

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-I

APPEAL NO. AT- 77/2018

APPEAL NO. AT- 81/2018

APPEAL NO. AT- 84/2018

M/s Shabbir International.....Appellant  
M/s Atherton and Imrooze.....Appellant  
M/s Imrooze Traders.....Appellant

**Versus**

The Commissioner (Appeals), SRB and another, Karachi.....Respondent

Mr. Mohammad Yousuf, Advocate for Appellant.

Ms. Shumaila Yar Muhammad, AC-SRB for Respondent.

Date of Filing Appeal: 12.10.2018

Date of hearing: 03.0-1.2018, 07.01.2018 and 8.01.2018

Date of Order: 27.02.2019

ORDER

**Justice ® Nadeem Azhar Siddiqi:** By this common order we intend to decide appeals three in number having common facts and points of law, filed by various appellants (Indenters) against the Order of their Compulsory Registration under section 24B of the Sindh Sales Tax on



Services Act, 2011 (hereinafter referred to as the Act). Assessment of tax and imposing of default surcharge and penalties.

01. The appeal No. 77/2018 has been filed by the appellant challenging the Order-in-Appeal No.182/2018 dated 01.10.2018 passed by the Commissioner (Appeals) in Appeal No. 160/2018 filed by the Appellant against the Order-in-Original No. 675/2018 dated 25.06.2018 passed by the Assistant Commissioner (Ms. Shumaila Yar Muhammad) SRB, Karachi.

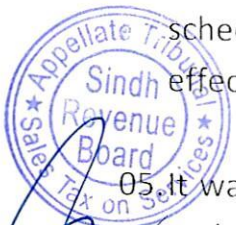
02. The appeal No. 81/2018 has been filed by the appellant challenging the Order-in-Appeal No.194/2018 dated 03.10.2018 passed by the Commissioner (Appeals) in Appeal No. 200/2016 filed by the Appellant against the Order-in-Original No. 480/2016 dated 08.06.2016 passed by the Assistant Commissioner (Ms. Rafia Urooj).

03. The appeal No. 84/2018 has been filed by the appellant challenging the Order-in-Appeal No.195/2018 dated 02.10.2018 passed by the Commissioner (Appeals) in Appeal No. 201/2016 filed by the Appellant against the Order-in-Original No. 479/2016 dated 07.06.2016 passed by the Assistant Commissioner (Ms. Rafia Urooj)

04. The facts of all three cases as mentioned in the Order-in-Original are that the appellants are engaged in providing or rendering taxable services of Indenters falling under Tariff Heading 9819.1200 of the 2<sup>nd</sup> schedule of the Act and chargeable to Sindh Sales Tax on Services effective from 01.07.2015 @ 14%.

05. It was alleged in the Order-in-Original that the appellants are providing and rendering indenting services without registration under section 24 of the Act despite SRB letters.

06. It was also alleged that from perusal of the data/record provided by J.S. Bank Limited/State Bank of Pakistan revealed that the appellant in Appeal No.77/18 has received indenting commission of Rs.93,827,480/=



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during the tax periods from July, 2015 to November, 2017 involving sales tax amount of Rs.10,300,468/=.

07. It was also alleged that from perusal of the data/record of State Bank of Pakistan revealed that the appellant in Appeal No.81/18 has received indenting commission during the tax periods from July, 2015 to December, 2015 involving sales tax amount of Rs.1,921,080/=.

08. It was also alleged that from perusal of the data/record of State Bank of Pakistan revealed that the appellant in Appeal No.84/18 has received indenting commission during the tax periods from July, 2015 to December, 2015 involving sales tax amount of Rs.1,066,136/=.

09. A show-cause notice dated 06.06.2018 (Appeal No. 77/18), 07.04.2016 (Appeal No. 81/2018) and 07.04.2016 (Appeal No. 84/2018) was served upon the appellant to explain as to why it should not be compulsorily registered under section 24B of the Act and why the Sindh sales tax may not be assessed along with default surcharge and penalties under various provisions of the Table of Section 43 of the Act.

10. The appellant filed its reply dated 22.06.2018 (Appeal No.77/18), 15.04.2016 (Appeal No.81/2018) and 15.04.2016 (Appeal No.84/2018). It was stated that the Sindh sales tax is an indirect tax and is required to pass on to the end consumer, which cannot be passed on to foreign clients. It was also stated in the reply that the sales tax on services of indenters are ultra vires of the provisions of Article 8, 18, 25, 77 and 163 of the Constitution of Pakistan, 1973. It was also submitted that services provided or rendered by an indenter are in their nature of export of services and referred Entry No. 27 and 49 of Part-I of the Fourth Schedule to the Constitution and it was also submitted that specific exemption/zero rating has been granted to services falling under Tariff Headings 9815.6000 (software or IT bases system development consultant) and 9815.3000 (Accountants and auditors).

*Mos*



11. The Assessing Officer after hearing passed Order of Compulsory Registration of the appellant under section 24B of the Act for the service falling under Tariff Heading 9819.1200 (Indenters) and also imposed penalty of Rs.100,000/=. The Officer also ordered for recovery of tax of along with default surcharge. The Officer also imposed penalty of for non-filing of sales tax returns and also imposed penalty for non-payment of tax amount and in case of non-compliance of the order for compulsory registration to pay penalty of Rs.100,000/=.

12. The all the three appellants challenged the said order by way of filing appeal before the Commissioner (Appeals), who maintained the order in original in toto and waived the penalties on the condition that appellant will pay tax and file returns within seven days, hence this appeal.

13. On 03.01.2019 Mr. Mohammad Yousuf Advocate for the appellant submitted that Tariff Heading 9819.1200 (Indenters), sub section (51A) of section 2 of the Act was effective from 10.07.20.15 and rule 41B of the Sindh Sales Tax on Services Rules, 2011 was effective from 4<sup>th</sup> August, 2015. He then referred section 2 (51A) of the Act and submitted that all principals of the appellants are foreign entities having no office or place of business in Sindh and are not subject to laws of Sindh or Pakistan and the Appellant is not performing any act as provided in the Section 2(51A) of the Act, 2011. His further contentions are as under.

13.1. He then referred to Item 27 of Part I of the Fourth Schedule (Federal Legislative List) to the Constitution of 1973 and submitted that Import and export, trade and commerce are under domain of Federal Government and Provincial Governments cannot legislate in this regard and even if it is assumed that the appellant is providing services same is export of service and tax can be levied by Federal Legislature. He also submitted that the tariff heading 9819.1200 is an encroachment upon the right of federation to legislate under entry No. 27.

13.2. He then referred Item No. 49 of Part I of the Fourth Schedule (Federal Legislative List) to the Constitution of 1973 and submitted that this entry deals with goods and by an exception (except Sales Tax on Services) the sales tax on services was given under the domain of the Provinces and



M. O. S.

that it is an independent entry as held by the Sindh High Court in the case of Pakistan Freight and Forwarder Association. Under exception the Provinces can only tax the services which do not relates to entry No.27. Alternatively he submitted that the tax can only be levied if the service is provided with in Sindh. No services have been provided in Sindh. For argument sake if the indenting is treated as a service it was provided from Sindh but not in Sindh as the service recipient is stationed abroad.

13.3. He then referred to the Preamble of Sindh Sales Tax on Services Act, 2011 and submitted that as per preamble the service is to be received or consumed in Sindh. Whereas since the service recipients are stationed abroad and neither the services provided in Sindh nor same is consumed in Sindh no tax is payable as the person who is to be taxed should come within the definition as provided in section 2 (63) and should be present in Sindh.

13.4. He then submitted that Sindh Sales Tax has been levied in VAT mode and the burden of tax has to be passed on to the recipient of service or to the end consumer. Under law the service provider is not liable to take upon itself the burden of payment of tax and is only liable to charge tax and on receipt of tax from the recipient to deposit the same with SRB. In this case since the service recipient is stationed abroad and is not subject to Pakistani laws the burden of tax cannot be passed on.

13.5. He also submitted that indenters are neither a broker nor a commission agent. The Job of indenters is to represent its principal in promotion of goods. Alternatively submitted that even if it is treated as a service it is export of service which is a subject falling within the domain of federation and province cannot legislate.

13.6. He further submitted that earlier the indenters were not subject to Federal Excise Duty and were also not subject to tax under the Sindh Sales Tax Ordinance 2000.

13.7. He also Referred to Para 5.1 of Order-in-original and submitted that the contents are not correct as appellant does not act on behalf of foreign principal.

13.8. He then referred to Para 5.1, page 29 of OIA and submitted that the Commissioner (Appeals) has wrongly held that appellant connects the foreign principal to local consumers/customers.

*MOS*



13.9. He also submitted that the appellant received all remittance in foreign currency through State Bank/banking channel and in case government of Sindh insist upon levying service tax on export of service the indenters will stop bringing the foreign exchange in the Country and that this tax is hurting the Pakistan foreign exchange earnings by the indenters

13.10. He then submitted that the Tribunal has to see whether a taxing event has been made out or not. Simply putting an entry in the Second Schedule does not bring the entry within ambit of charging section and Referred to Para 71 and others of the reported judgment of Sindh High Court, 2017 PTD 1, Pakistan Freight Forwarders Association Vs SRB on the point that provinces cannot legislate in respect of matters falling under federal legislative list. He also referred to reported case of Civil Aviation Authority of the Sindh High Court (2013 PTD 2048 CAA V SRB) and the Supreme Court of Pakistan (2017 SCMR 1344 SRB V CAA) on the point that the matters falling under federal legislation list cannot be taxed by provinces. He also referred to the reported judgment of Sindh High Court in the matter of tax on rental of properties case.

14. On 08.01.2019 Ms. Shumaila Yar Muhammad the learned AC submitted that the Indenting Service has been initiated in Sindh as the service provider is located in Sindh and the liability is upon the service provider to deposit tax under section 3 read with section 9 of the Act.

14.1. She then submitted that Entry No.27 deals with the Import and Export of Goods and not services and this entry is not relevant to the present case, the SST Act is dealing with the services only and only service of indenting has been taxed as the appellant is providing service within Sindh. After 18<sup>th</sup> amendment the provinces were authorized to tax services. The indenting service is part of 1<sup>st</sup> Schedule since inception of SST Act, 2011 and was part of second Schedule since 2015 and under an exception to Entry No.49 power of taxing service came within domain of provinces and was rightly taxed.

14.2. She then submitted that irrespective of where the service recipient resides since the service is originated in Sindh and provided in Sindh by the registered person from its place of business in Sindh within meaning of section 3 of the Act read with sub-section (64) of section 2 of the Act



and Section 4 of the Act is applicable as the economic activity is originated in Sindh.

14.3. She also submitted that if the Sindh sales tax was levied in VAT mode it does not mean that if the service provider is unable to pass the burden of tax to end user or service recipient the tax cannot be charged or payable. The appellant may pass on the tax to its principal stationed abroad and under law there is no restriction. The appellant cannot pass on tax to principal for the reason that according to Agreement the appellant is responsible to pay all government taxes. There is no binding in law for appellant to always pass on the burden of tax upon end user/service recipient.

14.4. She then submitted that it is not correct that appellant is exporting service. The Federation levied 5% Income Tax upon Indenters on their intending commission under section 164(2) of Income Tax Ordinance, 2001, whereas on exports the Federation charges 1% Income tax under section 154 of Income Tax Ordinance, 2001. The appellant is getting commission after deduction of 5% income tax. From this fact alone it is clear that the indenting service is not treated as export of service and by no stretch of imagination it can be said that appellant is exporting service.

14.5. She further submitted that if earlier the tax was not charged upon indenters this will not affect the levy of service tax under 2011 Act. The legislature has the power to tax or not to tax a service. Indenting service is part of 1<sup>st</sup> Schedule since inception and Second Schedule since July, 2015.

14.6. She then submitted that and "Agent" means a person who represent or acts for another and Commissioner (Appeals) has used the word "Agent" under this context and in Agreement words principal and agent were used.

14.7. She also submitted that tax has been rightly levied under proper authority and that some other indenters are paying Sindh sales tax on service without any objection and hesitation and some are not paying on flimsy grounds. She then submitted that the rate was reduced from 13% to 3% effective from 1<sup>st</sup> July, 2017, subject to limitations and conditions prescribed in the said notification, which is available in the publication of

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the Act by (9<sup>th</sup> Edition page No428, Notification dated 05.06.2017 effective from 1<sup>st</sup> July 2017).

14.8. She then submitted that this service is also part of all other provincial statutes. The province has not encroached upon the Federal legislative power. Tax on service is no more under the domain of Federation. The legislation was made under exception of Entry No.49 read with Article 141 and 142(i) of the Constitution.

15. In rebuttal to the contention of learned AC Mr. Mohammad Yousuf, advocate for the appellant submitted as under:

15.1. He referred to item No.27 of the Federal Legislative List, Fourth Schedule of the Constitution and submitted that Entry No.27 gives powers to Federal legislature to legislate in respect of import and export and this also includes export of service. In Article 27 the words Import and Export were mentioned without mentioning goods or service therefore service can be read after Import and Export.

15.2. He submitted that there is no dispute that appellant received consideration as Indenter in foreign currency through banking channel. In some cases/transactions consideration was received with or without providing any service.

15.3. He then submitted that the Indenter's job is to introduce the products / goods of its principal and to act within entire Pakistan. The transaction is between foreign person and a local person and the fees includes all the cost of maintaining office, advertising, and all other allied expenses which the Indenter is required to incur under agreement (introduction, promotion and sale of products) and the proposed tax to be charged without providing any allowance/deductions in this regard.

15.4. He referred Article 32 and submitted that levying of proposed tax on indenting service is against and in violation of various International treaties, conventions and agreements and is in violation of Article 32 and amounts to double taxation.

15.5. He referred to Definition under section 2(51A) of the Act effective from 10<sup>th</sup> July, 2015 and submitted that the service provided by appellant to its Principal stationed abroad does not come within ambit of indenter.

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He then submitted that S-3 and S-8 are not applicable as no service has been provided.

15.6. He then submitted that the nature of this tax is in VAT mode and is to be passed on to the consumer. The service provider/indenter is not liable to pay tax in VAT mode from its own pocket. The Indenter being a tax collector on behalf of department is required to collect tax from recipient of service and to deposit the same with SRB. Consumer can be an importer or exporter. The importers were withholding agents but they were never asked about their obligation to act as withholding agent. Since the Indenter if assumed to be a service provider and cannot pass on the tax to end consumer the recipient being alien the tax cannot be levied on a service provider.

15.7. He further submitted that historically there was no tax on Indenters and this is first time the tax was levied under Sindh Sales Tax on services. He also submitted that no excise duty was levied on service of indenter in 1969-1970 when it was first levied. He also submitted that even no tax was levied on indenter through Sindh Sales Tax on Services Ordinance 2000 and no tax was also levied on indenter till June, 2015 through Sindh Sales Tax on Services Act, 2011.

15.8. He then referred to entry 9 and 32 of the Fourth Schedule of the Constitution and submitted that the indenter received its commission in foreign exchange and to tax the foreign exchange is within domain of Federation.

15.9. He then submitted that in the agreements the clauses relating to Agent obligation provides that, the Indenter will get the commission without putting in any efforts. The rule is first sale and then commission. Invoices are between importer and exporter and the Indenter does not figure in those invoices.

15.10. He also submitted that if some other Indenters are paying Sindh sales tax this will not bind other Indenters to pay tax. There is no estoppel against law and the appellants cannot be pressed or forced to pay a levy which the appellants are not liable to pay.

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

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17. The main contention of the learned advocate for the appellant is that the taxable services provided or rendered by intenders are not within the domain of the Province and that the services provided or rendered by the indenters are not covered by the provisions of the Act, 2011. The departmental representative submitted that after 18<sup>th</sup> amendment in the Constitution of Pakistan, 1973 the power to tax services is within domain of the provinces and service of an intender is a taxable service under the Act, 20011. To resolve this controversy it appears necessary to examine the definitions of the "indenter", "taxable service" and "service or services" provided under section 2 of the Act, 2011.

*"(51A) Indenter means a person who is representative for a non-resident person or a non-resident company or a foreign product or service and who gets a consideration in the shape of commission, fee, remuneration or royalty on transection, irrespective of whether the transaction has taken place out of his effort, consent or otherwise".*

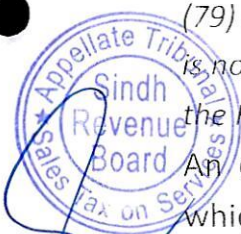
18. The "taxable service" has been defined in sub-section (96) of section 2 of the Act of 2011 as under.

*"(96) taxable service: shall have the meaning given under section 3;*

19. The "service or services" has also been defined in sub-section (79) of section 2 of the Act, 2011 as under:

*(79) service or services means anything which is not goods or providing of which is not a supply of goods and shall include but not limited to the services listed in the First Schedule of the Act".*

An explanation is attached to sub-section (79) of section 2 of the Act which provides that "Explanation--A service shall and continue to be treated as service regardless whether or not providing thereof involves any use, supply or consumption of any goods either as an essential aspect of such providing of service". The purpose of explanation is to facilitate proper understanding of a provision of law and to serve as guide line and not to enlarge the meaning of provision of law.



*MS*



20. According to Section 3 of the Act the taxable service is a service listed in the Second Schedule of the Act, which is provided by a registered person from his registered office or place of business in Sindh.
21. Economic activity is also defined in Section 4 of the Act and provides that *"an economic activity means an activity carried on by a person that involves or is intended to involve the provision of service to another person and includes"*:
22. Tariff Heading 9819.1200 (Indenters) is the part of Second Schedule of the Act, 2011. 98.19 provide *"services provided or rendered by specified persons or business"*.
23. After 18<sup>th</sup> amendment of the Constitution of Pakistan, 1973 Entry No. 49 has been amended and right to tax services has been vested in the Provinces. Mr. Yousuf submitted that under exception the Provinces can only tax the services which do not relates to entry No.27 of Fourth Schedule. He also submitted that In Article 27 the words Import and Export were mentioned without mentioning goods or service therefore service can be read after Import and Export. Alternatively he submitted that the tax can only be lived if the service is provided with in Sindh. Entry No. 27 deals with import and export. Despite the fact that word goods is not mentioned in the Entry No. 27 the word service or services cannot be read in the Entry on the plane rule of interpretation that courts cannot add any word in the law as the courts have the jurisdiction to interpret the law as it exists.
24. In the reported judgment of Sindh High Court in the case of Pakistan International Freight & Forwarders Association 2017 PTD 1, in relation to Entry No. 49, has held that *"58. In our view, the "exception added to entry No. 49 is not a "true" exception. Rather, it is an independent provision in its own right. It has two primary effects. Firstly, and most importantly for present purpose, it recognizes expressly on the constitutional plane that a taxing power in respect of taxing event of rendering or providing of services vests in the Provinces. From this passage it is clear that the provinces are vested with power to tax providing or rendering of services.*

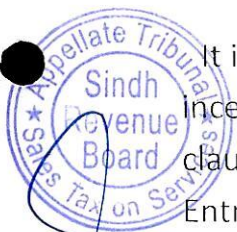
*M. S. J.*

25. From reading the above definition of an "indenter" it appears that indenter is the representative for the non-resident person or company or a foreign product. The job of the indenter is to represent its clients and products within the territory in which he functions. The definition is exhaustive to cover the services provided or rendered by indenters. It is not disputed that the appellant is working and representing its non-resident clients and foreign products and is providing service of indenter in Sindh. It is also not disputed that the appellant received consideration in the shape of commission, fee, remuneration or royalty on transaction, irrespective of whether the transaction has taken place out of his effort, consent or otherwise.

26. The learned A.R has referred to entry No. 27 of fourth Schedule Para (15.1 above) with the argument that import & Export across Customs frontiers, including that of goods as well as services fall solely in the domain of the Federation; thus outside preview of provincial tax. Entry 27 reads as under. However, Entry 27 is not to be read in isolation. It is one of the 77 entries of fourth Schedule which lays down the Federal legislative powers under Article 70 (4) of the constitution.

There is Entry 49 which empowers the Federation to levy taxes on sales and purchases of goods imported, exported, produced, manufactured or consumed, with the exception of "Sales Tax on Services".

It is pertinent to note that while Entry 27 is part of Fourth Schedule since inception i.e. 1973, Entry 49 was substituted in 1976 and an exception clause was inserted on 20<sup>th</sup> April, 2010 with the 18<sup>th</sup> Amendment. Thus Entry 27 is to be read with Entry 49 with its exceptions clause and the simple interpretation will be that while the Federation has regulatory power over import and export business across Customs frontiers and can also impose tax on sales and purchases of imported and exported goods. Its powers have been circumscribed in respect of imposition of Sales Tax on Services. So if there is a situation where services are imported (as in the case of franchising) or exported (as in the case of an indenter) these will fall outside the domain of the federation, and in the ambit of the provinces.



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Even otherwise as a principle of interpretation of statutes an amendment or a provision of law promulgated later in time than an existing provision of law would prevail over the previous provision of law on the same subject. Since Entry 49 is dated 13<sup>th</sup> September, 1976 whereas its exception clause was inserted on 20<sup>th</sup> April, 2010 it over rides Entry 27 which dates back to 1973.

The learned counsel has also taken the argument that under entry No. 9 read with entry No. 32 tax on foreign exchange earning falls within the domain of the Federation and since the appellant, an indenter receives its Commission in foreign exchange it cannot be taxed by the provinces. Here the argument of the learned A.R is misplaced. What he is submitting about are foreign exchange receipts which are the income of an indenter and there is no doubt that it is subject of Federal Income Tax. What the Provinces are authorized to tax is the value of the consideration for the services provided or rendered by the indenter. Since these are quantified in terms of foreign exchange and are synonymous with the receipts or income the argument that it is income falling within the domain of federation is incorrect.

27. The learned Assessing Officer has dealt all the contentions raised by the learned advocate for the appellant in para 10 to 15 of the order in original and rightly concluded that the appellant is providing the service of indenter.

28. The learned Commissioner (Appeals) also dealt all the contentions raised by the learned advocate for the appellant in order in appeal and on page 13 of the order has held that: *"In those paras I correctly found that in the case in hand the activity of the appellant is based on the agreement which is an arrangement for providing services and by existence of this pure arrangement the sale and purchase of goods takes place between the foreign principal and the local customers and not between the appellant and foreign principal. The duty of the appellant as per the agreement is to represent foreign principal and to facilitate the seller and buyer of goods. Therefore, there is a clear line of separation drawn between the seller and buyer and also between the appellant and the foreign client"*. In our view the findings of Commissioner (Appeals)



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do not suffer from any illegality and infirmity and the conclusion has been rightly drawn.

29. Reading the above quoted provisions (Section 2 (51A), (96), (79), section 3 and 4 of Act, 2011 read with Tariff Heading 9819.1200 ) together make it clear that services provided or rendered by the indenter are taxable services according to Act of 2011.
30. The appellant was compulsorily registered under section 24B. Section 24 of the Act provides that registration will be required for all persons who are resident and provide services listed in the second schedule from their registered office or place of business in Sindh. Section 24B provides that if a person is required to be registered under the Act, 2011 and that person has not applied for registration, the officer of the SRB shall, after such enquiry as he may deemed fit, register the person through an order to be issued in writing and such person shall be deemed to have been registered from the date he became liable to registration. The appellant is a resident person and is providing and rendering service of indenter with in Sindh and since the appellant failed to get registration it was rightly compulsory registered under section 24B of the Act of 2011.
31. The Assessing officer has imposed penalty of Rs.100,000/= under Serial No.1 of Table of Section 43 of the Act for non-registration. The provision provides that penalty can be imposed if any person who is required to apply for registration under this Act fails to make an application for registration before providing or rendering taxable services, such person is liable to pay penalty of Rs.10,000/- or five percent of the amount of Sales Tax. It was further provided that in case of non-compliance of compulsory registration the minimum penalty should be Rs. 10,000/-. It has not been discussed in the order in original as to what is the compliance (requirement) of compulsory registration, which the appellant failed to comply. It was also not discussed in the order in original why maximum/higher penalty of Rs.100,000/= was imposed instead of minimum/lessor penalty of Rs.10,000/=. When two types of penalties are provided under law the Assessing Officer is duty bound to justify the





imposition of maximum penalty. The two types of penalties are provided to cater different situations. It has not been discussed under which situation lesser penalty can be imposed and under what situation the maximum penalty can be imposed.

32. In view of the above we are satisfied that both order-in-original and order-in-appeal to the extent of imposing maximum/higher penalty of Rs.100,000/= suffer from legal infirmities and are not tenable under law, consequently the imposition of penalty of Rs.100,000/= is set-a-side. The appellant is liable to pay penalty of Rs.10,000/= only.

33. The Assessing Officer has also imposed penalty for non-filings of monthly returns under serial No.2 of Section 43 of the Act amounting to Rs.6,090,000/=. The Assessing Officer failed to give the period, rates and other details for imposing such a heavy penalty. The presence of mensrea is necessary for imposing penalty. The Assessing Officer has failed to establish mensrea. The penalty is therefore setaside for want of details and mensrea.

34. The Assessing Officer has also imposed penalty for non-payment of tax under serial No.3 of Section 43 of the Act and default surcharge under 44 of the Act. The presence of mensrea is necessary for imposing penalty and default surcharge. The Assessing Officer has failed to establish mensrea on the part of the appellant. The penalty and default surcharge is therefore setaside for want of mensrea.

35. In these cases the assessment order under section 23 of the Act was also passed. The assessment order was passed only on the basis of data/record provided by the bank. The assessment of tax only on the basis of entries available in the bank statement/account without any supporting material to link the said entries with the receipts relating to providing or rendering service is illegal and cannot be sustained.

36. In the reported judgment of AL-Hilal Motors versus Collector Sales Tax, 2004 PTD 868 a learned DB of the Sindh High Court has held that "It is

*H. J.*

*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. There is no room for any intendment and there is no presumption as to tax. In the absence of any deeming provision the Revenue is required to establish that a transaction falls within the parameters of taxable supplies or in furtherance of any taxable activity, failing which the sales tax imposed on the basis of some assumption or presumption not warranted in law, shall always be struck down. In the present appeals it is apparent that except discovering certain cash-credits entries in the books of the appellants, the Revenue Officers have not been able to produce any material to show that the said amounts are in any way linked with the taxable supplies or with any taxable activities or represent an amount on account of any business activity”.*

37. Though the above referred reported case is in respect of Sales Tax Act, 1990 but the principle is fully applicable in this appeal also. To assess the tax the Assessing Officer is required to establish that a transaction falls within the parameters of taxable services in furtherance of any taxable/economic activity, failing which the sales tax assessed on the basis of some assumption or presumption is not warranted in law. In these appeals it is apparent that except the entries available in the bank account the Assessing Officer has not been able to produce any material to show that the said amounts are in any way linked with providing or rendering the taxable services or with any taxable activities.

38. In view of the above discussion the order in original and order in appeal is upheld to the extent of compulsory registration of appellant under section 24B of the Act. The assessment order, imposition of default surcharge and various penalties imposed by the Assessing Officer and maintained by the Commissioner (Appeals) are set aside.

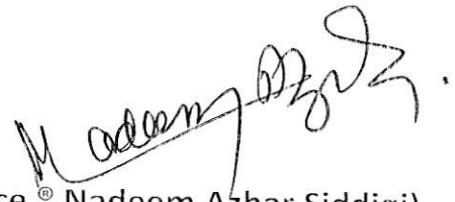
39. The appeal is partly allowed to the extent mentioned in para 33 above. The Assessing Officer may pass fresh Assessment Order after hearing and considering the pleas raised by the appellant or its counsel keeping in view the reported judgment of AL-Hilal Motors versus Collector Sales Tax, 2004 PTD 868 of a learned DB of the Sindh High Court.





40. The copy of this order may be provided to the authorized representative of the parties.

  
(Agha Kafeel Barik)  
TECHNICAL MEMBER  
Karachi

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

Dated: 27.02.2019

Certified to be True Copy

Copies supplied for compliance:-

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

  
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- 4) Office copy
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