

(Guard file)

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD

SB-I

APPEAL NO. AT-48/2019

M/s Burghari Medicos, Dadu.....Appellant

Versus

Assistant Commissioner, SRB. HyderabadRespondent

Date of Filing: 03.05.2019

Date of hearing: 26.09.2019

Date of Order: 30.09.2019

Mr. Nursing Lal Advocate for appellant

Mr. Kaleemullah Siddiqi AC-DR & Mr. Nabi Bux AC-SRB Hyderabad for respondent

ORDER

Justice[®] Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order-in-Appeal No.74/2019 dated 25.03.2019 passed by the Commissioner (Appeals-II), SRB in Appeal No. 110/2017 filed by the appellant against the Order-in-Original No. 66/2017 dated 03.08.2017 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 Linz Pharmaceuticals Private Limited (LP) and M/s Bosch Pharmaceuticals Private Limited (BP) and for distribution of goods in Sindh. It was also stated in the order-in-original that the appellant has signed an agreement with LP and BP for distribution and delivery of their goods confirmed by BP.




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) 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 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 10.05.2017 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 18.05.2017 and stated that the appellant was appointed as a distributor by various companies and selling and purchasing goods on margin profit basis which are not liable to Sindh sales tax. It was also stated that appellant is not engaged as service provider or supply chain management but, only purchases medicines and sell the same on fixed margin or profit.

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. The learned advocate for the appellant submitted as under:-



07. Mr. Nursing Lal the learned advocate for the appellant submitted that he will rely upon the grounds of appeal and submitted that appellant is not providing any service in terms of Sindh Sales Tax on Services Act, 2011 and tariff heading 9845.0000 was wrongly invoked. He then submitted that withholding of tax mechanism is available vide Notification dated 01.07.2014 and the company/ principal is required to withhold tax and to deposit the same with SRB. The grounds of appeal are as under:-

- (i) An order of Tribunal has been made basis of the order-in-appeal, whereas facts of this cases are entirely different from the facts of the case relied upon by Commissioner (Appeals).
- (ii) The respondent No. 1 without considering the record, replies and submission of the appellant passed the impugned order. The order of the Respondent No. 1 is contrary to the facts narrated in the impugned order.
- (iii) Respondent No. 1 without considering the arrangement of Agreements of Appellant passed the impugned order making basis of Agreement of Colgate Palmolive.
- (iv) The agreement of Appellant discloses that Appellant is engaged in business of bulk purchase and earning discounts on bulk purchase. It is assumption of the respondent No. 1 that the ownership of products even in custody of Appellant lies with the Companies.
- (v) The Respondent No. 1 completely failed to justify the Supply Chain Management and definition of Distribution from the Act. The law is silent and nothing has been defined and further if respondent relied on definition of Sales Tax Act, 1990 the Respondent did not considered that Appellant is not registered under Sales Tax, 1990.

08. Mr. Nabi Bux the learned AC submitted that he is relying upon the earlier decisions of the Tribunal and his arguments recorded in those appeals. He additionally submitted that this case related to compulsory registration under section 24B of the Act, and the appellant is a resident person dealing in taxable services falling under Tariff Heading 9845.0000 (Supply chain management or distribution (including delivery) services of the 2nd schedule of the Act and was rightly compulsorily registered.

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



09. The dispute is whether the activity or 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 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 passed 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

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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.

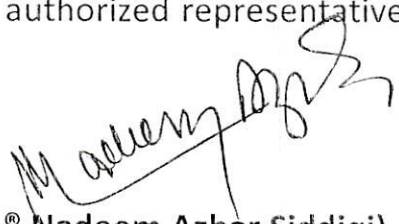
21. From the contents of the agreements produced before us the substance of the same appears to facilitate sale and delivery of goods and not simple sale of goods. It is now well settled point of law that while construing an instrument/document whole document is to be read and considered to ascertain 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 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.


(Justice[®] Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi

Dated: 30.09.2019

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

30/9/19

Registrar

Order Dispatched on

30/9/19

Registrar