

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-1

APPEAL NO. AT-56/2019

Allied Rental Modaraba-----Appellant

Versus

Assistant Commissioner, SRB, Karachi-----Respondent

APPEAL NO. AT-61/2019

Assistant Commissioner, SRB, Karachi-----Appellant

Versus

Allied Rental Modaraba-----Respondent

Date of filing of Appeal: 24.05.2019

Date of hearing: 28.10.2019

Date of Order: 31.10.2019

Mr. Farhan Mohib, ACA for tax payer.

Mr. Kaleemullah, AC-SRB for department.

ORDER

Justice ® Nadeem Azhar Siddiqi: This appeal bearing No. AT-56/2019 has been filed by the tax payer (hereinafter referred to as the "tax payer")



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challenging the Order-in-Appeal No.89/2019 dated 23.04.2019 passed by the Commissioner (Appeals-I) in Appeal No. 105/2018 filed by the tax payer against the order in original No. 457/2018 dated 07.05.2018 passed by the Assistant Commissioner (Ms. Umi Rabbab) SRB, Karachi.

01.The other appeal bearing No. AT-61/2019 has been filed by the department (hereinafter referred to as the "department") challenging the Order-in-Appeal No.89/2019 dated 23.04.2019 (hereinafter referred to as OIA dated 23.04.2019) passed by the Commissioner (Appeals-I) in Appeal No. 105/2018 filed by the tax payer against the department against the order in original No. 457/2018 dated 07.05.2018 (hereinafter referred to as the OIO dated 07.05.2018) passed by the Assistant Commissioner (Ms. Umi Rabbab) SRB, Karachi.

02.Both the appeals are against the same order and on the same facts, hence decided by this order.

03.The facts as stated in the OIO dated 07.05.2018 are that the tax payer is a registered person providing taxable service in respect of operation and maintenance amounting to Rs.160,203,765/= as evident from the financial statements for the year 2011-2012 which falls under service category of Contractual Execution of Work or Furnishing Supplies, Tariff Heading 9809.0000 of the Second Schedule of Sindh Sales Tax on Services Act, 2011 (herein after referred to as the Act) subject to Sindh sales tax liable to Sindh sales tax @ 16%.

04.The allegation against the tax payer as stated in the OIO is non-payment of SST on the aforesaid services which shows that the tax payer has violated the provisions of sections 8, 9 and 17 of the Act.

05.A show-cause notice dated 15.03.2013 was served upon the tax payer invoking Tariff Heading 9813.3000 (services provided or rendered in respect of modaraba and musharika financing) calling



upon it to show-cause as to why Sindh sales tax amounting to Rs.25,632,602/= should not be assessed under section 47 (1A) of the Act along with default surcharge under section 44 of the Act and penalties under clauses 3, 6d, 11 and 12 of section 43 of the Act. The tax payer submitted the reply dated 24.04.2013 in which it was stated that section 47 (1A) of the Act was not applicable. It was also stated that the main business of the tax payer was to provide CATERPILLAR Generators on "Ijarah" and in addition to this the tax payer also provided operation and maintenance services for the customers owned CATERPILLAR Generators. It was further stated that out of Rs.160,203,765/= the value of services provided in Sindh was to the extent of Rs.76,488,117/= and other than Sindh was Rs.83,715,648/=.

06. Record shows that Show-Cause Notice (SCN) dated 15.03.2013 was served upon the tax payer invoking Tariff Heading 9813.3900. After the SCN dated 15.03.2013 another SCN dated 20.05.2013 was served upon the tax payer alleging therein that the tax payer is providing services of contractual execution of work (i.e. operation and maintenance service) falling under Tariff Heading 9809.0000 (services provided or rendered by persons engaged in contractual execution of work or furnishing supplies) of the Second Schedule of the Act.

07. The first OIO No. 160/2013 dated 12.07.2013 was passed treating the services provided by the tax payer under Tariff Heading 9809.0000 of the Second Schedule of the Act determining the tax liability of Rs.25,632,602/= along with default surcharge and penalty of Rs.1,281,630/= under clause 3 of section 43 of the Act. The tax payer challenged the first OIO before the Commissioner (Appeals), SRB who amended para 8 of the OIO to the extent of maintaining tax demand of Rs.12,238,098/= without default surcharge and penalty and setaside the tax demand on the value of service of Rs.83,715,648/= on account of services initiated and rendered outside Sindh. The Commissioner (Appeals) also annulled invocation of section 47 (1A)



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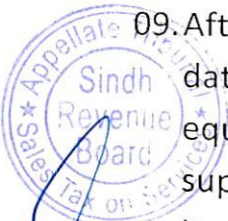
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of the Act. While passing the OIA in appeal No. 16/2014 dated 25.02.2014 the Commissioner (Appeals) invoked Tariff Heading 98.13 without specifying the relevant Tariff Heading under which the services provided or rendered by the taxpayer fell and further held that scope of O&M or M&C had become secondary when the taxpayer by virtue of tariff heading 98.13 are taxable and any services provided in whatever mode either through rental agreements or through O&M agreements were liable to Sindh Sales Tax on Services (SSTOS) as per law.

08. The OIA in appeal No. 16/2014 dated 25.02.2014 passed by Commissioner (Appeals) was challenged by the taxpayer before this Tribunal by filing appeal No. AT-123/2015. The Tribunal after hearing the parties has passed the order dated 06.03.2018 and set aside both the OIO and OIA in appeal and remanded the case to the Assessing Officer to determine the nature of service and proper classification of services provided or rendered by the tax payer.

09. After remand the Assessing Officer passed fresh OIO No. 457/2018 dated 07.05.2018 and held that operation and maintenance of heavy equipment fell under contractual execution of work or furnishing supplies, Tariff Heading 9809.0000 of the Second Schedule of the Act. It was also held that services of the tax payer do not fall under Tariff Heading 9822.000, maintenance and cleaning. The Assessing Officer determined tax liability of Rs.12,494,098/= along with default surcharge and penalty amounting to Rs.624,704/= under clause 3 of section 43 of the Act.

10. The said OIO No. 457/2018 dated 07.05.2018 was challenged by the tax payer before Commissioner (Appeals) in Appeal No. 105/2018 decided by Commissioner (Appeals-I) vide OIA No. 89/2019 dated 23.04.20219. The Commissioner (Appeals) held that the services of O & M does not fall in the description as envisaged in Tariff Heading 9809.0000 of the Second Schedule of the Act. The Commissioner (Appeals) also held that the activity of "equipment rental




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agreements" fell in the description of "commodity and equipment leasing", Tariff Heading 9813.3020 which was brought to tax net effective from January, 2012 vide Sindh Sales Tax on services (Amendment) Ordinance, 2011 (XIV of 2011). He then ~~and~~ set aside the OIO and directed the Assessing officer to work out the sales tax liability and default surcharge and inform the tax payer as well as to Commissioner (Appeals-I) The tax payer was further directed to pay the amount so calculated without fail.

11. Both the parties to this appeal have dissatisfied with the said OIA has challenged the same before this forum. The tax payer has challenged the order in appeal on the grounds that (a) The Commissioner (Appeals) has erred in adjudicating on a contract of "equipment rentals" which was not the subject matter in appeal or arising from the impugned OIO No. 457 of 2018 dated April 23, 2019 and nor it was discussed in the original proceedings OIO No. 160 of 2013 dated July 12, 2013. (b) Without prejudice to the above, the Commissioner (Appeals) has erred in holding that the income from 'equipment rentals' during the period from January 2012 to June 2012 [which is barred by limitation under section 47(1A)] taxable under Tariff Heading "9813.3020 "Commodity and equipment leasing" under Second Schedule to the Sindh Sales Tax on Services Act, 2011. (c) The Commissioner (Appeals) has erred in not adjudicating on Ground of Appeal No. 8 which is reproduced below:

"8. Without prejudice to the Ground of Appeal, the AC has erred by holding that sales Tax is also recoverable on services of Rs. 1,600,000/= rendered outside the province of Sind."

12. The department in its reply submitted that as far as sub-section (5) of the section 58 was concerned, it had been summarized along with the facts of the case that, Commissioner (Appeals) has violated the said provision of the Act, 2011 by not providing the parties the opportunity for further investigation of the case and altered the case by changing the Tariff Headings. If the sub-section (1) and (2) of section 59 was to be read with sub-section (5) of section 58 of the Act,

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it is crystal clear in law that Commissioner (Appeals) can only direct the Assessing Officers for further investigation of the case as may the need arises during pendency of appeal before him and not after disposal. Hence, keeping provision of sub-section 5 of section 58 of the Act and sub-section 1 and 2 of the section 59 of the Act Commissioner (Appeals) has violated all the said provisions of the aforesaid Act.

13. The department has challenged the said OIA on the grounds that: (a) the Commissioner (Appeals) has erred in law by holding that the Sindh Sales Tax was not livable on contracts of Operation & Maintenance Services as such services do not fall in the category of "contractual execution of work or furnishing supplies", without considering the fact that services provided by the registered person are not "cleaning & maintenance services" of cleansing standards because the term operation & maintenance is such huge that the cleaning & maintenance is just a meager part of it, and neither the definition nor the scope of it can define & cover the huge scope of operation and maintenance under the scope of contractual execution of work or furnishing supplies. Thus the same is liable to be taxed under the Act from July, 2011 onwards. (b) That as per section 59 (1) of the Act the learned Commissioner (Appeals) may only confirm, vary, alter, set aside or annul the decision or order appealed before him. Therefore, he cannot pass such order or give directions to the Department/Tax payer to re-assess the value of taxable services on the basis of such record/documents which have already been provided and considered for adjudication at the appellate stage. The provisions of section 59(1) of the Act is reproduced below for ready reference:

"In disposing of an appeal lodged under section 57, the Commissioner (Appeals) SRB may pass such order as he thinks fit, confirming, varying, altering setting aside or annulling the decision or order appealed against. (c) That the Commissioner (Appeals) was not justified in setting aside the penalties in as much as the same have

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been imposed as per the provisions of the Act. He relied upon the following reported judgments:

- i. 2016 PTD 786 of Honorable Lahore High Court in case of Commissioner Inland Revenue, Lahore Versus Saritow Spinning Mills Ltd.
- ii. 2016 PTD 643 of Honorable Lahore High Court in case of Commissioner Inland Revenue, Lahore Madina Cotton Mills Limited.

14. Mr. Farhan Mohib the learned representative of the tax payer in his arguments submitted that the main business of the tax payer is to provide CATERPILLER Generators on Ijarah and to provide operation and maintenance services for the customers owned generators. He then submitted that main issue in the first proceedings was whether the tax on operations and maintenance service was chargeable to tax under Tariff Heading 9809.000 or 9822.2000. He further submitted that the department vide letter dated 3rd June, 2015 informed the tax payer regarding the chargeability of tax on maintenance or cleaning services under Tariff Heading 9822.2000 effective from 1st July, 2014 and alleged that the tax payer is providing the services under the head of operation and maintenance service. He then submitted that after the remand of the case by this Tribunal to the Department the Assessing Officer again passed OIO No. 457/18 and raised demand of Rs.12,404,098/= by declaring the operation and maintenance services covered by Tariff Heading 9809.000. He also submitted that OIO was set aside by Commissioner (Appeals) to the extent that services of operation and maintenance were not covered by tariff heading 9809.0000. He also submitted that Commissioner (Appeals) fell in error in not adjudication ground NO.8 of Appeal relating to services provided outside Sindh and that Commissioner (Appeals) fell in error in adjudicating on a rental agreement with M/s Sanofi Aventis Pakistan Limited, which was not the subject matter of the appeal before him as is evident from grounds of appeal. He also submitted that the Commissioner (Appeals) while framing the order in appeal altogether ignored the provisions of sub-section (3) of section 59 of the Act and that the subsequent OIO No. 457/18 was



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passed after remand, hence the proceedings are bound only to the extent of matter remanded and is not authorized to initiate separate proceedings.

15. Mr. Kaleemullah, the learned AC-DR for respondent submitted that he will rely upon the grounds of Appeal No. AT-61/2019 and the Synopsis filed on 19.08.2019 in Appeal No. AT-56/2019.

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

16. It is an admitted position that the tax payer is a Modaraba under Modaraba Companies and Modaraba (Floatation and Control Ordinance, 1980 (XXXI of 1980) and is in business of providing CATERPILLAR Generators on Ijarah (Rental/Leasing) and also providing operation and maintenance services to the customers owned generators. The tax payer got voluntarily registration on 25.08.2011, modified on 11.09.2012 under sub-heading 9813.3910 (as mentioned in the Registration Profile of the Tax payer). This Tariff heading is not available in the Second Schedule of the Act instead Tariff Heading 9813.3900, Services provided or rendered in respect of modaraba and musharika financing is available. As per the taxpayer it got another registration pursuant to the letter of department dated 3rd June, 2015 under Tariff Heading 9822.2000, "maintenance and cleaning services" and started paying tax.

17. The Commissioner (Appeals) after altering tariff heading from 9809.0000 (contractual execution of work or furnishing supplies) to 9813.2020 (commodity and equipment leasing) against the plea of tax payer that its services falls under tariff 9822.2000 (maintenance and cleaning services) has disposed of the appeal by directing the tax payer to provide all contracts of equipment leasing from January, 2012 to June, 2012 along with details of payment received and directed the department to work out the sales tax liability. The department dissatisfied with the said OIO has also challenged the

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same before this Tribunal. The questions involved in these appeals appear to be as under:

- (i) Whether the Commissioner (Appeals) without confronting the tax payer/parties can alter the Tariff Heading at appellate stage and that too without putting the parties on notice.
- (ii) Whether the Commissioner (Appeals) in view of specific provisions i.e. sub-section (5) of Section 58 of the Act and sub-section (1) and (2) of Section 59 of the Act can pass an order sending back the case to Assessing Officer to work out the Sales Tax liability.

18. The core issue involved in this appeal is the determination of actual nature of services provided or rendered by the tax payer and classification of proper Tariff Heading for the purpose of charging Sindh Sales Tax. The tax periods involved are July, 2011 to June, 2012. The tax liability determined by the Assessing Officer was Rs.12,494,098/= (under tariff heading 9809.0000) along with default surcharge and penalty of Rs.624,704/= against the previously determined tax liability of Rs.25,632,602/= (under tariff heading 9809.000) along with default surcharge and penalty of Rs.1,281,630/=.

19. The Assessing officer has wrongly invoked Tariff Heading 9809.000 despite being aware of order dated 28.09.2015 of Tribunal in the case of APM Terminals Pakistan Limited reported as PTCL 2017 864 and 2018 PTD 527 and the order is also available on the web site of SRB. The DB of this Tribunal In the Order of DC, SRB versus Byco Terminal (Appeal No. AT-14/2016) and M/s Syed Azam Hussain Naqvi versus Assistant Commissioner, SRB, Karachi Appeal No. AT-37/2018 confirmed the findings recorded in the order of APM Terminals. The relevant portion of the order of DC, SRB versus Byco is reproduced below.

"The Tariff heading 9809.0000 is a general heading to cover contractual execution of work or furnishing supplies not falling in any other tariff heading. The benefit under Tariff heading 9809.0000 can only be taken if the service provided or rendered is not listed in the First or Second Schedule to the Act and provided under contractual execution of work or furnishing supplies. Tariff heading 9809.0000 has two components i.e. providing or

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rendering (1) contractual execution of work or (2) furnishing supplies. To attract 9809.0000 it is necessary that both the components are available in the contract or agreement. This argument finds support from the Exemption Notification No. SRB-3-4/7/2013 dated 18th June, 2013 which provides that "in relation to the work or supplies the total value of which does not exceed 50 Million rupees in a financial year subject to the condition that the value component of services in such contractual execution of work or furnishing supplies also does not exceed 10 million rupees. The exemption can only be claimed if in a contract both elements are present. Admittedly while providing services of storage, rental and equipment handling the respondent has not executed any work and has also not furnished supplies. It appears that the tax was charged under the first phrase of T.H. 9809.000 (contractual execution of work). For invoking first phrase it is necessary that the respondent has performed or executed some type of work involving physical and mental exertion to attain an end as defined in the Black's Law Dictionary, Tenth Edition, which is lacking in the Contracts of storage, rental and equipment handling. The works contract is an agreement which is a mixture of service of labour and transfer of goods. Under a works contract the contractor agrees to do certain job in execution whereof, certain goods are transferred to the contractee, again this aspect is missing in the contract of storage, rental and equipment handling.



20. The Commissioner (Appeals-I) after relying upon the orders of this Tribunal has rightly held that Tariff Heading 9809.000 is not applicable. The order of Commissioner (Appeals) is based on the earlier orders of the Tribunal which orders unless set aside by the Honorable High Court in the referential jurisdiction is not only binding upon the Commissioner (Appeals) but is also binding upon the Assessing Officer. The Officers who are not following or observing the orders of the Tribunal are committing misconduct and action against such officers can be recommended by the Tribunal.

21. Now the question is whether the Commissioner (Appeals) without confronting the tax payer/parties can alter the Tariff Heading at appellate stage and that too without putting the parties on notice. The Commissioner (Appeals) under the provisions of sub-section (1) of section 59 of the Act may pass such order as he think fit, confirming, varying, altering, setting aside or annulling the decision

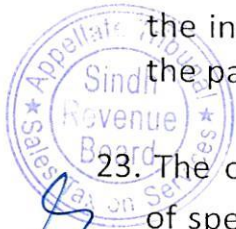
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or order appealed against. However under sub-section (2) the Commissioner (Appeals) may make such further enquiry as may be necessary provided that he shall not remand the case for *denovo* consideration. Sub-section (5) of section 58 of the Act provides that the Commissioner (Appeals) may, before disposing the appeal, call for such particulars as he may require respecting the matters arising in the appeal or cause further enquiry to be made by the officer of SRB.

22. The perusal of the above provisions leads to the conclusion that the Commissioner (Appeals) has the power to alter and vary the order of Assessing Officer and under such power can also alter or change the Tariff Heading invoked in the OIO. However this is to be done after further enquiry by Commissioner (Appeals) himself or by the Officer of SRB and after notice or confronting the parties and providing them with an opportunity to place their respective submissions before him. The change or alteration of Tariff Heading without notice or providing hearing to the parties is against due process of law and violates the provisions of Article 10-A of the Constitution. However in the instant matter this has not been done, causing prejudice to both the parties.



23. The other question is whether the Commissioner (Appeals) in view of specific provisions i.e. sub-section (5) of Section 58 of the Act and sub-section (1) and (2) of Section 59 of the Act can pass an order sending back the case to Assessing Officer to work out the Sales Tax liability. The Commissioner (Appeals) while disposing of the appeal has neither make such further inquiry to calculate or work out the Sales Tax himself as provided under sub-section (2) of section 59 of the Act nor during the pendency of the appeal required the officer, SRB to calculate or work out the tax liability as provided under sub-section (5) of section 58 of the Act. The concluding para No. 12 and 13 of the order in appeal are read as under:-

"12. For the given reasons the OIO is set aside to the extent of tax on contract of O & M and it is accordingly held that such services do not fall in the category of "contractual execution of work or furnishing supplies. However, the OIO is altered to the extent of "equipment rental agreements "and it is accordingly held that activity squirrelly fall in the

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description "commodity and equipment leasing" and the Taxpayer is liable to pay the tax on the same from January, 2012, along with the default surcharge. As far as the penalty is concerned the discussions above mentioned show that the matter required a through interpretation, as a result of which most of the part of the assessed amount is set aside. The Taxpayer has also registered in the other category upon notice of the concerned officer and has made compliance. Therefore, the malafides on the part of the Taxpayer cannot be established in the circumstances. In view whereof the Taxpayer penalty is also set aside and the Taxpayer is hereby discharged from such liability.

13. *The Taxpayer is therefore directed to provide all the contracts of equipment rentals executed during the period from January, 2012 to June, 2012 along with the details of payments received within a period of 15 days of receipt of this Order. The Respondent is directed to work out the sales tax liability and the default surcharge thereon and inform the Taxpayer as well as the Commissioner (Appeals)-I, within a further period of 10 days. The Taxpayer is accordingly directed to pay the amount so calculated and informed in due diligence, without fails. The Appeal is hereby disposed of in the above terms.*



24. From the conclusion drawn by the Commissioner (Appeals) it appears that he has issued direction to the AC to calculate the tax on contracts of equipment rentals instead of operation and maintenance service for which show cause notice dated 20.05.2013 was issued to the taxpayer. The Commissioner (Appeals) under the provisions of sub-section (1) of section 59 of the Act may pass such order as he think fit, confirming, varying, altering, setting aside or annulling the decision or order appealed against. However in exercise of such power he cannot adjudicate upon a question or dispute which was not the subject matter of the show-cause notice. In the reported judgment of Collector Central Excise and Land Customs versus Rahim Din, 1987 SCMR 1840 it has been held that adjudication based on a ground not mentioned in show-cause notice was palpably illegal and void on face of it.

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25. From the arguments of the taxpayer it appears that the taxpayer is providing the service of renting or leasing of generators on Ijarah falling under tariff heading 9813.2020 (commodity or equipment leasing) or 9813.3030 (hire purchase leasing) and operation and maintenance of generators. At the relevant tax period there was no specific Tariff Heading to cover the services of operation and maintenance. However Tariff Heading 9813.8100 (other) was available. The original Tariff Heading was "other" substituted by Sindh Sales Tax on Service (amendment) Ordinance, 2011 (XIV of 2011) made on 1st November, 2011 and subsequently enacted as Sindh Sales Tax on Service (amendment) Act, 2012 (II of 2012) made on 26th January, 2012. The said Tariff heading 9813.8100 after amendment read as under:-

"Others, including the services provided or rendered by non-banking finance companies, modaraba and musharika companies and other financial institutions".

26. In the Tariff Heading 9813.8100 the words "others" and "services" have been used which normally denotes that all other services provided by Modaraba and Musharika not mentioned elsewhere may be taxable since 1st November, 2011. A SRB Notification bearing No. SRB No. 3-4/7/2013 dated 18.06.2013 is also available providing exemption from payment of sales tax on certain services mentioned under tariff heading 98.13. The relevant portion is reproduced below:-

"Respective sub headings of tariff heading 98.13: Services provided or rendered by banking companies and non-banking financial companies in respect of hajj and umrah, cheque book issuance, Musharika and Modaraba financing and utility bills collection".

27. None of the forum below has considered the above tariff heading and the exemption notification. Apparently the department just to tax the services provided by Modaraba and Musharika companies in ignorance of exemption notification invoked tariff heading 9809.0000.

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28. In view of the above discussions both the order in original No. 457/2018 dated 07.05.2018 and order in appeal No.89/2019 dated 23.04.2019 are set aside and it is held that the services of "operation and maintenance" neither fall within the ambit of Tariff Heading 9809.0000 nor 9813.3020.

29. Both the appeals are allowed and the case is remanded to the Assessing Officer to hear the parties afresh. The Assessing Officer is required to first determine the actual nature of services provided or rendered by the taxpayer and then to invoke proper Tariff Heading under which such services falls for the purpose of taxing the services provided or rendered by the taxpayer. The Assessing Officer may also consider the exemption notification and allow the benefit of the same to the taxpayer if available as provided in the reported case of Saleem Haji Rehmatullah Dada VS. Commissioner of Income Tax, Companies-V, Karachi 2003 PTD 593 a DB of Sindh High Court has held that *"the relief available to a person in law is not to be denied on account of technicalities. It was further held that it is the duty of the tax officials to act in accordance with the spirit of law and keeping the principles of justice in view. The justice should not be crucified on the altar of technicalities and an assessee should not be required to perform impossibilities, which in itself amounts to negation of justice"*. The benefit of the exemption notification should be extended to the taxpayer even if it has not asked for it. This exercise should be completed within sixty days from the date of receipt of this order without allowing unnecessary adjournments to the parties.

30. The tax payer subject to final determination and adjustment if any is required to continue to pay the Sindh sales tax as before.

31. The appeal is disposed of in the above terms. The copy of the order may be provided to the parties.


(Imtiaz Ahmed Barakzai)

TECHNICAL MEMBER


(Justice[®] Nadeem Azhar Siddiqi)

CHAIRMAN

Certified to be True Copy

Order issued on

12/11/19


Registrar


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order Dispatched on

12/11/19

Registrar

Karachi. Dated: 31.10.2019

Copies supplied for compliance:-

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

Copy for information to:-

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

