

(Guard file)

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

SB-I

APPEAL NO. AT- 52 /2019

M/s, Royal Medicos Pharma, Tharparkar.....Appellant

**Versus**

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

Date of Filing Appeal: 10.05.2019

Date of hearing: 16.09.2019 and 23.09.2019

Date of Order: 30.09.2019

Mr. Lajpat Khatri, Advocate for Appellant.

Mr. Kaleemullah AC-DR for Respondent.

ORDER

Justice ® Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order-in-Appeal No.56/2019 dated 09.03.2019 passed by the Commissioner (Appeals-II), SRB in Appeal No. 137/2017 filed by the Appellant against the Order-in-Original No. 87/2017 dated 18.08.2017 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 Linz Pharmaceuticals (Pvt) Ltd., Chas A. Mendoza and Bosch Pharmaceuticals for distribution of goods in Sindh. It was also stated in the order-in-original that the appellant has signed an agreement with Chas A. Mendoza for distribution and delivery of their goods confirmed by Chas A. Mendoza.

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 2<sup>nd</sup> 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 and before providing taxable services.

03. A show-cause notice dated 27.04.2017 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 03.07.2017 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 pharmaceutical products against advance payment and is selling goods after getting margin. The appellant refer to clause 6 of the Agreement with Chas A. Mendoza to show that the appellant is selling products on the price and policy of the company. Further replies were also filed on 13.07.2017 and 01.08.2017.

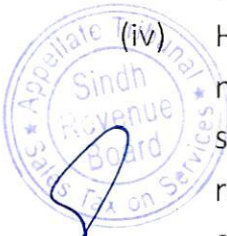
04. The Officer-SRB passed Order of Compulsory Registration of the appellant under section 24B of the Act for the service falling under Tariff Heading 9845.0000 (Supply chain management or distribution (including delivery) services of the 2<sup>nd</sup> schedule of the Sindh Sales Tax on Service Act, 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:-



- (i) The appellant is working as dealer, distributor and wholesaler of pharmaceutical goods and is not involved in taxable activity for the reason that the appellant gets 10% discount from the supplier/manufacturer and the discount is mentioned on the invoices
- (ii) The appellant neither working for commission nor receiving any commission from the supplier/manufacturer and is not a Commission agent and Tariff Heading 9845.0000 of the Second Schedule of the Act was wrongly invoked.
- (iii) The Act neither provides the definition of supply chain management nor distributor and in absence of definition in law the activity of the appellant cannot be treated as of supply chain management or distributor.



(iv) He submitted that there is distinction between supply chain management and distributor and both terms cannot be used simultaneously. In supply chain management no investment is required and the agent works against receipt of charges or commission. The distributor paid advance price of goods and become the owner of the goods and free to sell the goods on its own terms.

(v) The appellant has to invest by way of paying cost of goods in advance and has to maintain the stock for sixty days and has to borne all expenses for distribution from its own pocket.

(vi) The department is claiming Sindh sales tax on gross amount of goods (which is exempted from payment of sales tax under Sales Tax Act, 1990) instead of service charges.

(vii) The Sindh sales tax Act was promulgated in VAT mode and no mechanism for passing on the tax to end user has been provided and in absence of such mechanism no tax can be levied.

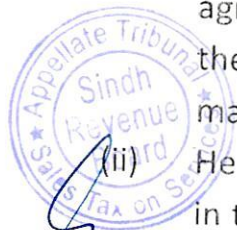
07. Mr. Lajpat Khatri also submitted that the appeal before Commissioner Appeals) was filed on 17.09.2017, whereas the order-in-appeal was passed on 09.03.2019 beyond the period prescribed in sub-section (5) of section 59 of the Act. He also submitted that during pendency of appeal no adjournment has been sought by the appellant and that at the second date the hearing was concluded and the order was reserved and

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thereafter instead of passing the order the appeal was transferred to Commissioner (Appeals-II) and matter was heard again and thereafter the order was passed. The Commissioner (Appeals-II) deliberately avoided mentioning date of hearing in the order.

08.Mr. Kaleemullah the learned AC-DR of the respondent submitted as under:-

(i) He mainly relied upon the contents of the order-in-original and order-in-appeal. He submitted that from the replies of the respondent it is clear that the appellant is working for others in supplying their goods against consideration. The appellant has no choice to sell the goods on its own terms but has to act as per the agreement and has to act within a specified area and has to sell the goods on the instructions and the price fixed by the manufacturer.



(ii) He submitted that the appellant is a resident person and dealing in the taxable activity and is liable to registration under section 24 of the Act and on its failure to get voluntarily registration rightly compulsory registered under section 24A of the Act.

(iii) He then submitted that the relationship between the appellant and Chas A. Mendoza is covered under a written agreement and the appellant was appointed and termed as distributor in the agreement and from reading the various clauses of the agreement it is clear that appellant was appointed distributor to sell the goods of principal. He referred to various clauses of the agreement between the appellant and Chas A. Mendoza in support of his argument that the appellant has to act under the instruction of the manufacturer/supplier. He then submitted that appellant is providing services to manufacturer for distribution of its goods against consideration in the form of discount and is liable to pay Sales Tax on Services.

(iv) He then referred to tariff heading 9845.0000 [supply chain management or distribution (including delivery) services] of the Second Schedule and submitted that this is a taxable service as

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provided under section 3 of the Act of 2011. On a question from the Tribunal he informed that neither the definition of supply chain management or distribution (including delivery) services is provided in the definition clause of the Act nor any rule has been framed. He then submitted that compulsory registration was made on the basis of contents of agreement under a specific tariff heading 9845.0000 of 2<sup>nd</sup> Schedule to the Act which provides that "distribution" (including delivery) is a taxable service.

09. Mr. Lajpat in rebuttal submitted that the tax has to be levied either on the manufacturer or on retailer and not on the middle man who worked for a meager amount of discount.

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

10. 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.

11. It is not disputed that after 18<sup>th</sup> 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 1) 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.

12. 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.

13. The appellant is a resident person and is admittedly registered with FBR and is operating in Sindh. The appellant purchased pharmaceutical 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 service to another person and is covered by the provision of section 4 of the Act read with Tariff Heading 9845.0000.



14. The Commissioner (Appeals-II) while dismissing the appeal has relied upon the earlier DB order dated 22.11.2018 of the Tribunal in Appeal No. AT- 61 /2018, M/s JSN Traders, Hyderabad Versus Assistant Commissioner, SRB, Karachi, the operative part of which is read 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".

15. 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.

16. As far as the submission of the learned advocate for the appellant that the appeal before Commissioner (Appeals) was filed on 17.09.2017, whereas the order-in-appeal was passed on 09.03.2019 beyond the period prescribed in sub-section (5) of section 59 of the Act. The appeal can be decided within one hundred and eighty days and in computing the time period time taken through adjournment by the appellant shall be excluded. In this regard a report was called from Commissioner





(Appeals-II). The report shows that 540 days were consumed in finalizing the appeal out of which 177 days were taken by the appellant by way of adjournment and after excluding 177 days from 540 days the remaining days comes to 363 days out of which the Commissioner (Appeals) had taken 211 days in announcing the order. The order in appeal is bared by time. However, the order is not an assessment order under section 23 of the Act which provides time period for finalizing the assessment order, but is an order under section 24B of the Act, which do not provide any period of time for passing the order of compulsory registration. In case the order-in-appeal is declared as bared by time no purpose will be served as the Department can initiate fresh proceedings for registration.

17. 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.

18. 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 <sup>®</sup> Nadeem Azhar Siddiqi)  
Chairman

Certified to be True Copy

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.

REGISTRAR  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD

Order issued on

30/9/19

Registrar

Order Dispatched on

30/9/19

Registrar