BEFORE THE APPELATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-1

APPEAL NO. AT-21/2019

The Assistant Commissioner, SRB .....Appellant

Versus

M/s Swift Transport Network..... .....Respondent

Mr. Muhammad Yousuf Bukhari, AC and Mr. Kaleemullah, AC-DR for SRB/appellant.

Mr. Kamran Rizvi, Advocate and Mr. Zakria Khan for respondent.

Date of Filing of Appeal:	08.03.2019.
Date of Hearing:	06.11.2019
Date of Order:	18.11.2019

ORDER

Justice (R) Nadeem Azhar Siddiqi. This appeal has been filed by the appellant/department challenging the Order-in-appeal No. 41/2019 dated 20.02.2019 (hereinafter referred to as OIA) passed by the Commissioner (Appeals-II) in Appeal No. No. 319/2018 filed by the respondent against the Order-in-Original No. 790/2018 dated 19.09.2018 (hereinafter referred to as OIO) passed by the Assistant Commissioner (Mr. Muhammad Yousuf Bukhari), SRB, Karachi.

02. The facts of the case as briefly stated in Order-in-Original (OIO) are that the respondent was voluntarily registered with SRB under the

service category of "Inter-City transportation or carriage of goods by road or through pipeline or conduit", Tariff Heading 9836.0000 of the Second Schedule of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) chargeable to Sindh Sales Tax (SST) effective from 01.07.2014.

03. The allegation against the respondent in the OIO is that it had provided inter-city transportation services to M/s Lucky Cement Private Limited (herein after referred to as Lucky Cement) amounting to Rs.641,941,010/= during the periods from October, 2017 to February, 2018 and charged SST of Rs.69,066,992/=. It was also alleged in the OIO that Lucky Cement had withheld and paid 20% of the SST and remaining 80% amounting to Rs.69,066,992/= was paid to the respondent who failed to make any payment to SRB on account of Lucky Cement.

04. It was also stated in the OIO that the respondent vide SRB letter dated 26.04.2018 was asked to visit the office of SRB along with all details of services provided to Lucky Cement, however no details were provided.

05. A show-cause notice (SCN) dated 08.05.2018 was served upon the respondent to explain as to why sales tax liability amounting to Rs.69,066,992/= for the above mentioned tax periods may not be assessed and recovered along with default surcharge and penalty under serial No. 3 of the Table of section 43 of the Act. The respondent appeared on 24.05.2018 and filed written reply dated 23.05.2018. The respondent also provided summary of all services provided to Lucky Cement with copies of invoices and certificate of deduction of tax by withholding agent/service recipient and submitted that 100% SST were withheld by the service recipient/Lucky Cement in terms of Rule 3 (5) of the Sindh Sales Tax Special Procedure (Withholding Rules, 2014 (hereinafter referred to as the Withholding Rules) and no SST was payable by the respondent.

06. The Assessing Officer in para 6 of the OIO submitted that the respondent had provided record revealing that the transportation service to the tune of service Rs.242,889,468/- were provided to Lucky Cement during the tax periods from October, 2017 to February, 2018, however, the respondent had charged SST on the net freight value amounting to Rs.101,526,505/= instead of actual freight value by excluding the fuel expenses incurred in rendering the service.

07. The Assessing Officer passed OIO on the premise that the respondent was required to charge SST on the gross value of invoice, but the respondent charged SST on net value in violation of Section 8 of the Act read with rule 42G of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules). It was further stated in OIO that the respondent suppressed its sale by charging SST on the net freight value, which lead to short payment of SST. Finally the Assessing Officer determined SST liability of Rs.18,767,732/= on the gross value of transportation services amounting to Rs.242,889,468/= along with default surcharge. The Assessing Officer also imposed penalties amounting to Rs.938,371/= under serial No. 3 of Table under section 43 of the Act.

08. The respondent had challenged the OIO before Commissioner (Appeals) who allowed the appeal in favour of the respondent, and discharged the respondent from any tax liability, hence this appeal by the Department.

09. In the grounds of appeal it has been urged that: (a) the Respondent No. 2 has ignored the primary provision of charging SST and gross value of services under section 8 of the Act, read with section 5, 6 and rule 42G of the Rules, on which the entire case is built upon, hence the OIA requires to be annulled. (b) the Respondent, services provider had charged SST on the net freight value of services by excluding the fuel expenses incurred in rendering of services without appreciating the fact that the element of fuel was a primary ingredient for rendition of under reference transportation services and without fuel no sales could be generated. (c) the respondent No.2 has erred by holding the service recipient of the respondent No,1 liable for the payment of SST without

appreciating the fact that the respondent No. 1 had failed to discharge its primary responsibility of charging SST on the gross value of the taxable services as required under the substantive charging provision of section 8 of the Act, and special procedures provided in rule 42G of the Rules.

10. In the written comments the learned AC has submitted that the respondent had failed to charge SST on the aforesaid gross value of services amounting to Rs.250,390,650/-,and has instead charged SST on the consideration of Rs.102,017,727/- received from the service recipient Lucky Cement, in complete disregard of section 5 and 6 of the Act read with Rule 42G of the Rules.

11. In the Rejoinder the respondent submitted that from the careful perusal of the impugned finding it appears that the learned Assessing Officer segregated the invoice into net freight and he treated the gross freight value as net freight value. No diesel or fuel amount has been paid by Lucky Cement nor the same was part of the invoice. It was also pointed out that the bill/summary mentioned complete data of transportation including truck number, bilti number, STO number, destination, product, trip way, job order, weight, rate per ton, freight, diesel slip, diesel reservation number, total diesel consumed/usage and rate/filter, diesel amount and net freight. It was further contended that the value of diesel had been mentioned proportionately for the millage purposes and such figure was calculated to charge input tax from the FBR by Lucky Cement in its sales tax returns filed with FBR. The fuel/diesel amount was not received by the appellant and Lucky Cement had itself charged 100% sales tax on the invoice which was gross value and thus the learned Assessing Officer had failed to properly appreciate the facts of the case.

12. On 27.03/2019 Mr. Yousuf Bukhari the learned AC-SRB appeared and submitted that the respondent issued invoices to Lucky Cement after excluding the value of Diesel/Petrol used in providing transport services. He referred to Section 5 and 6 of the Act and submitted that value includes all federal and provincial taxes except Sindh Sales Tax on services.

13. Mr. Kamran Rizvi Advocate submitted that Lucky Cement being recipient of service had withheld and deposited entire sales tax amount and no amount of tax was remitted to the respondent for deposit. He supported the order of Commissioner (Appeals) and submitted that no assessment order can be passed against the respondent service provider as the responsibility for payment/deposit of tax fell upon the recipient.

14. On 02.05.2019 Mr. Yousuf Bukhari submitted that the tax liability determined by the Assessing Officer amounting to Rs.18,767,432/-. However respondent filed an appeal before Commissioner (Appeals) who setaside the assessment holding that the recipient of service was liable to withhold 100% tax and to pay the same to SRB as per Rule 3 (5) read with clause (f) of Rule 1 of the said Withholding Rules without appreciating the fact that the service provider had not fulfilled its responsibility of charging SST on gross value of service as mentioned in section 5 and 8 of the Act read with Rule 42G (3) of the Rules. He also submitted that in some invoices diesel amount was deducted from the total value of the service whereas in some other invoices tax was charged on the invoice value without deduction on account of diesel amount

15. Mr. Kamran Rizvi Advocate submitted that under Withholding Rules the recipient of Inter-city Transport Service, Tariff heading 9836.000 was a withholding agent of 100% tax and was paying the same to SRB. He further submitted that responsibility of service recipient/withholding agent cannot be shifted towards the service provider. Moreover the recipient as per agreement had provided the fuel and for that reasons the fuel charges were excluded from the invoices. He further submitted that according to Withholding Rules the recipient was liable to withhold entire amount of Sales Tax on account of Inter-city Transport Services and to deposit the same with SRB.

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

16. The main contention of the AC-DR is that tax has not been properly charged in the invoices as these were issued after excluding fuel charges. The contention of the respondent is that Lucky Cement which is the service recipient provided fuel cards and no amount has been incurred by the respondent on this account and the invoices were issued for the services provided or rendered.

17. On 02.05.2019 after hearing the arguments of the learned representatives of the parties the following points were framed:

(a) When the Withholding Rules provides that the service recipient of inter-city transportation service is liable to withhold 100% of tax and, to pay the same to SRB, whether the liability can be shifted on the service provider?

(b) Whether the respondent has not charged the tax properly on invoices. If yes, what will be the consequence?

18. Before discussing the above points we first need to discuss the allegation leveled against the respondent SCN and its treatment in the OIO. In the instant matter the SCN dated 08.05.2018 was issued on the allegation that the respondent provided inter-city transportation services to Lucky Cement amounting to Rs.641,941,010/= and have charged sales tax of Rs.86,333,740/= during October, 2017 to February, 2018 and that Lucky Cement withheld 20% of SST and had paid SST amounting to Rs.69,066,992/= to the respondent, but that amount was not deposited with SRB. During the proceedings and while writing the OIO the Assessing Officer has changed the allegation and in para No. 6 of the OIO stated that the respondent provided inter-city transportation services of Rs.242,889,468/= during October, 2017 to February, 2018, however the respondent charged SST on the net freight value of Rs.101,526,505/= instead of actual freight value by excluding the fuel charges incurred in rendition of the taxable service. The Assessing Officer changed the allegation without notice or confronting the respondent. The Value of service was also reduced from Rs. Rs.641,941,010/= to Rs.242,889,468/=. The SCN is silent and did not mention the basis on which it was issued. Apparently when the SCN was issued no material was available before the learned Assessing Officer to

conclude that the respondent provided services valuing to Rs.641,941,010/= and the issuance of SCN without material available with the Assessing Officer was a fishing and roving expedition and such practice was deprecated by the superior courts. This view gains support from the following:-

(i) Assistant Director Intelligence & Investigation, Customs, Karachi versus B. R. Herman, PLD 1992 SC. In this case it was held that the authority cannot make a roving inquiry or issue a notice by merely shooting in dark in the hope that it will be able to find out some material out of the same.

(ii) Caretex versus Collector, Sales Tax, 2013 PTD 1536. In this case it was held that SCN is not a casual correspondence or a tool or license to commence roving inquiry into the affairs of the tax payer based on assumption and speculations but is a fundamental document that carries definitive legal and factual position of the department against the tax payer.

19. Superior courts have also deprecated the practice of adjudication on the ground/allegation not mentioned in the SCN. The allegation/ground on the basis of which the OIO was passed was not mentioned in SCN. In the reported case of Collector Central Excise and Land Customs versus Rahim Din, 1987 SCMR 1840 it was held the adjudication based on a ground not mentioned in the SCN, was palpably illegal and void on face of it. In view of the discussion it is held that the ground adjudicated in the OIO was not part of SCN.

20. Now we will discuss Point (a) above i.e. (1) when the Withholding Rules provides that the service recipient of inter-city transportation service is liable to withholding of 100% tax and, to pay the same to SRB, whether the liability can be shifted on the service provider. Here it is pertinent to mention that section 9 of the Act deal with the liability of the person to pay tax and sub-section (1) of section 9 of the Act provides that the liability to pay the tax shall be on the registered person providing service. Section 13 of the Act deal with "Special procedures and tax withholding provisions" and sub-section (1) of this section

provides that "Notwithstanding" anything contained in this Act, the Board may, by notification in the official Gazette, prescribe special procedure for the payment of tax, valuation of taxable services, registration, record keeping, invoicing or billing requirements, returns and other related matters in respect of any service or class of services and subject to such limitations and conditions as may be specified in the notification.

21. The Board by Notification dated 01.07.2014 framed Withholding Rules and the institutions listed in sub-rule (2) of rule 1 of Withholding Rules were declared withholding agents. Clause (e) of sub-rule (2) of rule 1 of the Withholding Rules provides ~~that~~ the companies, as defined in clause (28) of section 2 of the Act. Admittedly Lucky Cement is a company and is a withholding agent. Rule 3 of Withholding Rules fixed the responsibility of the withholding agent and sub-rule (1) of this rule provides that a withholding agent shall deduct and withhold the sales tax from the payment made to the service provider and deposited the same with SRB. Sub-rule (3) 0f Rule 3 provides that a withholding agent, other than a person or a recipient of taxable service covered by clause (f) of sub-rule (2) of rule 1 of the Withholding Rules, shall deduct an amount equal to one-fifth of the total amount of sales tax shown in the sales tax invoice issued by a registered person and shall make payment of the balance amount to service provider for deposit with SRB. Lucky Cement is a service recipient of inter-city transport service and is covered by clause (f) of the above rule and is required to withhold entire amount of sales tax shown in the sales tax invoice from the payment due to the service provider. It is an admitted position that Lucky Cement being a company and withholding agent deducted, withheld and deposited the applicable sales tax with SRB. The relevant paras of OIA are produced for ready reference as under:-

> *"19. Plain reading of the above provisions of the Withholding Rules show rule 3(1) of the Withholding Rules provides responsibility of withholding agent. The rule 3(3) of the Withholding Rules provides that a withholding agent, other than a person or a recipient of the taxable service covered by clause (f) of sub-rule (2) of rule 1 of the Withholding Rules, shall deduct an amount equal to one-fifth of the total amount of sales tax shown*

in the invoice. This means that the recipient of service of Inter-city Transportation or Carriage of Goods is required to withhold the entire tax amount and to deposit the same with SRB. This position is clear from rule 3(5) of the Withholding Rules, which provides that a withholding agent, who received the service of Inter-city Transportation or Carriage of Goods from a registered person, shall deduct the amount of sales tax as mentioned in the invoice or the bill issued by the service provider, from payment due to service provider.

From this rule, it is clear the service provider of Inter-city Transportation or Carriage of Goods service is not responsible or requires paying or depositing the tax and that the recipient of services of Inter-city Transportation or Carriage of Goods is responsible to withhold entire amount of tax and deposit the tax.

20. The Appellant being service provider of Inter-city Transportation or Carriage of Goods has discharged its responsibility by declaring 100% sales tax as withheld by the service recipient in their monthly sales tax returns filed with the SRB; hence, it was the responsibility of the service recipient to withhold the tax and to deposit the same with SRB. The appellant had placed on record invoices which show that amount mentioned on the invoices were inclusive of all taxes.

21. In view of the above discussion this appeal is allowed and the Order-in Original is set aside".

22. It may be seen that the Withholding Rules were framed and notified under section 13 of the Act and that the said section starts with the non-obstante clause i.e. "Notwithstanding anything contained in this Act". A non-obstante clause is a legislative device which is usually used to give overriding effect to certain provisions over some contrary provisions that may be found either in the same statute or some other statute. Clearly section 13 and Withholding Rules framed thereunder have an overriding effect over the other provisions of the Act and it operates as an ouster of earlier provision where there was conflict and inconsistency. The view gain support from the following reported cases.

(i) Packages Limited versus Muhammad Maqbool, PLD 1991 SC 258. In this case it was held that "a non-obstante clause will operate as ouster only if an inconsistency between the two is found to exist".

(ii) EFU General Insurance & others versus Federation of Pakistan, PLD 1997 SC 700. In this case it was held that "a non-obstante clause is usually used in a provision to indicate that the provision should prevail despite anything to the contrary in the provision mentioned in such non-obstante clause. In case there is any inconsistency between the non-obstante clause and another provision, one of the objects of such a clause is to indicate that it is the non-obstante clause which would prevail over the other clause".

The withholding rules were framed under section 13 of Act and will take precedence over section 9 of the Act thus responsibility of payment of tax on inter-city transportation service rest upon the service recipient and not the service provider.

23. We have examined the findings given in OIA of the learned Commissioner (Appeals) as discussed in the light of the above mentioned provisions of law and do not find any legal infirmity in his order. The recipient of inter-city transport services being a withholding agent is liable to withhold 100% tax and to deposit the same with SRB, and that such burden cannot be shifted upon the service provider in view of section 13 of the Act read with Withholding Rules, 2014.

24. The point (b) framed above is "whether the respondent has not charged the tax properly on invoices. If yes, what will be the consequence"? This is an admitted position that the respondent issued invoices without fuel charges which were provided by Lucky Cement and charged SST as per the value of invoice which was withheld and deposited by Lucky Cement. The contention of the Assessing Officer was that the fuel charges was an integral part of the service and in view of section 5 and 8 of the Act read with section 42G of the Rules the SST should be charged after adding the fuel charges. However the respondent has contended that as per agreement the fuel was supplied by Lucky Cement and the invoices have rightly issued without inclusion of fuel charges. Section 5 deals with the value of a taxable service and sub-section (1) (a) of the section provides that the "value of a taxable services is the consideration in money including all Federal and Provincial duties and taxes, if any, which the person providing a service

received from the recipient of the service but excluding the amount of sales tax under the Act". Thus in view of the discussed provisions of the Act the respondent has properly charged SST on the basis of consideration in money received from Lucky Cement.

25. Clause (c) of sub-section (1) of section 5 of the Act provides that in case there is reason to believe that the value of a service has not been correctly declared in the invoice or for any special nature of transaction it is difficult to ascertain the value of a service, the open market price can be determined under section 6 of the Act. No determination of open market price has been made in the instant case and in absence of such determination the SST charged on the invoice value is correct. Section 8 of the Act is charging section and sub-section (1) of section 8 of the Act provides that sales tax shall be charged, levied and collected on the value of the taxable service at the rate specified in the Schedule. The respondent has charged the SST correctly on the basis of value of taxable services provided to Lucky Cement.

26. Furthermore proviso to sub-rule (3) of rule 3 of the Withholding Rules provides that unless otherwise specified in the contract between the service recipient and service provider, the amount of sales tax, for the purpose of this rule, shall be worked out on the basis of gross value of the taxable services under the tax fraction formula. The invoices excluding fuel charges were issued under the contract or the understanding between the parties. This provision provides protection to the contract between the service provider and the service recipient. In the reported case of Commissioner Income Tax versus Siemens AG, 1991 PTD 488 the honorable Supreme Court has held as under:-

"When two contracting parties agree to do something by a mutual valid contract or intend doing so, and it is not prohibited by Islam, a third party, like Income Tax Department or for that matter court has no power to modify either the contract or with what they intend to do with it".

In the same judgment it was further held as under:-

"The Income Tax authorities cannot change the nature of contract intended by the parties thereto, under the pretext that the rule of interpretation of a fiscal law in this behalf is different".

27. The Assessing Officer has referred to rule 42G of the Rules which provides procedure for collection and payment of sales tax on the services provided or rendered by persons or transport agencies engaged in the services of or in relation to inter-city transportation or carriage of goods by road or through pipeline or conduit and submitted that as per sub-rule (3) of rule 42G of the Rules the value of the taxable services for the levy of sales tax shall be the gross amount charged for the services provided or rendered, including the charges for services of cargo handling like loading, un-loading, packing, un-packing, stacking and storage of the goods or the cargo. It has been alleged by the Assessing Officer that the fuel charges were not included but he has failed to appreciate that for the purpose of appellant the gross value of the invoice is the charges it received from Lucky Cement and the respondent is not liable to charge SST on the fuel charges which were not incurred by it but the same were borne by Lucky Cement. The above provision clearly provided that "gross amount charged for the services provided or rendered". Here fuel charges are not provided to be included in the gross amount like other charges mentioned in the above rule. Therefore, in our view the respondent has properly charged SST on the value of services provided by it to Lucky Cement.

28. In view of the above discussions the appeal has no merits and is accordingly dismissed. The copy of the order may be provided to the learned representatives of the parties.

(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER

(Justice ® Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi. Dated: 18.11.2019

Order Dispatched on 20/11/19
Registrar

Order issued on 20/11/19
Registrar

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SINDH REVENUE BOARD

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