

M/s Logon Broadband (Pvt) Ltd.....Appellant

Versus

Assistant Commissioner, SRB, Karachi.....Respondent

Date of filing of Appeal: 22.03.2019

Date of hearing: 09.12.2019& 18.12.2019

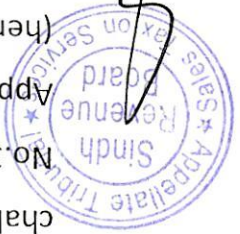
Date of Order: 20.03.2020

Mr. Iftikhar Ahmed Shamsi, Advocate for appellant.

Ms. Uzma Ghory, AC-DR and Mr. Zain Manzoor, 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.32/2019 dated 31.01.2019 passed by the Commissioner (Appeals-I) in Appeal No. 461/2018 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 980/2018 dated 01.12.2018 passed by the Assistant Commissioner (Mr. Vickey Dhingra) SRB, Karachi.



02. The facts as stated in OIO are that the appellant was voluntarily registered with SRB on 17.03.2018 under the category of Bandwidth Services, Tariff Heading 9812.2000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (herein after referred to as the Act) subject to levy of Sindh Sales Tax (SST).

03. The allegations against the appellant as stated in the OIO were that the scrutiny of annual audited financial accounts of the appellant for the years 2013-14, 2014-15, 2105-16 and 2016-17 revealed that the appellant had received consideration of Rs.25,006,705/= involving SST of Rs.4,732,595/=, such amount was not deposited with SRB and tax returns were also not e-filed.

04. The appellant was informed vide letter dated 26.08.2018 about the non-payment of SST and non-filing of Sales Tax Returns (Returns). The appellant complied with the said letter on 24.07.2018 through its authorized representative M/s Hashim Hameed Zaher & Co. and submitted that exemption as per Notifications No. SRB-3-4/7/2013 dated 18.06.2013 and No. SRB-3-4/10/2016 dated 28.06.2018 were available and the appellant was entitled to claim input tax adjustment of Rs.2,014,828/= and had thus claimed refund of Rs.89,195/=.

05. A show-cause notice (SCN) dated 29.10.2018 was issued under sub-section (2) of section 23 of the Act in which the appellant was directed to explain as to why Sindh sales tax of Rs.4,732,595/= may not be assessed and recovered along with default surcharge and penalties under serial No. 2, 3, 6(d), and 11 of the Table of section 43 of the Act. The appellant did not file any written reply but instead filed a letter on 14.11.2018 and raised the same contentions as mentioned in its earlier letter.

06. The Assessing Officer (AO) passed OIO determining the tax liability of Rs.4,732,595/= along with default surcharge and further imposed penalty of Rs.236,630/= and 420,000/= under serial No. 3 and 2 of Table



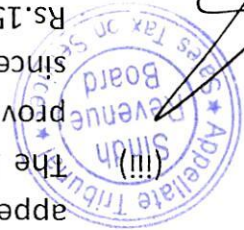
under section 43 of the Act for non-payment of tax and non-filing of monthly sales tax returns.

07. The appellant challenged the OIO before Commissioner (Appeals) who maintained the OIO to the extent of principal amount of tax and default surcharge and conditionally waived the penalties, hence this appeal by the appellant.

08. Mr. Iftikhar Ahmed Shamsi the learned advocate for the appellant has submitted as under:-

- (i) The appellant is a provider of broadband (Internet Services) and got voluntarily registered with SRB in March, 2018. The user ID and Password were communicated by SRB to the appellant for payment of SST and filing monthly e-returns. However, a letter dated 26.06.2018 was received from SRB for submissions of details for the past years 2013-14, 2014-15, 2015-16 and 2016-17, and the same were provided on 24.07.2018 to SRB. Thereafter a SCN dated 29.10.2018 was received which was duly complied with and the OIO was passed on 01.12.2018 without allowing exemption available to the appellant through various exemption notifications issued by SRB. Moreover the AO has also disallowed the input tax claimed by the appellant on provision of taxable broadband services.
- (ii) The Commissioner (Appeals) erroneously upheld the OIO without considering the legal as well as factual grounds taken by the appellant in the memo of appeal filed before him.

The AO had malafidely levied tax on exempted services despite providing all invoices to the department. It was submitted that since the appellant charged an amount which was below Rs.1500/- and Rs.2500/= from its clients thus no SST was charged which is evident from the bill books produced by the appellant. The tax was worked out from the financial statements provided by the appellant. However in case the appellant was liable to pay sales tax it was also entitled to claim input tax paid on acquiring the services of internet.



(iv)



(v) The OIO was passed without mentioning any provision of the Act,

perhaps for the reason that the Act does not provide any provision for passing assessment order against a non-registered person. Moreover the provision under which the assessment order could be passed against a non-registered person was also not confronted in the SCN.

(vi) The OIO suffers from legal infirmity as apparently this was not the case of assessment instead a case of short payment of tax and non-filing of returns.

(vii) The snap shots produced on page 4 of OIO were not confronted in SCN although the entire OIO was based on these snap shots. It was submitted that the order of adjudication, being based on a ground, which was not mentioned in the SCN was palpably illegal on the face of it. The AR relied upon the reported judgment in the case of The Collector Central Excise & Land Customs & others versus Rahm Din, 1987 SCMR 1840.

(viii) Paragraphs 8.3 & 8.4 of OIO were contradictory to each other as the web site was created in August 2018 and such invoice was accordingly produced. However no evidence was placed on record to show that the appellant was charging tax but had not deposited the same. It was pointed out that prior to registration neither tax could be collected and deposited nor the returns could be filed. The AR referred to the reported order of this Tribunal in the case of AC-SRB V/s Target, 2018 PTD 536. He further mentioned that if the department was charging tax prior to date of registration it was obliged to allow input tax on the basis of invoices provided to the department.

08. Ms. Uzma Ghory the learned AC-DR, SRB submitted as under:-

(i) The AO was passed under section 23 of the Act and invoking or confronting section 47 (1) of the Act or other provisions of the Act were not necessary.

(ii) It was the duty of the appellant to get registration before providing taxable services, even if the same were exempted.



Ms.

(!!!!) The OIO was not solely based on snap shots and the amount of tax was confronted in the SCN and that was sufficient opportunity for passing OIO.

(iv) Website of the appellant showed that tax had been charged but not deposited with SRB.

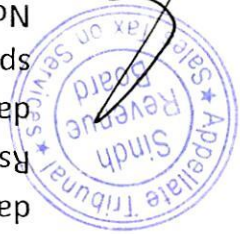
(v) The appellant was not entitled to claim exemption since it had failed to mention the speed of internet in the invoices. The exemption was available if the speed was from 2 mbps to 4 mbps and the amount of invoice/value was not more than Rs. 1500/- to 2500/-. Each and every invoice was examined but the speed of connection was not mentioned in the invoices.

(vi) The appellant was liable to charge and pay tax prior to the date of registration as the definition of registered person included the person liable to be registered. However it was not entitled to claim input tax adjustment in view of proviso to sub-section (71) of section 2 of the Act.

(vii) For claiming input tax adjustment e-filing of monthly tax returns were mandatory and input tax adjustment could only be claimed within four months to six months. However the input tax claimed by the appellant was time barred and no application for condonation was filed under section 81 of the Act.

(viii) The appellant was registered with SRB in March, 2018 under the principle activity of (Bandwidth Services) Tariff Heading 9812.2000 and the said service was exempted from payment of SST from July, 2011 to June, 2013. However in view of Notification dated 01.07.2013 the exemption was allowed upto invoice of Rs.1500/- per month. Whereas in view of another Notification dated 01.07.2014 the exemption was allowed upto Rs. 1500/- with speed of 2mbps. The exemption was further restricted vide Notification dated 01.07.2016 to 2mbps speed with invoice amount of Rs. 1500/- and 4mbps speed with invoice amount of Rs. 2500/-.

09. In rebuttal Mr. Iftikhar Shamsi, Advocate submitted that the first Notification was issued on 18.06.2013 which provided the value of





service of Rs.1,500/= as the only condition to avail exemption. Whereas in the subsequent Notification dated 01.07.2014 the condition of speed up to 2 mbps was added and thereafter in the Notification dated 28.06.2016 the value of service was enhanced to Rs.2,500/= with 4 mbps speed to avail exemption. He also submitted that mentioning the speed in invoices was not the condition of availing exemption.

10. Mr. Shamsi further submitted that after passing of the OIA dated 31.01.2019 the bank account of the appellant was attached vide attachment letter dated 01.02.2019 received on 04.02.2019 and an amount of Rs. 80,077/- was withdrawn. Prior to this also a sum of Rs.26,834/- was withdrawn from the bank account of the appellant. It was also submitted that OIA was received on 02.02.2019 and without even providing the copy of the OIA the bank account was attached and amount was withdrawn. He submitted that the malafides of the department is apparent at the face of the record as the Commissioner (Appeals) first provided copy of OIA to the Assessing Officer and then to the appellant so that the department could take coercive action thus depriving the appellant from approaching the Tribunal for obtaining stay against coercive recovery.

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

12. The assessment order was passed in respect of tax periods from July, 2013 to June 2017 when the appellant was not registered with SRB since it got voluntarily registration in March, 2018. The question is under what provision of the Act an assessment order could be passed against a non-registered service provider.

13. The SCN was silent with regard to the provision under which an assessment order was intended to be passed against the appellant for the period it was not registered with SRB. The OIO was also silent with regard to the provision under which the assessment order was passed. In the SCN sub-section (2) of section 23 of the Act was invoked which

only provides that no order under subsection (1) or (1A) shall be made by an officer of SRB unless a notice to show cause is given to the person in default.

14. In the SCN the appellant was treated as registered person even for the period it was not registered. Quoting of the provision of law in the SCN was necessary to inform the appellant about the intended action so that the appellant could prepare proper defence. However without quoting the relevant provision of law the SCN was prejudicial to the interest of the appellant and deprived it from taking a proper defence. In the reported case if Wak Limited versus Customs, Central Excise and Sales Tax Appellate Tribunal, 2018 PTD 253 Land Customs it has been held as under:-

*"8. Jurisprudence is now pretty settled on the point that show-cause notice is a serious business and is not a casual correspondence. Its purpose is to put the person on notice about the allegations for which the authorities intend to proceed against him and to give him an opportunity to explain his position.*

15. In the reported case of Collector of Sales Tax and CE, Lahore, 2007 PTD 1804 (Supreme Court) it has been held as under:-

*"It is to be noted that instead of taking into consideration technicalities, the Court looks into the matter with different angles namely as to whether substantial compliance has been made or if any of the sub-rule has been omitted then what prejudice is likely to cause to the party to whom the show cause notice is given. But in the instant case, we are of the opinion that no prejudice shall be caused to the respondents because the substantial compliance of the relevant rules has been made".*

In the reported case rule was mentioned but the sub-rules were omitted and in that context the Honorable Supreme Court had held that substantial compliance of the rules was made. However, the instant case is distinguishable since no provision of law has been quoted or mentioned in the SCN under which the intended order was to be passed.





16. In other reported case of AL-Khair Gadoon Ltd., versus The Appellate Tribunal and others, 2020 PTD 18 (Supreme Court) it has been held as under:-

*"What is crucial to note that, in deciding the legal validity of the show cause notice, it is important to first see whether the recipient/assesse of the said notice has been put to any prejudice in preparing and putting up its defence to the allegations made therein".*

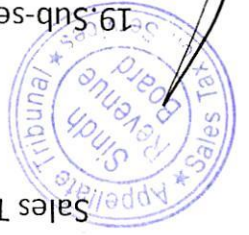
17. In view of the above two judgments of the honorable Supreme Court it is apparent that it has to be seen that what prejudice had been caused to the appellant by omitting the relevant provision of law from the body of SCN. Certainly prejudice was caused to the appellant as the notice was issued without quoting relevant law on wrong notion that the appellant was a registered person and was liable to pay tax for the entire tax periods mentioned in the SCN. A proceeding based on an illegal SCN is not maintainable.

18. The SCN was issued and OIO was passed treating the appellant as registered person for the period it was not registered relying upon the definition of registered person provided in the Act. If the person liable to be registered is equated with the registered person the Chapter IV of the Act which dealing with the Registration becomes redundant and there is no need to formally register the service providers. In the reported case of Super Asia Muhammad Din and Sons (Pvt) Ltd., versus Collector of Sales Tax, Gujranwala it has been held as under:-

*"Redundancy or superfluity of an Act of Parliament and a provision of law cannot be readily accepted".*

19. Sub-section (71) of section 2 of the Act provides the definition of "registered person" as under:-

*"means a person who is registered or is liable to be registered under this Act or any other person or class of persons notified by the Board in the official Gazette."*

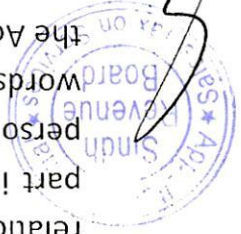




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22. On examination of sub-section (1) of section 3 of the Act it is evident that the same deals with the registered person providing service from its registered office in Sindh. However, if sub-section (2) thereof is read with explanation attached to the said sub-section it appears that the

21. Sub-section (1A) to section 23 was added through Sindh Finance Act, 22015 (XXXVI of 2015) effective from 10.07.2015. This sub-section commenced with the phrase "Notwithstanding anything contained in this Act" provided that "where a person fails to file the return for a tax period by the due date or where the registered person fails to furnish any information, explanation, documents, record or any other details as may be required in a notice issued under sections 23, 28, 29 or 52 an officer of SRB, not below the rank of Assistant Commissioner, shall, based on any available information or material, make an assessment order, to the best of his judgment, determining the minimum tax liability of such registered person for the tax period specified in the notice" (emphasis supplied). In this section the legislature in the earlier part in relation to non-filing of return used the word "person" and in the later part in relation to assessment of tax used the words "such registered person". From this it is clear that whenever the legislature used the words "registered person" it means registered person registered under the Act, <sup>and it</sup> does not include "person liable to be registered"



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20. On examination of sub-section (1) of section 23 of the Act it appears that by invoking the same an assessment of tax can be made only against a registered person as the words used there in are "that a registered person has not paid the tax due on taxable services provided by him".

Apprently the "registered person" and "person liable to be registered" are two different categories as the "person "liable to be registered" but not registered shall not be liable to any benefits available to a registered person under the rules.

*Provided that a person liable to be registered but not registered under this Act shall not be entitled to any benefit available to a registered person under any of the rules made thereunder".*

same deals with the service provided by non-resident person to a resident person. Section 9 of the Act deals with the person liable to pay tax and sub-section (1) thereof has fixed the liability of payment of tax upon the registered person. The law is well settled that tax can only be levied under a provision of law which is unambiguous and clear. In the reported case of Al-Hilal Motors Stores and another versus Collector Sales Tax and Central Excise (East) and another, 2004 PTD 868 it has been held as under:-

*"It is an 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 cases it is apparent that except discovering certain cash-credits entries in the books of the appellant, 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 present on amount on account of any business activity".*

23. In the above reported case the assessment was passed only on the basis of entries available in the bank statement. Whereas in the instant case the assessment was made against a non-registered person without quoting the relevant provision of law in the SCN and in the IO. An assessment order cannot be passed against a non-registered service provider.

24. Chapter IV of the Act deals with Registration and section 24 of the Act thereof provides that registration will be required for all persons who are resident and provide any of the services listed in the Second Schedule to the Act from their registered office or place of business in

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word.

26. The Assessing Officer also imposed penalty for non-filing of returns for the tax periods the appellant was not registered. Chapter VI of the Act deals with returns. Sub-section (1) of section 30 of the Act provides for furnishing of returns in the prescribed form by the registered person. Whereas Chapter III of the Rules deals with filing of returns whereby rule 11 provides that the provision of this chapter shall apply to all the registered persons to file return under section 30 of the Act. Rule 12 of the Rules provides that every registered person registered under the provision of the Act, shall file the return as specified in the Form SST-03. Rule 13 provide for electronic filing of returns by every registered person required to file return on obtaining a unique User-ID and pass word by e-Enrolling with SRB web portal and electronically file a return (available on the website) from the web portal. From the perusal of the Rules it is apparent that e-returns cannot be filed without unique User-ID and pass

25. In the same way while examining Chapter II of the Rules which deals with Registration and De-Registration. Rule 3 and 4 thereof provides that the providers of service are required to be registered in the manner specified in this chapter. Sub-Rule (3) of Rule 5 provide that SRB has to communicate to the service provide his provisional registration number and the user ID, pin code and password. And after activation of user ID and e-enrolment formalities for payment of amounts of tax and filing of tax returns. Chapter III of the Rules deals with filing of returns. Rule 11 also provides that this chapter shall apply to registered persons required to file returns. From this rule it is evident that a person who is not registered is not be in a position to pay tax and file returns without registration number, user ID, pin code and password.

This provision provides that registration is necessary if a person is a resident and provides services listed in the Second Schedule from its registered office. Chapter V of the Act deals with Book Keeping and Audit proceedings. Sub-section (1) of section 26 of the Act provides for maintaining and keeping record by registered person at its registered office.

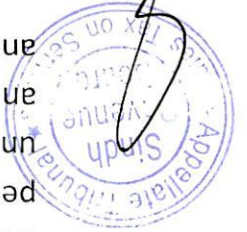


27. The definition of "SRB registered person" available in sub-rule (8) of Rule 2 of the Sindh Sales Tax Special Procedure (Withholding Rules), 2011 (hereinafter referred to as the Withholding Rules) substituted effective from July 2014 provides that a person registered with SRB under the Act for providing or rendering of taxable services as defined in clause (90) of section 2 of the Act. The definition of un-registered person" available in sub-rule (10) of Rule 2 of the Withholding Rules provides a person who is liable to be registered under the Act but is actually not registered and does not hold a Sindh sales tax registration number (STTN). From these two definitions it is evident that the "SRB registered person" and "un-registered person" are two different type of persons and cannot be treated as one person.

28. Rule 4 of the Withholding Rules deals with the responsibility of registered service provider and provides that the registered service provider shall issue tax invoice, as stipulated in section 26 of the Act, read with sub-rule 1(1) of rule 29 of the Rules in respect of every taxable service provided or rendered to a withholding agent.

29. On plain reading of above quoted provisions of law, it is abundantly clear that without sales tax registration number a person liable to be registered cannot pay sales tax, and cannot file sales tax returns under section 30 of the Act. Thus such person cannot be subjected to audit under section 28 of the Act, hence levying sales tax by the department without recourse to section 24 of the Act, illegal. It is also clear from the perusal of the provision of the Act and Rules that there is no provision under which a non-registered person is liable to charge and collect tax and to deposit the same with SRB. There is also no provision in the Act and the Rules under which a non-registered person can file e>Returns.

30. The Commissioner (Appeals) in the OIA heavily relied upon the definition of registered person under sub-section (71) section 2 of the Act and the reported case of M/s Khan & Company versus Deputy Commissioner-IR, 2015 PTD, 796 (DB of Peshawar High Court) in which tax was levied on

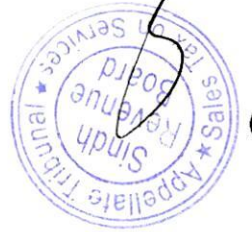




un-registered person. In its judgment the Peshawar High Court while remanding the case to Tribunal to decide whether the petitioner fall within the categories of persons liable to be registered has not considered the implications of sub-section (2) of section 23 of the Sales Tax Act, 1990 which has specifically provided that "no person other than a registered person or a person paying retail tax shall issue an invoice under this section". From plain reading of sub-section (2) of section 23 above it is abundantly clear that a tax invoice cannot be issued by a person liable to be registered under the Sales Act, 1990, the outcome is that when a person liable to be registered cannot issue tax invoice it cannot collect tax also. Sub-section (2) above was considered in a subsequent judgment by a learned DB of Lahore High Court in Commissioner Inland Revenue versus S.K. Steel, Casting, Gujranwala, 2019 PTD 1493. In this reported judgment a passage from the judgment of the Supreme Court in M/s Amina Z. Beauty Salon was quoted, which reads as under:-

"17. In view of the above, our answer to the proposed question is that the combined reading of the provisions of the Act, 1990 and the Rules framed thereunder manifestly disclose the intention of the law maker that, where a person is liable to be registered, the applicant-department is first required to register that person compulsorily or otherwise in accordance with law, and then charge sales tax from it under section 3 of the Act of 1990, and may proceed against that person regarding prior to registration contravention of the provisions of the Act of 1990, if any."

31. The crux of the above judgment appears to be that the tax cannot be charged or levied on a person unless such person was registered with the department. The law is well settled that tax can only be levied under a provision of law which is unambiguous and clear and if there appears any doubt the same should be resolved in favour of tax payer. However action can be taken against it for contravention if any, prior to registration.



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32. There is yet another provision which distinct "registered person" from "un-registered person" i.e. clause 1 of Table under section 43 of the Act which provides that "any person who is required to apply for registration under this Act fails to make an application for registration before providing taxable services" "Such person shall be liable to pay penalty of 10,000/- rupees or five percent of the amount of sales tax he would have been liable to pay had he been registered, whichever is higher. In the case of non-compliance 1[of notice or an order] of compulsory registration, the minimum penalty shall be 100,000 rupees. Provided that such person who is required to get himself registered under this Act, fails to get registered within ninety days of providing taxable services, he shall be further be liable, upon conviction by a Special Judge, imprisonment for a term which may extend to one year, or with fine which may extend to the amount of sales tax he would have been liable to pay had he been registered, or with both.

33. In this provision also the registered person and un-registered person were treated differently. Penalty was provided for the person who is liable to be registered but fail to make an application for registration before providing taxable services. However all the persons liable to be registered if not registered before providing taxable service are being deemed to be registered person as per the definition of clause (71) of section 2 of the Act and they cannot be penalized.

34. In the instant case the appellant got registration before issuance of SCN and the department treated it as registered person even before the date of registration under section 24 of the Act thus no SCN could be issued to it under Clause 1 of Table under section 43 of the Act as mentioned above. However the Department subject to limitation is at liberty to issue fresh show-cause notice to the appellant for violation under this clause.

35. In view of the above this appeal is allowed and both the OIO and OIA are annulled. The copy of the order may be provided to the learned representatives of the parties.





Registrar  
*[Signature]*

Order Dispatched on ..... 02/04/2020

Registrar  
*[Signature]*

Order issued on ..... 02/04/2020

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

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

Copy for compliance:

Dated: 20.03.2020  
Karachi

(Imtiaz Ahmed Barakzai)  
Member Technical  
*[Signature]*

(Justice® Nadeem Azhar Siddiqi)  
Chairman  
*[Signature]*

Certified to be True Copy  
REGISTRAR  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD  
*[Signature]*