

**BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT
KARACHI**

DOUBLE BENCH-I

APPEAL NO. AT-92/2018

M/s Green Star Social Marketing,
KarachiAppellant

Versus

Assistant Commissioner (Unit-24),
SRB, KarachiRespondent

Date of filing of Appeal: 22.10.2018
Date of hearing: 30.03.2021
Date of Order 19.04.2021

Mr. Saud-ul-Hasan, Advocate along with Mr. Arsalan Siddiqi, ACMA and
Mr. Junaid Siddiqi CIMA, for the appellant.

Mr. Asif Ali Rahoojo, AC-SRB for respondent.

ORDER

Justice ® Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.202/2018 dated 17.10.2018 passed by the Commissioner (Appeals) in Appeal NO. 201/2018 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 127/2018 dated 09.03.2018 passed by the Mr. Ghulam Mustafa Kathio Assistant Commissioner, (Unit-24), Sindh Revenue Board (SRB) Karachi.



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02. The brief facts stated in the OIO were that the appellant having (SNTN# 0913138-8) was a withholding agent in terms of sub-rule (2) of rule 1 of Sindh Sales Tax Special Procedure (Withholding) Rules, 2011 & 2014 (hereinafter referred to as the Withholding Rules). Appellant being a withholding agent was liable to withhold and deposit the amount of Sindh Sales Tax (SST) at the applicable rates on receipt of taxable services provided or rendered to it by the service providers.

03. It was alleged in the OIA that while scrutinizing the record, it was revealed that the appellant had deposited an amount of Rs.5,294,148/-with SRB against advertisement services till June-2016, in relation to the received or procured taxable services. However, after the detailed scrutiny of the financial record of the appellant for the fiscal years ended 2012, 2013, 2014, 2015 and 2016 respectively, it was revealed that the appellant had incurred expenditure against various heads which was covered under certain taxable services, as envisaged in the Second Schedule to the Sindh Sales Tax on Services Act, 2011(hereinafter referred to as "the Act) and was chargeable to Sindh Sales Tax (SST) as per prescribed rates under section 8 read with respective Tariff Heading of the Second Schedule to the Act. The details of taxable services are as under:-

Tax Period	Year	SST Rate	Value of Advertisement Services Received	SST Involved	SST Deposited	SST Payable
July-2011 to June-2012	2012	16	99,079,000	15,852,640	0	15,852,640
July-2012 to June-2013	2013	16	137,034,000	21,925,440	0	21,925,440
July-2013 to June-2014	2014	16	244,921,000	39,187,360	0	39,187,360
July-2014 to June-2015	2015	15	83,596,000	12,539,400	45,546	12,539,400
July-2015 to June-2016	2016	14	225,656,000	31,591,840	5,248,602	26,343,238
Total			790,286,000	121,096,680	5,294,148	115,802,532



04. It was further alleged that the appellant being a withholding agent in terms of clause (e) of sub-rule (2) of rule 1 of Withholding Rules, 2014 had failed to deposit the due SST in relation to aforesaid expenditures made against taxable services received or procured by it.

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Page 2 of 16

05. It was stated that various letters were issued to the appellant wherein, the it was required to clarify its position against the expenditures and was also required to provide the copies of all invoices/ bills received by it. However despite granting many extensions of time, it failed to provide proper reply or documents for the necessary verification of the aforementioned expenditures.

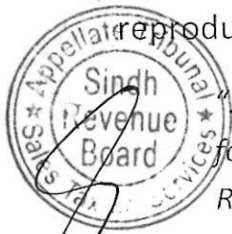
06. The appellant was served with a Show-Cause Notice (SCN) dated 28.11.2017 calling upon it to explain as to why the SST amounting to Rs.115,802,532/- should not be recovered from it under the provisions of section 47 of the Act, 2011 read with rule 3(1), (3), (4) & (5) of the said Withholding Rules. The appellant was also called upon to explain as to why default surcharge under section 44 of the Act and penalties under Serial No. 3 and 11A of Table under section 43 of the Act should not be imposed.

07. It was alleged in the OIO that the case was fixed for numerous dates and the appellant despite seeking adjournments could not submit any reply. Thus the Assessing Officer (AO) passed OIO levying SST of Rs.115,802,532/- under section 47 of the Act alongwith payment of default surcharge under section 44 of the Act. The AO also imposed penalty of Rs.5,790,127/- and further penalty of Rs.115,802,532/- under Serial No. 3 of Table under section 43 of the Act.

08. The appellant challenged the OIO before Commissioner (Appeals) by way of filing of appeal which was dismissed. The operative part of the OIA is reproduced for ready reference as under:-

...28. Due to continuous lack of interest shown by the Appellant, this forum fails to seek reasons to interfere with order passed by the Respondent. Therefore, this forum holds the impugned order as fair and justified and above OIO is hereby upheld in above terms".

Hence this appeal by the appellant.



09. Mr. Arsalan Siddiqui the learned representative of the appellant submitted as under:-

i) The appellant is a service recipient of various services including goods from all over Pakistan, and this factor has not been considered by the AO and Commissioner (Appeals) while taxing the appellant.

ii) The alleged value of advertisement services included cost of air tickets, expenses of staff salaries, reimbursement, training, telecommunication, transport services, electronic media and print media expenses which were not taxable. However advertisement services acquired in Sindh was taxable and 100% withholding was required by the recipient of service.

iii) The AO while issuing SCN had failed to mention Section 47(1B) therein. This section was inserted vide Sindh Finance Act, 2016 which was assented on 18.07.2016 and therefore could not be applied retrospectively for the period from July 2011 to June 2016.

iv) The SCN issued on 28.11.2017 was time barred to the extent of tax periods from July-2011 to June-2013.

v) The SST was demanded on the basis of entries available in the financial statements without linking the same with the providing or rendering of services.



The Advertisement expenses relating to tax periods from July-2011 to June-2015 were funded under grant in aid and were under exemption vide notification dated 28.08.2011 which was up dated on 18.06.2013 (available in 8th Edition of Book on Sales Tax on Services by Tariq Najeeb Chaudary page 407). Due to this reason the service providers had neither charged SST nor the appellant had withheld and deposited the same with SRB.

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vii) The appellant was not registered for profit but as a Guarantee Limited Company and received grant in aid from various N.G.Os and grant in aid programs of the government.

viii) The appellant was not registered with FBR for Sales Tax purposes for the tax periods July-2011 to June-2016. It therefore does not fall within the jurisdiction of LTU and could not act as a withholding agent.

ix) Section 13(3) of the Act was inserted prospectively through Sindh Finance Act, 2019 which stated that persons required to withhold SST were held liable to pay the amount of sales tax which was short withheld or not withheld. However before this provision, there was no provision in the Act which catered for recovery of SST from withholding agent. The above provision was applicable from 01st July, 2019 prospectively and did not have retrospective effect on the tax periods involved in this appeal.

x) The Hon'ble High Court of Sindh in a recent judgment dated 22nd December 2020 passed in the case of Fatima Fertilizer Company Limited V/s Commissioner-II, SRB has held that the obligation upon a withholding agent was incorporated in the Act vide the Sindh Finance Act, 2019. Hence any tax liability intended to be recovered from a withholding agent prior to the applicability of the Sindh Finance Act, 2019 was illegal.

xi) It was therefore requested that considering the above judgment of the Hon'ble High Court of Sindh, the assessment proceedings initiated by the SRB and demand raised through OIO and confirmed through OIA pertaining to the periods from July-2011 to June-2016 was illegal. Moreover the SST for the tax periods from July 2014 to June 2016 were withheld and deposited with FBR.

10. The learned AC-SRB submitted as under:-

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[Signature]
Page 5 of 16

i) The appellant had acquired advertisement services from various channels in Sindh and being withholding agent it was required to withhold 100% of the SST and to deposit the same with SRB.

ii) The amount of advertisement expenses were taken from the financial statements as the appellant had failed to provide supporting documents and details. Moreover the entry of advertising expenses included other non-taxable items.

iii) Tax was only charged on advertising expenses as shown in the financial statements and no tax was charged on other expenses as incorrectly alleged by the appellant.

iv) The original clause (f) of sub-rule (2) of rule 1 of the Withholding Rules, 2011 provided that the FBR or SRB registered persons receiving the advertisement services could act as withholding agent. The appellant is a company and as per its own admission had received grant in aid from government and was thus covered under clause (c) and (d) of sub-rule (2) of rule 1 of the Withholding Rules, 2011 and rule (c) and (f) of sub-rule (2) of Rule 1 of Withholding Rules, 2014 and was liable to act as withholding agent for the purpose of withholding of SST and its deposit with SRB.

v) In view of sub-rule (4) of rule 3 of the Withholding Rules, 2011 and sub-rule (5) of Rule 3 of the Withholding Rules, 2014 it was the responsibility of the appellant to withhold 100% of SST amount shown in the invoices or bills and to deposit the same with SRB.

vi) The appellant was unnecessarily raising false pleas that it was not qualified to act as withholding agent and was not liable to withhold the SST just to avoid payment of due SST.

vii) The appellant had filed fresh breakup dated 16.01.2019 (filed on 30.01.2029) for the tax periods 2015-16 whereby the advertising



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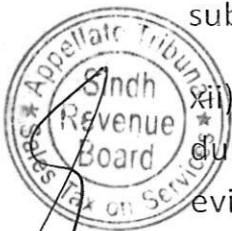
services received in Sindh were shown at Rs.36,387,874/- involving SST of Rs.5,220,822/-. Moreover the appellant had deposited a sum of Rs.5,248,602/= against the same.

viii) The liability to payment of tax on advertisement services was fixed upon the recipient of service who was required to withhold 100% of withholding tax under sub-section (2) of Section 13 of the Act.

ix) The SST which was not levied or short levied by reason of some inadvertence, error or miscalculation could be recovered under sub-section (1) of section 47 of the Act. Besides this, the SST if not levied by reason of some collusion, abatement, deliberate attempt, misstatement, fraud, forgery, false and fake documents the same could be recovered under clause (a) of sub-section (1A) of section 47 of the Act.

x) The sub-section (3) of section 13 of the Act was inserted on 5th July, 2019 during the pendency of this appeal before the SRB-Tribunal. This was a procedural provision and could be applied retrospectively on the pending proceeding.

xi) The appellant despite withholding the amount of SST failed to deposit the same with SRB. This amount could be recovered under sub-section (1) of section 16 of the Act.



xii) The appellant had withheld an amount of Rs.1,657,474/- during the tax periods from July-2013 to June-2014 which was evident from the returns filed by the service provider of the appellant. Such amount was liable to be deposited by the appellant with SRB under sub-section (1) of section 16 of the Act.

11. In reply the learned representative of the appellant further submitted as under:-

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Page 7 of 16

- i) The appellant had already provided a certificate from its Advertising Agent that during the financial year-2014 the appellant had neither acquired any services nor withheld any amount of SST.
- ii) The appellant was not covered under sub-section (1) of Section-16 and section 47 of the Act since the provisions were not applicable to withholding agents.

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

13. The contention of the respondent was that being a recipient of advertising services the appellant had withheld 100% of SST but failed to deposit the same with SRB. The contention of the appellant was that it was not covered under the definition of withholding agent as provided under Withholding Rules of 2011 and 2014 till June-2016 and thus was not liable to withhold the SST amount. The other plea of the appellant was that before insertion of sub-section (3) of section 13 in the Act through Sindh Finance Act, 2019 there was no provision in the Act for fixing the liability of a withholding agent. The advocate for the appellant relied upon a recent judgment passed in the case of Fatima Fertilizer Company Limited versus Commissioner-II, SRB by a DB of High Court of Sindh dated 22nd December 2020 in which it was held that the obligation upon a withholding agent was incorporated in the Act vide the Sindh Finance Act, 2019. Hence any tax liability intended to be recovered from a withholding agent prior to the applicability of the Sindh Finance Act, 2019 was illegal.



After hearing the learned representatives of the parties at length the following points have been framed:-

- i) Whether the appellant was not covered by the definition of withholding agent provided in the Withholding Rules, 2011 and 2014?
- ii) Whether before insertion of sub-section (3) of section 13 in the Act (Sindh Finance Act, 2019) there was any provision in the Act which fixed the responsibility/liability of withholding agent?

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iii) Whether the appellant had withheld any amount of SST, and was liable to deposit the same with SRB under section 16 of the Act?

15. We take up the first point for discussion "Whether the appellant was not covered by the definition of withholding agent provided in the Withholding Rules, 2011 and 2014. This point is discussed as under.

a) During the tax periods from July-2011 to June-2014 the Withholding Rules, 2011 were in field and from July, 2014 onwards the Withholding Rules, 2014 were applicable. The contention of the appellant was that it was not registered with FBR as it did not fall under the jurisdiction of LTU for the purposes of sales tax. It was also not registered with SRB as it was not dealing with the taxable services. In the relevant tax periods July-2011 to June-2014 the Withholding Rules, 2011 were in field. Whereas the contention of the Department was that the appellant was covered under clause (e) and (f) of sub-rule (2) of rule 1 of the Withholding Rules, 2011 which read as under:-

"(e) taxpayers as fall in the jurisdiction of Large Taxpayers Unit of Inland Revenue of the Federal Board of Revenue for the purposes of sales tax, federal excise duty or income tax.

(f) recipients of service of advertisement, who are registered for the Federal Sales Tax on Goods or for Sindh Sales Tax on Services".

It appears from the reading of the above definitions that only the tax payers falling under the jurisdiction of LTU-FBR for the purposes of sales tax and federal excise duty and the recipients of service of advertisement registered for the Federal Sales Tax on Goods or for Sindh Sales Tax on Services were liable to act as withholding agent. However the submission of the appellant was that for the tax periods from July-2011 to June 2014 it neither fell within the jurisdiction of LTU nor was registered with FBR for the purposes of sales tax and federal excise duty and was also not registered for



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Sindh Sales Tax. The appellant had produced certain documents in support of his contention which established that for the relevant tax period it could not act as withholding agent.

c) The contention of the respondent was that the appellant being importer of goods was required to be registered under the Sales Tax Act, 1990 since in the definition of registered person, a person liable to be registered was included. The burden was therefore upon the Department to prove that the appellant was qualified to act as withholding agent. However the department has failed to produce any document in support of its contention.

d) For the tax periods July-2014 to June-2016 the Withholding Rules, 2014 were in field. The department claimed that the appellant was covered under clause (f) of sub-rule (2) of rule 1 of the Withholding Rules, 2014 which read as under:-

“(f) FBR-registered or SRB-registered persons receiving the services of advertisements.”

Whereas in the definition clause of Withholding Rules, 2014 the FBR-registered person was defined as under:-

“....(5) FBR-registered person means a person registered with FBR under the Sales Tax Act, 1990, for the purpose of taxable supply of goods as defined in clause (41) of section (2) thereof.

e) The reading of the above provisions clearly reflect that only those persons could act as withholding agents who were registered with FBR under the Sales Tax Act, 1990 for the purpose of taxable supply of goods. The contention of the appellant was that it was dealing in the goods which were exempted thus no registration under Sales Tax Act, 1990 was required. The contention of the department was that the appellant was dealing in taxable supplies and was liable to be registered under the Sales Tax Act, 1990. The appellant has submitted in its written submissions that the appellant



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being a company had enrolled itself as a withholding agent with SRB on 26.03.2015 under clause (e) of sub-rule (2) of rule of 1 of the Withholding Rules, 2014. The said rule reads as under:-

(e) Companies, as defined in clause (28) OF SECTION 2 of the Act.

f) The above provision was inserted in the Withholding Rules, 2014. The appellant is admittedly a Company incorporated under the Companies Ordinance 1984 and is thus covered by the above definition. Moreover it has got registered voluntarily and was therefore qualified to act as withholding agent.

g) In view of the above discussions we hold that for the tax periods July-2011 to June-2014 the appellant could not act as withholding agent. However from July-2014 onwards the appellant was qualified to Act as a withholding agent.

16. The point No.(ii) is now taken up for discussion "Whether before insertion of sub-section (3) of section 13 in the Act (Sindh Finance Act, 2019) there was any provision in the Act which fixed the responsibility/liability of withholding agent". This point is discussed as under:-

a) The applicant was a Limited Company and was recipient of advertising services from various channels in Sindh. The Board issued Notification in the shape of Withholding Rules, 2011 under sub-section (2) of section 13 of the Act which required that the persons falling under the jurisdiction of LTU-FBR for the purposes of sales tax and federal excise duty and the recipients of service of advertisement registered for the Federal Sales Tax on Goods or for Sindh Sales Tax on Services to act as withholding agent. As per the Withholding Rules it was the responsibility of the service recipient of advertisement services to withhold 100% of SST and to deposit the same with SRB.



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b) Section 47 of the Act deals with recovery of tax not levied or short levied and sub-section (1) of section 47 of the Act provide for non-levy of tax or charge for the reason of some inadvertence, error or miscalculation. Moreover sub-section (IA) of section 47 of the Act provided that where by reason of some collusion, abatement, deliberate attempt, misstatement, fraud, false or fake documents any tax or charge has not been paid or is, short paid, assessed or collected, the person liable to pay such tax shall be served with a notice to show cause for non-payment of such tax. However the tax would be determined under sub-section (2) of section 47 and the person shall pay the amount so determined.

c) Sub-section (1B) of section 47 of the Act was inserted on 18th July, 2016 and it provided that "where any person required to withhold tax under the provision of this Act or rules made thereunder fails to withhold the tax or fails to deposit the withheld or deducted amount of tax in the prescribed manner, the office of SRB shall determine the amount in default and order its recovery in the prescribed manner". In the entire section 47 the word used was "person" and not "registered person" or "withholding agent". Apparently section 47 was inserted in the Act to determine the tax liability and to recover the same from the persons who were required to withhold the tax, but had failed to withhold the same or failed to deposit the withheld or deducted amount of tax.



The appellant has relied upon sub-section (3) of section 13 of the Act which was inserted on 5th July, 2019. It was submitted by the appellant that before this provision there was no provision in the Act which provided for recovery of SST from withholding agent. The said provision read as under:-

"...[(3) Where a person or class of persons is required to withhold or deduct full or part of the tax on the provision of any taxable service or class of taxable services, and either fails to withhold or deduct

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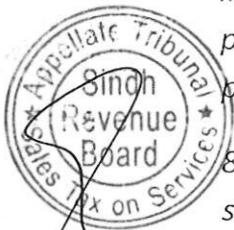
the tax or, having withheld or deducted the tax, fails to deposit the tax in the Government treasury, such person or class of persons shall be personally liable to pay the amount of tax and the default surcharge thereon in the prescribed manner.]

e) The above provision was considered by the Honorable High Court of Sindh in its recent judgment dated 22nd December 2020 passed in the case of Fatima Fertilizer Company Limited V/s Commissioner-II, SRB and It was held as under”

“...6. Section 9 of the Sindh Sales Tax on Services Act, 2011 (“Act”) contains the statutory definition of a person liable to tax. It is manifest from the provision that the liability is generally imposed upon the registered person providing the service or the person receiving the service. Section 13(3) was inserted in the Act vide the Finance Act 2019 to impose liability upon a withholding agent. The appellant’s case quite simply is that prior to the coming into effect of the Finance Act 2019, a withholding agent was not a person liable to tax within meaning of the Act.

7. The learned Tribunal to have erred in relying upon the generic meaning of the term person, as contained in section 2(63) of the Act, in order to maintain liability upon the applicant. It is our deliberated view that the generic definition could not be applied to imposed liability upon a person who otherwise did not qualify as a person liable to tax, within meaning of the Act itself, for the periods prior to when such a liability was impose.

8. The initial imposition of liability upon the applicant was per section 47 (1A) of the Act; however, the learned Tribunal has already disregarded the application of the said provision and instead maintained liability per section 47(1)of the Act. The period for issuance of the show cause notice read five years at the relevant time; however, the verbiage of section 47 of the Act clearly states that the obligation is placed upon a person liable to pay any tax. There is no cavil to the proposition that the liability upon a withholding agent to pay tax was not imposed until the Finance Act,



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2019; hence any apportionment thereof prior thereto appears to be devoid of statutory sanction.”

f) In view of the above discussions and relying upon the judgment of the High Court of Sindh in the case of Fatima Fertilizer supra which was binding on this Tribunal, we hold that before insertion of sub-section (3) of Section 13 of the Act (Sindh Finance Act 2019) there was no provision in the Act which fixed the responsibility / liability of Withholding Agent thus the appellant was not liable to pay such tax.

17. Now we will take up for discussion point No. (iii), “Whether the appellant had withheld any amount of SST, and was liable to deposit the same with SRB under section 16 of the Act”. This point is discussed as under:-

a) The allegation against the appellant was that it had failed to deposit the withheld SST on advertising services. The appellant had denied the allegation. However it had submitted a Statement dated 27.02.2020 for the tax periods from July-2011 to June-2016 showing the name of advertising company/channel. The appellant also submitted Statement for the year 2014-2015 showing the value of service and the tax involved. The appellant also submitted Statement dated 30.01.2019 for the tax periods July-2015 to June-2016 showing the services acquired from electronic media in Sindh. The AC also filed Breakup of Advertisement Services and reconciliation statement dated 17.02.2020 on the basis of information provided by the appellant. It was apparent from the material available on the record that the appellant had withheld the SST to some extent and deposited the same with SRB as reflected in the chart under para 3 supra.

b) The tax so collected, deducted or withheld by the appellant was to be deposited with SRB under section 16 of the Act, even if the appellant was not qualified to act as a withholding agent. The said section is reproduced for ready reference as under:-

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“16. Collection of excess sales tax: (1) Any person who has collected or collects any tax or charge, whether under misapprehension of any provision of this Act or otherwise, which was not payable as tax or charge or which is in excess of the tax or charge actually payable and the incidence of which has been passed on to the person to whom the service is provided, shall pay the amount of tax or charge so collected to the Government.

c) The above provision is an independent provision and not dependent upon section 13, 23 and 47 of the Act and was inserted in the Act to protect the collection of SST from those persons who do not fall within the ambit of “registered person” or “withholding agent” and had collected the tax but had failed to deposit the same with SRB.

d) We therefore consider it appropriate to direct the concerned AC-SRB to enquire in the matter and if sufficient material is available to justify that the appellant had withheld the SST during the period from July 2011 to June 2016, but had failed to deposit the same totally or short deposited the same the concerned AC-SRB may issue fresh SCN to the appellant invoking section 16 read with section 47 of the Act.

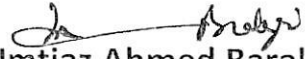
18. Considering the above discussions and relying upon the judgment of the High Court of Sindh in the case of Fatima Fertilizer supra we allow this appeal and hold that the appellant as a withholding was not liable to pay the tax till 30th June, 2019. However if the appellant had collected the tax (subject to enquiry by the concerned AC) than it was liable to deposit the same with SRB under section 16 of the Act.

19. This Order is subject to the outcome of the appeal filed or to be filed by SRB in the Supreme Court of Pakistan, against the judgment in the case of Fatima Fertilizer as discussed supra. The appeal is disposed of in the above terms.

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Page 15 of 16

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


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER


(Justice Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi:

Dated: 19.04.2021

Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
- 2) The Assistant Commissioner, SRB, for compliance

Copy for information to:-

- 3) The Commissioner (Appeals), SRB, Karachi.
- 4) Office Copy.
- 5) Guard File.

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REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on

06/05/2021

Registrar

Order Dispatched on

06/05/2021

Registrar