

(Guard file)

BEFORE THE APPELATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

APPEAL NO. AT-01/2019

DB-1

M/S Bridge Telecom (Pvt) Ltd.....Appellant

Versus

Deputy Commissioner, SRB, Karachi.....Respondent

Date of Filing of Appeal: 03.01.2019.

Date of Hearing of Appeal: 04.03.2019

Date of Order: 30.04.2019

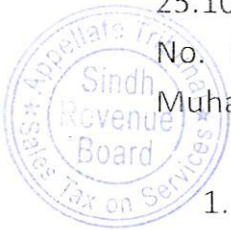
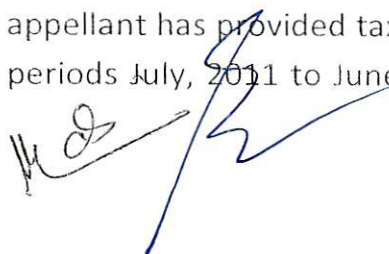
Mr. Sarwar Mohiuddin, Advocate for Appellant.

Mr. Vicky Dhingra AC, SRB for Respondent.

ORDER

Justice (R) Nadeem Azhar Siddiqi: This appeal has been filed by the appellant/taxpayer challenging the Order-in-appeal No. 207/2018 dated 25.10.2018 passed by the Commissioner (Appeals-I) confirming Order-in-Original No. 86/2016 dated 08.02.2016 passed by the Deputy Commissioner (Mr. Muhammad Ali Mazgani); SRB, Karachi.

1. In short, the facts of the case as stated in Order-in-Original are that the appellant has provided taxable services of Telecommunication for the tax periods July, 2011 to June 2014 falling under tariff heading 98.12 of the

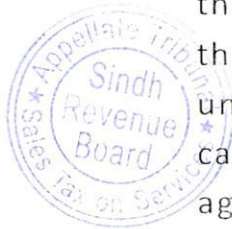
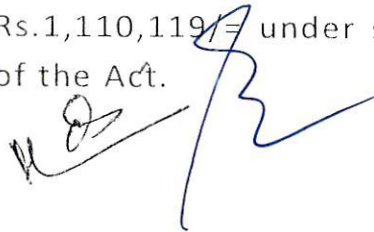


Second Schedule of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) chargeable to Sindh sales tax @ 19.5%.

The allegations against the appellant are that perusal of the audited financial statements reveals that the appellant had provided total taxable services for the above tax periods amounting to Rs. 114,259,769/=, whereas in the details the value of sales was shown at Rs. 45,401,113/= and value of service income was shown at Rs.68,858,656/=. Sales Tax at the rate of 19.5% is applicable on the value of taxable services for the tax periods July, 2011 to June, 2014 amounting to Rs.22,280,655/= [(Rs.45,401,313/= + Rs.68,868,656/=)*19.5%]. It was also alleged that record available with the SRB shows that the appellant has declared an amount of Rs.78,275/= in annexure C of the sales tax return for the tax period June, 2014 against the actual liability of Rs.22,280,655/= [45,401,113/= + Rs.68,858,656/=) * 19.5%]. It was further alleged that the appellant neither deposited due amount of Sindh sales tax nor submitted sales tax returns for the aforesaid tax periods.

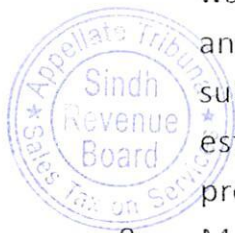
A show-cause notice dated 16.06.2015 was served upon the appellant for assessment under section 23 of the Act along with default surcharge and imposition of penalty under serial No.3 of the table under section 43 of the Act. The appellant submitted the reply dated 23.06.2015 and submitted that it is registered under Sales Tax Act, 1990 and the figures indicated in the show cause notice represent the total revenue, including revenue against supplies against which sales tax was paid under the Sales Tax Act, 1990.

Finally the order in original was passed in the sum of Rs.22,202,380/= along with default surcharge and penalty of Rs.1,110,119/= under serial No.3 of the Table under section 43 of the Act.



The appellant challenged the order-in-original before the Commissioner (Appeals), who upheld the order in original to the extent of principal amount of Rs.13,349,163/= and the default surcharge. The Commissioner (Appeals) conditionally waived the penalty imposed by the Assessing Officer.

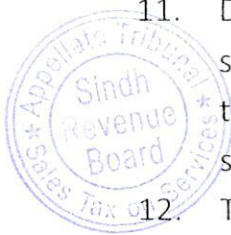
6. Mr. Sarwar Mohiuddin, the learned Advocate for the appellant submitted that tax periods involved in this appeal are from July 2011 to June, 2014 and for that period the appellant was not registered with SRB and has not charged any tax from service recipients. Mr. Sarwar further submitted that agreements to provide services were entered into in the years 2008 onwards and payment received after July 2011 is not taxable as at the relevant time i.e. 2008 when agreements were entered into there was neither any Sales Tax on Services nor the appellant was aware that such tax would be levied. He also submitted that the services were provided before the promulgation of the Sindh Sales Tax on services Act, 2011 but invoices were sent thereafter and for that reason tax was not charged.
7. Mr. Vicky Dhingra, AC submitted that the appellant being service provider of telecommunication services is liable to deduct and deposit the entire sales tax on services provided by it in terms of sub-rule (1) of Rule 3 of SST Special Procedure (Withholding) Rules, 2011 and 2014. He then submitted that at the appellate stage before Commissioner (Appeals) on the basis of reconciliation report a sum of Rs.8,853,217/- was reduced from the total Sales Tax as assessed by the Assessing Officer and tax was reduced from 22,202,380 to Rs.13,349,163/-. He also submitted that from the invoices produced by the appellant it is not established that the services under contracts were provided before the promulgation of the Act of 2011.
8. Mr. Sarwar Mohiuddin Advocate in rebuttal submitted that all the three contracts i.e. Askari Bank, UBL and International Complex were entered into much before the promulgation of Sindh Sales Tax on Services Act, 2011 and for that reason no clause with regard to payment of Sindh Sales Tax on Services was included in the contracts and no tax was charged or



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deducted. He then submitted that after deducting the amount of Rs.3,075,219/- from the determined tax liability of Rs.13,349,163/- the appellant is ready to pay balance amount of Rs.10,273,944/- in twelve monthly equal installments. He also challenged the imposition of Penalty and Default Surcharge on the ground that the same was imposed without establishing mensrea.

9. Mr. Vicky Dhingra, AC submitted that the tax was calculated on the basis of service provided or rendered after 1st July, 2011 on the basis of invoices provided by the appellant. He submitted that as per sub-section (2) of Section 17 of the Act a taxable service is considered to have been provided in the tax period during which (i) It was provided to the recipient (ii) Invoice for the value of taxable service was sent to the recipient (iii) or consideration for the same was received. He then submitted that as per invoices produced by the appellant the services have been provided during the tax periods when the said services were subject to tax and accordingly the appellant is liable to pay tax. He relied upon the reported Judgment in the case of Molasses Trading and Export Company (Pvt) Ltd. vs. Government of Pakistan 2007 PTD 1005 (DB SHC) on the point that no vested right is created in favor of appellant having entered into a contract prior to levy of duty to claim exemption from such duty.
10. We have heard the learned representatives of the parties and perused the record made available before us.
11. During the pendency of appeal the appellant filed re-conciliation statement giving the details of services provided and rendered during the tax periods involved. According to the statement the total tax liability shown is Rs.13,349,163/=.
12. The AC also filed incomplete re-conciliation report stating therein that the appellant has not furnished the record. This statement is not correct and a deliberate misstatement on the part of the AC. The learned representative of the appellant has provided the copy of reconciliation statement as well as copies of contract and invoices to the AC under cover of his letter dated 12.02.2019 delivered on 15.02.2019. On the said



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letter the round rubber seal of respondent is affixed in token of acknowledgement. Furthermore in his arguments recorded above the AC has submitted that the tax was calculated on the basis of service provided or rendered after 1st July, 2011 on the basis of invoices provided by the appellant. It is strange and not believable that without the record the assessment order was passed and the same was maintained by the learned Commissioner (Appeals) after reducing the amount. Even in the order in appeal in para 2 the Commissioner (Appeals) stated that "The Report was based on the evidence as much as provided by the appellant". It appears that the AC has deliberately avoided to place true facts of the case and also failed to properly assist the Tribunal in reaching at a just, proper and reasonable conclusion/decision.

13. From the reconciliation statement of the appellant it appears that the appellant admits the liability of deposit of tax to the extent of Rs.10,273,944/= and disputed an amount of Rs.3,075,219/= on the ground that the same pertains to the period prior to registration. The appellant was registered on 1.07.2014. The tax periods involved are July, 2011 to June, 2014. The appellant has provided the contracts and invoices and apparently all invoices are prior to the date of registration. None of the forums below has considered and determined who is liable to deposit the tax in case the service is provided by the unregistered person. The Commissioner (Appeals) in para 5 of the order in original stated that "*.....any person who intends to provide the taxable services is required to register with SRB. And a person who is providing taxable services and is not registered with SRB is deemed to be a "registered person" for the purpose of tax, as under section 2 (71) of the Act, 2011. In presence of such provisions the appellant was a "registered person" under section 2 (71) and also was required to register as well...*" Section 9 (1) of the Act fixed the liability to pay the tax upon the registered person and not on a "non-registered person" or "deemed to be registered person". The registered person is a person who got voluntarily registration under section 24 (1) of the Act or compulsorily registered under section 24 (A) of the Act. As far as sub-section



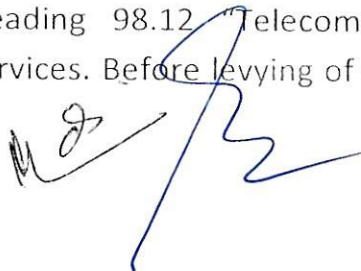
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(71) of section 2 of the Act is concerned the same provides the definition of registered person and provides that "a person who is registered or is liable to be registered". A person liable to be registered did not acquire the status of registered person unless registered under section 24 of the Act. If all the persons liable to be registered are treated as registered person, section 24 of the Act becomes redundant and if the intention of the legislature to treat all persons liable to be registered at par with the registered person there is no need to insert section 24 in the Act. Provisio to section 2 (71) provides distinction between a "registered and non-registered person" and provides that a person liable to be registered but not registered is not entitled to benefit available to a registered person. From this it is clear that the person liable to be registered is not at par with the registered person.

14. Both the forums below also failed to determine the specific service provided or rendered by the appellant and the Tariff Heading under which the services involved falls. An attempt was made on the part of the AC to argue that all services provided or rendered by telecommunication companies are taxable. This argument has no force and if the same is accepted the listing of specific services in the second schedule of the Act becomes redundant. If the intention of the legislature is to tax all services provided or rendered by the telecommunication companies the listing of specific services in second schedule are not necessary and one liner "all services provided or rendered by the telecommunication companies" is sufficient to tax the services. The above questions was considered by a learned DB of High Court of Sindh in the reported case of Citibank NA versus Commissioner Inland Revenue and another, 2014 PTD 284, Justice Munib Akhtar, as he then was (now elevated to Supreme Court of Pakistan) speaking for the bench held as under:

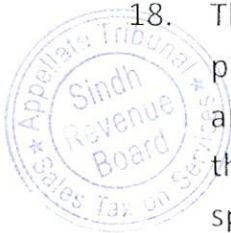
"The attempt by learned counsel to conclude from the enumeration of the persons that all the services provided by them were included in Heading No.98.13 cannot be accepted. This would render otiose the listing of specific services in the various sub-headings".

15. Heading 98.12 "Telecommunication" services comprised of several services. Before levying of tax determination of specific service and tariff



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

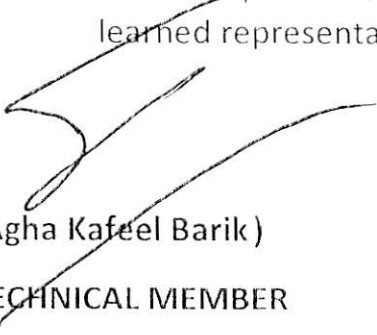
16. The appellant requested to allow to deposit of tax of Rs. 10,273,944/= in twelve monthly installments on the ground of bad business condition and that the tax has not been charged from the service recipients. Keeping in view that the appellant has accepted its liability to deposit the tax with SRB it appears appropriate to allow some relief to it. In view of this the appellant is allowed to deposit the sales tax amount of Rs.10,273,944/= in eight monthly equal installments along with default surcharge to be calculated and communicated by the respondent to the appellant within seven days from the date of receipt of this order. The first installment is payable on the 15th May, 2018 and subsequent monthly installments are payable on or before 15th of each English calendar month. In case of default of two consecutive installments the whole amount will become due and payable and the respondent may recover the balance amount as per the provisions of the Act of 2011.
17. The appellant is not liable to pay any penalty as the department has failed to establish mensrea and malafide on the part of the appellant as held in the reported judgment of Deputy Collector, Central Excise and Sales Tax, Lahore Versus ICI Pakistan Limited, Lahore, 2006 SCMR 626 and D.G. Khan Cement Limited versus Federation of Pakistan and others, 2004 SCMR 456.
18. The order in original and order in appeal is maintained to the extent of principal tax amount of Rs. 10,273,944/= and default surcharge thereon and setaside to the extent of Rs.3,075,219/=. The case is remanded to the Assessing Officer/Assistant Commissioner to first determine the specific service and the Tariff Heading under which services provided or rendered by the appellant falls and then to inquire the period in which the services to the tune of Rs.3,075,219/= were provided and also determine that in case of service provided by un registered person who is liable to deposit the tax with SRB. (Due to non-determination of specific service and Tariff Heading the entire order in original and order in appeal can be setaside. However keeping in view that the appellant has



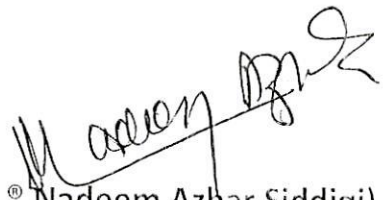
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admitted tax liability to the tune of Rs. 10,273,944/= the order in original and order in appeal is set aside only to the extent of disputed amount).

19. The appeal is disposed of. The copy of the order be supplied to the learned representative of the parties.


(Agha Kafeel Barik)

TECHNICAL MEMBER


(Justice[®] Nadeem Azhar Siddiqi)

CHAIRMAN

Certified to be True Copy

Karachi

Dated: 30.04.2019

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-II), SRB, Karachi.
- 4) Office copy
- 5) Guard file.


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on

03/05/19

Registrar

Order Dispatched on

03/05/19

Registrar