

(Quad file)

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

SB-I

APPEAL NO. AT- 04 /2019

M/s. Mustufa and Brothers.....Appellant

Versus

Assistant Commissioner, SRB, Hyderabad.....Respondent

Date of Filing Appeal: 18.01.2019

Date of hearing: 27.03.2019, 02.04.2019 and 26.09.2019

Date of Order: 30.09.2019

Mr. Ghazanfar Siddiqui, Advocate, Mr. Nasir Altaf, ACMA and Mr. Imran Zaidi, FCA for Appellant.

Mr. Kaleemullah AC-DR and Mr. Nabi Bux, AC for Respondent.

ORDER

Justice[®] Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order-in-Appeal No.218/2018 dated 19.11.2018 passed by the Commissioner (Appeals-II), SRB in Appeal No. 97/2017 filed by the Appellant against the Order-in-Original No. 59/2017 dated 14.07.2017 passed by the Deputy Commissioner (Mr. Syed Rizwan Ali) SRB, Hyderabad.

01. The facts of the case as mentioned in the order-in-original are that the appellant is engaged in providing or rendering taxable services of distribution of goods/products of companies/manufacture in Sindh and is associated with M/s English Biscuit Manufacturers (Private) Limited (EBM) for distribution and delivery of goods in Sindh. It was also stated



in the order-in-original that the appellant has signed an agreement with EBF for distribution and delivery of their goods confirmed by EBM.

02. It was alleged in the Order-in-Original that the appellant is engaged in economic activity in terms of section 4 of The Sindh Sales Tax on Service Act, 2011 (herein after referred as the Act) and provided services in terms of section 3 of the Act. It was further alleged that such activities of the appellant fall under Tariff Heading 9845.0000 "Supply chain management or distribution (including delivery) services" of the 2nd schedule of the Act and chargeable to Sindh Sales Tax on Services @ 13%. It was also alleged that the appellant being a resident in terms of sub-section (73) of section 2 of the Act required to apply for registration under section 24 of the Act, but failed to make an application for registration with SRB before providing taxable services.

03. A show-cause notice dated 03.05.2017 under section 24B of the Act was served upon the appellant to explain as to why it should not be compulsory registered and penalties should not be imposed. The appellant filed its reply dated 08.05.2017 and stated that the appellant was appointed as a distributor but was not engaged as service providing company and maintained that it is working as trader of goods and paying sales tax and income tax. In the Final Reply dated 31.05.2017 the appellant submitted that the distributor purchase goods from the manufacturer and sell those to retailers in a specific area/region and that the SST is applicable in case the agreement is signed between the parties as principal and agent to sell goods on commission basis.

04. The Officer-SRB passed Order of Compulsory Registration of the appellant under section 24B of the Act for the service falling under Tariff Heading 9845.0000 (Supply chain management or distribution (including delivery) services of the 2nd schedule of the Sindh Sales Tax on Service Act, 2011 and also imposed penalty of Rs.10,000/= and in case of non-compliance of the order for compulsory registration to pay penalty of Rs.100,000/=



05. The appellant challenged the said order of compulsory registration by way of filing appeal before the Commissioner (Appeals), who maintained the order of compulsory registration, hence this appeal.
06. Mr. Ghazanfar Siddiqi the learned advocate for the appellant submitted as under:-
- (i) The appellant is one of the distributor of renowned company namely English Biscuit (EBM) and used to purchase their products under the terms of distribution agreement wherein the appellant was described as distributor. The appellant is registered with FBR for the purpose of Sales Tax Act, 1990 and Income Tax Ordinance 2001.
 - (ii) He submitted that after purchasing the products from EBM the appellant re-sell the products to its customers who may be wholesaler or retailers. Under the agreement of distributor the appellant was assigned a territory and is required to maintain certain quantity of stock to maintain demand and supply balance and further to report the stock balance to EBM.
 - (iii) He then submitted that the respondent instead of going through the entire distribution agreement has picked and choose only those clauses or terms which suit them for the purpose of registration and taxing the appellant.
 - (iv) He also submitted that the ownership of goods was transferred to the appellant and this is a transection of purchase and sale of goods and not a service as provided under the Sindh Sales Tax on Services Act, 2011 and referred to section 4 of sales of goods Act, 1930 and submitted that the job/work done by the appellant is covered under this Section.
 - (v) Then respondent has misconstrued the terms of agreements of distribution.
 - (vi) Mr. Ghazanfar placed on record photocopy of the order of High Court in Reference No. 06/2019 (M/s M. Mubbashir Traders) and submitted that the core issue before the Tribunal is whether the applicant is liable to be registered and whether the nature of transaction is of sale and purchase of goods or services as provided under the Sindh



Sales Tax on Services Act, 2011. He submitted that the respondent has filed to look into the substance of the agreement of distribution and the department has wrongly treated the value addition as service charges which are protected under federal law. He relied upon the order of Commissioner (Appeals-I) from Indian Jurisdiction.

- (vii) He also referred to sub section (46) Clause (b) of Section 2 of the Sales Tax Act, 1990 and submitted that the discounted price is the price minus trade discount for the purpose of levying of Sales Tax 1990 and the department wrongly treated this discount as value of service. He referred to the Judgment of Sindh High Court in the case of Abad (Construction Industry).

07. The learned representative of the appellant also filed written submissions on 18.07.2019 in support of grounds of appeal, which read as under:-

- (i) The respondent had not considered the information and records provided at the stage of adjudication.
- (ii) Discount envisage in the agreement is mistakenly construed by Respondent as receipt of consideration for rendering service by Appellant to EBM.
- (iii) The Appellant is engaged in supply of goods upon spending huge investment.
- (iv) Discount is in fact profit/margin for supply of goods. Price structure having element of discount at each stage in supply chain clearly reflects that it pertains to supply of goods instead of any rendering of service.
- (v) The Respondent to establish the appellant as distributor in the impugned order had not discussed Para 18 of the agreement with M/s EBM which expressly envisages that the transaction is of sale and purchase of goods between Appellant and EBM. Further, the Respondent had not considered the definitions of "distributor", and "wholesaler and dealer" as provided under Sales Tax Act, 1990 in framing the order which governs the agreement and taxable activity of the Appellant.
- (vi) The Respondent-1 in Para 10 of its order had wrongly interpreted the definition of Distributor as given in Section 2 (7) of Sales Tax Act by



construing the words "for further supply" in said definition as "for the purpose of subsequent delivery". Such manipulation was made by Respondent with intension to include the element of services in definition of "Distributor" which was made by the Respondent-1 in Para 15 of its Order. Further, the Respondent-1 in its impugned Order had not discussed the definition of "Distributor" in details in line with Sales Tax Act, 1990 rather quoting various dictionary meaning of the word to form its opinion in aforesaid Para 15 of its order.

- (vii) In terms of Section 4(2) of Sales of Goods Act, 1932 a contract of sales is contract where the seller transfers the property in goods to buyer for a price whether absolute or conditional. Keeping in view Section 4(2) of Sale of Goods Act, 1932, the Respondent do not consider the condition mentioned in the agreement that are associated with purchase of goods by the Appellant for subsequent sale in terms of Section 4 (2) of Sales of Goods Act, 1932.
- (viii) The Respondent erred to ignore that the discount given to the Appellant is trade discount which is allowed in terms of Section 2(46) of Sales Tax Act, 1990 for establishing value of services and properly reflected in invoices and agreement between supplier and buyer for sales of good.
- (ix) The Respondent-1 in Para 8 of its impugned Order also endorse the fact that person engaged in rendering of distribution services, who do not have title or ownership of the items, are recognizing their revenue on commission bases which is not in case of the Appellant as evident from its Income Tax Return filed with FBR. However, the Respondent in same Para reversed its finding by limiting it to the extent of small service providers with the intension to encompass the activity of the Appellant under ambit of service provider.
- (x) The Respondent may not tax the transaction being a service under SSTSA which was already taxable under Sales Tax Act, 1990 being supply of goods. Such action of the Respondent is tantamount to double taxation.
- (xi) The superior courts in many judgment held that a transaction which was taxed under a statutory law may not be tax under other revenue law.



(xii) The transaction between the Appellant and EBM has no element of hybrid transaction as such transaction is simply a purchase and sales transaction which is evident from documentary evidence pertaining to such purchase and sales of the goods by the Appellant. Our aforesaid contention is also supported by sales tax returns submitted by vendor of the Appellant i.e. EBM which declared sales to the Appellant in Annexure-C of its sales tax returns filed with FBR under Income Tax Ordinance, 2011.

(xiii) Regarding penalty it is stated that the appellant was not involved in any deliberate/ willful evasion of tax. In support of contention the appellant relied upon the 2004 (90) Tax 1 and 2006 PTD 1132 and submitted that the penalty was wrongly imposed on the company.

08. The respondent filed Written Statement and submitted as under.

(i) The appellant receives trade discounts instead of fixed price and it varies from 14% 12% and 11%. It signifies that appellant is not the end user and acts as middle men.

(ii) The appellant cannot sell the items at his choicer of price, rather follows the manufacturer instruction and passes on only 3% to 6% discount to retailer and 6% discount to whole seller. It is evident that appellant does not have any rights of ownership.

As per agreement the appellant is bound to follow instructions, company's policies and directives for distribution of products. Hence no right of ownership lies with appellant/service provider.

(iv) In addition to above learned AC submitted that he relied upon the earlier decisions of the DB of the Tribunal and his submissions recorded therein.

I have heard the learned representatives of the parties and perused the documents made available before me.

09. The dispute is whether the activity of the appellant is purchase and sale of goods or the same is service covered under Tariff heading 9845.0000 [supply chain management or distribution (including delivery) services]. Both the parties have divergent views. The controversy is to be decided in view of the provisions of the Sindh Sales Tax on Services Act, 2011.



10. It is not disputed that after 18th Amendment in the Constitution of Pakistan the provincial legislatures were authorized to levy sales tax on services. Words "Distributor, Sale, Supply Chain and Taxable Supply" have not been defined in the Sindh Sales Tax on Services Act, 2011. Whereas all these words are defined in the Sales Tax Act, 1990. The service has been defined in sub-section (79) of section 2 of the Act, which provides that "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 to this Act. Explanations are also attached to this definition, which provides I) A service shall remain and continue to be treated as service regardless whether or not the providing thereof involves any use, supply, disposition or consumption of any goods either as an essential or as an incidental aspect of such providing of service; II) Unless otherwise specified by the Board, the service or services involved in the supply of goods shall remain and continue to be treated as service or services. The explanations made it clear that the service or services involved in the supply of goods shall remain and continue to be treated as service or services. The appellant under an Agreement of Distribution supply goods to whole seller, dealers and retailers and this activity is covered by Tariff Heading 9845.0000 (Supply Chain Management or distribution (including delivery) services of the Second schedule of the Act. Section 3 of the Act also provides that a taxable service is a service listed in the Second Schedule of the Act.



11. The case relates to compulsory registration of the appellant under section 24B of the Act read with tariff heading 9845.0000 of the Second Schedule of the Act. 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 and after notice, register the person through an order to be

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issued in writing and such person shall be deemed to have been registered from the date he became liable to registration.

12. The appellant is a resident person and is admittedly registered with FBR and is operating in Sindh. The appellant purchased goods and supplied to wholesalers and retailers within the area assigned to it as per the instructions and rate fixed by its principal. As per section 3 of the Act a 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. The appellant economic activity involves the provision of providing service to another person and is covered by the provision of section 4 of the Act read with Tariff Heading 9845.0000.

13. The DB of this Tribunal vide order dated 22.11.2018 in Appeal No. AT-61/2018, M/s JSN Traders, Hyderabad Versus Assistant Commissioner, SRB, Karachi, has held as under:-

"18. The appellant under an agreement has been appointed Distributor to deliver the products of Colgate Palm Olive (CPO). The preamble of the agreement (Labbaik) provided that the appellant was appointed "distributor" of all products of (CPO). The preamble of the agreement (Nazar Shakeel & Bros.) provided that the said Nazar Shakeel and Bros. was appointed "distributor" for all products manufactured & traded by the Company/CPO. The distribution of goods on behalf of appellant is a service under the Act of 2011 and the Commissioner (Appeals) has rightly treated it as service.

19. Clause 8 of the agreement of Labbaik provides that the appellant will use best endeavors to promote and increase sale of products. The same clause further provides that the appellant will maintain adequate stocks of CPO to ensure prompt deliveries to customers. This clause makes it clear that despite the fact the on payment the ownership of goods was transferred to the appellant along with the element of risk and reward the fact remains same that the sale of goods by CPO to the appellant is not a simple sale and the appellant is required to deliver the goods as per instruction of the CPO. Under the agreement the appellant is required to use best endeavors to promote sale, which may not be a pre-condition in an ordinary sale of goods. Furthermore in this clause word "deliveries" was used and not sale, which clearly reflects that the appellant has to deliver goods to the customer and not



to sell the goods. Clause 15 of the agreement provides that the appellant will submit daily, weekly, fortnightly, and or monthly stocks report as may be required by the CPO. In case of simple sale this clause is unnecessary and the purchaser of goods is not required to maintain stock and to submit reports. Clause 16 of the agreement provides that at the time of termination of agreement products lying un-sold will be taken back at the discretion of CPO. This clause negates the arguments of the appellant that the goods become the property of the appellant. In normal sale the return of goods may not be a condition.

20. Even if it is considered that on payment of consideration by the appellant the goods become its property and ownership along with risk and reward transferred to the appellant one thing is clear that the appellant cannot exercise full control over the goods and is bound by the instruction of CPO regarding sale, fixing of price and the area in which the goods are to be sold. In this case the appellant as distributor acquired goods against cash consideration or credit for supplying to the whole sellers or retailers and in this way he supplied goods of its principal against fixed margin.

21. From the contents of the agreements produced before us the substance of the same appears to facilitate sale and delivery of goods and not simple sale of goods. It is now well settled point of law that while construing an instrument/document whole document is to be read and considered to ascertain the scope and object of the instrument/document. It is also now well settled principle of law that for determining the true purpose of the instrument/document one must look into its substance and not the form. In the reported judgment in the case of *Kamran Industries versus Collector of Customs*, PLD 1996 Karachi Page 68 a Honorable DB of Sindh High Court has held that "That a statute/instrument/document is to be read as whole, and an attempt has to be made to reconcile various clauses for a rationale meaning, while avoiding redundancy to any part thereof. In the other reported judgment in the case of *Habib Insurance Limited versus Commissioner of Income Tax (Central)*, Karachi PLD 1985 Supreme Court Page 109, it has been held that "It is true as contended by the learned counsel for the appellant that in Revenue cases one must look at the substance of thing and not at the manner in which the account is stated".

14. The facts of this case and the case earlier decided are on same footings. The dispute is the same, whether the services provided by a distributor is falling under Tariff Heading 9845.0000 (supply chain management or



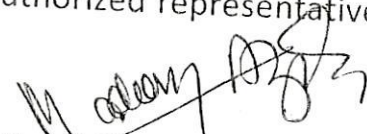
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distribution (including delivery) services) of the Second Schedule of the Act and is a taxable service under the Act, 2011 or not. Earlier decision of DB of this Tribunal is binding.

15. As far as the imposition of penalty of Rs.100,000/= is concerned, since there is a contest between the parties the appellant is not required to pay penalty of Rs.100,000/= and is only required to pay Rs.10,000/= if it failed to comply the order of registration within fifteen days from the date of receipt of this order.

16. In view of the above discussion the appeal is dismissed. The copy of the orders may be provided to the learned authorized representative of the parties.

Karachi
Dated. 30.09.2019


(Justice Nadeem Azhar Siddiqi)
Chairman

Copies supplied for compliance:-

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

Copy for information to:-

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

Certified to be True Copy


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on-----

30/9/18
Registrar

Order Dispatched on-----

30/9/18
Registrar