construed as comprehending, not only such things, as they signify according to their natural import, but also those things which the interpretation clauses declared that they shall include. Therefore, the legislature has provided the examples after the word "include" and these examples contain the words "**specialized cleaning services**" which duly covers the economic activities performed by the appellant".*

26. In our opinion the learned Commissioner (Appeals) has enlarged the scope of the definition of "maintenance or cleaning" to include the service of lifting and transportation of garbage for the purpose of taxing the appellant. The learned Commissioner (Appeals) has erroneously held that "**specialized cleaning services**" duly covers the economic activities performed by the appellant. The definition of "maintenance or cleaning" clearly provides that the same is applicable to the premises and areas defined therein and the scope of the definition cannot be enlarged to tax

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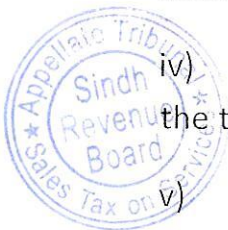


some other service not included in the definition. The Commissioner (Appeals) by enlarging the scope of definition of "maintenance or cleaning" cannot include lifting and transportation of garbage into it. We are satisfied that the appellant is not providing the service of "maintenance or cleaning", TH 9822.3000.

27. The principles of interpretation of fiscal statutes are well settled. Some of these principles mentioned below have been reiterated in the recent judgment of the Supreme Court in the case of M/s Pakistan Television Corporation versus Commissioner Inland Revenue (Legal) LTU Islamabad, Civil appeal No. 1509/2016 with reference to reported judgment in M/s Pakistan Television Corporation versus Commissioner Inland Revenue (Legal), Islamabad and others. ,

- i) There is no intendment or equity about tax and the provisions of a taxing statute must be applied as they stand.
- ii) The provisions creating tax liability must be interpreted strictly in favour of the taxpayer and against the revenue authorities.
- iii) Any doubts arising from the interpretation of a fiscal provision must be resolved in favour of the tax payer.

iv) If two treasonable interpretations are possible, the one favoring the tax payer must be adopted.



- v)
- vi)
- vii)
- Viii).....

28. In the reported judgment of Al-Hilal Motors Stores versus Collector, Sales Tax and Central Excise (East) 2004 PTD 868 (DB Sindh High Court) it has been held that "It is the established principle of the law of taxation that an assessee can be subjected to tax under a provision of law, which is unambiguous and clear.

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29. The SRB can neither declare any other service as "janitorial service" nor enlarge the definition of services listed in the Second Schedule of the Act. However the legislature by legal fiction or deeming clause can include lifting and transportation of garbage from one place to other in the definition of "janitorial services" or "cleaning or maintenance". In the absence of any deeming provision the revenue is required to establish that a transaction falls within the parameters of service listed in the Second Schedule of the Act. If we examine the facts of this case on the above touch stone the activity performed by the appellant by implication or intendment can neither be treated as "Janitorial Service" nor "Cleaning or Maintenance Service".

30. The SSWMB has deducted 20% of Sindh Sales Tax from the amount mentioned in the invoices of the appellant and deposited the same with SRB despite the fact that the appellant has not separately shown the Sindh Sales Tax on the invoices. Mere erroneous deduction of Sindh Sales Tax from the invoice amount of the appellant does not make the appellant liable to pay the tax on the service which is not taxable. The letter of FBR referred to by the learned AC is also not relevant and the same is for deduction of Income Tax from the Contractors. It appears that the SSWMB is deducting the tax from the invoices amount of the appellant in view of letter dated 26.07.2016 addressed by Syed Rizwan Ali, Deputy Commissioner, Unit- 20 to the Principal Officer, SSWMB misinterpreting the expression "janitorial services". By this letter SRB informed SSWMB that being the service recipient of "Janitorial Services" it has to act as withholding agent. The SSWMB without properly assessing the matter has started withholding Sindh Sales Tax and deposited the same with SRB. Even if the other contractors of SSWMB are paying Sindh Sales tax to SRB without any objection will do not bind the appellant to pay the tax on a service which is not taxable.

31. The learned Commissioner (Appeals) while dismissing the appeal maintained the penalties imposed by the Assessing Officer without considering whether the same can be imposed or not and while upholding the penalties has failed to consider that the department has failed to establish mensrea. In our various orders relying upon the



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judgments/orders of superior courts we have held that penalties and default surcharge cannot be imposed unless the department establishes mensrea and contumacious default on the part of tax payer. It appears that the learned Commissioner (Appeals) not only ignored the orders of this Tribunal but also ignored the judgments/orders of superior courts which are binding upon the learned Commissioner (Appeals) and ignoring the same is amounts to the Contempt of Superior Courts.

32. The Assessing Officer imposed penalty of Rs.135,739/= under Table No.3 of Section 43 of the Act, penalty of Rs.2,714,784/= under Table No. 6(c) of Section 43, penalty of Rs.2,174,784/= under Table No.6 (d) of Section 43 of the Act and penalty of Rs.2,174,784/= for tax fraud under Table No.8 of Section 43 of the Act of the Act.


33. Penalty under Table No.3 of Section 43 of the Act can be imposed subject to establishing mensrea as held as held in Pakistan versus Hard Castle Waud, PLD 1967 Supreme Court 1 and Commissioner Inland Revenue versus Habib Bank limited, 2007 PTD 901 (Sindh High Court). Penalty under Table No. 6(c) and 6 (d) Section 43 of the Act can be imposed if the department through convincing evidence establishes mensrea and that the person knowingly and fraudulently committed acts and omission mentioned in the provision. Penalty under Table No.8 of Section 43 of the Act can be imposed where any person commits, cause to commit or omit to commit tax fraud and department through convincing evidence establishes that the same has been done knowingly, dishonestly or fraudulently and without any lawful excuse as held in the case of Al-Hilal Motors Stores versus Collector Sales Tax and Central Excise, PTD 2004 868 (DB, Sindh High Court). From the perusal of the order in original it appears that the Assessing Officer before imposing penalty has totally failed to discuss the presence of mensrea.

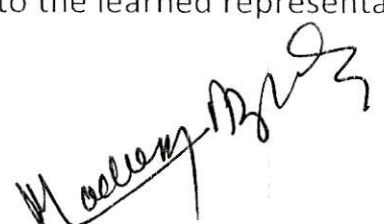
34. In view of the above both the order in original and order in appeal are setaside. Appeal No. 75/2018 filed by the tax payer is allowed and Appeal No. 97/2018 filed by the department is dismissed.

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35. Since the appeal has been decided on merits no discussion on the other points raised by the learned representative parties are necessary.

36. The copy of this order may be provided to the learned representatives of the parties.


(Agha Kafeel Barik)
TECHNICAL MEMBER


(Justice[®] Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi

Dated: 21.01.2019

Certified to be True Copy

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.


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD