

(Cover file)

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

SB-1

APPEAL NO. AT-65/2019

Assistant Commissioner, SRB, Karachi.....Appellant

Versus

M/s Hussain Private Limited.....Respondent

Date of Filing: 12.07.2019

Date of hearing: 26.07.2019

Date of Order: 30.07.2019

Mr. Sanjay Kumar, Assistant Commissioner, SRB for applicant.

ORDER

Justice @ Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order-in-Appeal No.103/2019 dated 16.05.2019 passed by the Commissioner (Appeals-II) in Appeal No. 29/2013 filed by the respondent against the order in original No. 19/2013 dated 29.08.2013 passed by the Assistant Commissioner (Mr. Muhammad Shoaib Iqbal), SRB, Karachi.



01. The facts as stated in the order-in-original are that the respondent is also working under the name of Abdullah Builders and is engaged in providing or rendering taxable services of Construction Services, Tariff Heading 9824.0000, Property Developers, Tariff Heading 9807.0000 and Contractor of Buildings, Tariff Heading 9814.0000 of the Second Schedule of the Sindh Sales Tax on Services Act, 2011 (herein after

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referred to as the Act) and the person providing or rendering the said services are required to be registered with SRB under section 24 of the Act.

02. It was alleged in the order-in-original that the respondent was directed vide letter dated 16.11.2011 and 15.12.2011 to get itself registered with SRB, but it had failed to do so. The appellant vide letter dated 28.09.2012 provided an opportunity to the respondent to explain why it should not be compulsory registered under section 24B of the Act.

03. It was further alleged in the order in original that the respondent through M/s Sandhu & Co., vide letter dated 25.04.2013 submitted that they will apply for registration at Karachi, because all their activities were based at Karachi. It was also alleged that compulsory registration notice dated 16.05.2013 under section 24B of the Act was issued to the respondent. In reply to the show cause notice M/s Sandhu & Co., for the respondent submitted that the respondent was not engaged in providing construction services and do not fall under the category of 9824.0000. The respondent also submitted that the respondent is mere contractor working for some projects owned by other parties.

04. As per the order in original several hearing opportunities were given to respondent but no one appeared for hearing. Finally the Officer-SRB passed order for compulsory registration of the respondent under section 24B of the Act and also imposed penalty of Rs.10,000/= or 5% of the tax involved, and a penalty of Rs.100,000/= under serial No.1 of table under section 43 of the Act.

05. The respondent challenged the order-in-original by way of filing appeal before the Commissioner (Appeals-II) who allowed the appeal and set aside the order of compulsory registration.

06. The appellant/department has now challenged the said order in appeal before this forum.



07. Mr. Sanjay Kumar the learned Assistant Commissioner, SRB submitted that the Commissioner (Appeals-II) erred in law by relying upon the reported judgment of the High Court in the case of ABAD, 2018 PTD 1 as the respondent is not one of the petitioners and the judgment is not applicable to this case. He then submitted that the Commissioner (Appeals-II) also erred in law by allowing the appeal of the respondent and allowed an illegality committed by the respondent to perpetuate. He also submitted that the Commissioner (Appeals-II) erred in law by ignoring the reply of the respondent to show-cause notice in which the respondent has submitted that the respondent is mere contractor working for some projects owned by other parties.

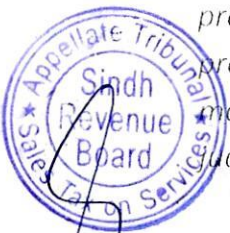
08. I have heard the learned AC and perused the record made available before me.

09. This appeal relates to the compulsory registration of the respondent under section 24B of the Act. The Commissioner (Appeals-II) allowed the appeal of the respondent after considering para 44 of the reported judgment of the High Court of Sindh in the case of ABAD, 2018 PTD 1487, which provides as under:-

"In view of the foregoing we hereby quash the notices and orders impugned in the petitions and restrain the respondent from taking or continuing with, any action or proceedings in terms or in respect thereof. However, this shall not prevent the SRB or the departmental authorities from initiating fresh proceedings or taken action anew in accordance with the Act (if at all such proceedings and/or action are lawfully sustainable), but at all times and in manner only that is consistent with what has been held and laid down in this judgment".

10. The facts of the reported case of ABAD are that the petitioners are in one way or another part of construction industry and are aggrieved by the issuance of show-cause notice for compulsory registration under the Sindh Sales Tax on services Act, 2011 and their contention was that they do not come within the ambit of the Act as they do not provide any service. Para 2 of the judgment is read as under:-

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"That Section, in its subsection (1), *inter alia* states that a taxable service is one that is listed in the Second Schedule to the Act. We are concerned with tariff headings Nos. 9807.0000, 9814.3000 and 9824.0000. These entries, as set out in the First and Second Schedules, are as follows:-

Tariff Heading No	First Schedule	Second Schedule
9807.0000	Services provided or rendered by property developers and promoters.	Services provided or rendered by property for (a)Development of purchased or leased land for conversion into residential or commercial plots. (b)Construction of residential or commercial units.
9814.3000	Services provided or rendered by architects, town planners, constructors, property developers or promoters, interior decorators..... Property developers, or promoters	Property developers or promoters
9824.0000	Construction services	Construction services

11. The High Court after detail discussion in ABAD case supra held as under:

"36. Turning now to tariff heading No. 9824.0000, the first point that needs to be considered is the one that was referred in para 21 above, namely, given that there is at least some overlap between this and the other two headings, what is the consequence in terms of the Second Schedule? In our view, tariff heading No. 9824.0000 can apply to the construction activities of property developers or promoters and also to any other person. However, in respect of property developers or promoters, if any services could be regarded as "construction services" but are rendered in the course of any activity as would directly and materially be part of the activity or service under the other two tariff headings then such services would stand excluded from heading No. 9824.0000.



We now come to the main question: what sort of services can be regarded as coming within the ambit of the tariff heading? We begin by nothing what ought not to come within its scope. Any activity in which the relationship between the service provider and the recipient is governed by a contract for sale in terms of section 54 of the 1882 Act should not, for reasons already given, constitute a service within the meaning and scope of the tariff heading. Having considered the matter, in our view the tariff heading will apply to a situation where (i) the activity can be regarded as a service directly and materially related to the construction of immovable property as such, and

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(ii) the activity cannot, more naturally and properly, be regarded as coming within the scope of some other tariff heading. Thus, there are two requirements: condition (i) must be shown to exist, and condition (ii) must not be applicable. Furthermore, the last two words ("as such") of condition (i) are of importance. It is possible that the putative service provider is engaged in an activity that is related to the construction of immovable property, and that this connection is both direct and material. However, the activity may not necessarily be connected "as such" with the construction, in which case it will not be a service within the meaning of the tariff heading.....

42. Keeping all of the above analysis and discussion in mind, and now examining the impugned notices and orders in the light thereof, we are of the view that the SRB and departmental authorities have seriously, and to an extent fundamentally, misunderstood and misapplied the Act and more specifically, the three tariff headings here involved. The impugned notices and orders disclose an approach that is rather simplistic and superficial, and in our view clearly runs counter to the requirement of the statute. Serious errors of law have been made at a fundamental level. No attempt appears to have been made to discover the specific facts applicable to each petitioner, and to the extent that the facts are set out at all, the same have not been fully appreciated, or explored. The impugned notices and orders are not sustainable and cannot therefore be allowed to stand".

12. From the above quotations from the judgment of the High Court it is apparent that notices were quashed for the reason that the departmental authorities have seriously, and to an extent fundamentally, misunderstood and misapplied the Act and more specifically, the three tariff headings here involved. The High Court while quashing the notices also observed that serious errors of law have been made at a fundamental level and no attempt appears to have been made to discover the specific facts applicable to each petitioner.



13. The Commissioner Appeals-II) in his order relying upon para 44 of the Judgment in ABAD case has held as under:-

"4. The learned representative for the Respondent submits that the Respondent for the time being will comply the order of the High Court and in the meantime has also considered challenging the order before the

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appropriate forum and in case the Respondent succeeds the action will be re-initiated against the Appellant

5. I have given due consideration to the submission of both the learned parties and perused the record made available before me. It may be appreciated that mere challenging the order of the Honorable High Court before another forum does not create any right in favour of the Respondent, nor it restrains this Appellate forum following the orders of the Honorable High Court of Sindh. Therefore, this line of arguments is of no help to the case of the Respondent as after passing of the judgment by the Honorable High Court of Sindh, reported in 2018 PTD 1487.

6. In view of the above relying upon the judgment of the Honorable High Court of Sindh, this appeal is allowed and the IO is set aside".

12. In my view Commissioner (Appeals-II) has not committed any error. The department while issuing show-cause notice to the respondent for compulsory registration was not certain about the actual taxable services provided or rendered by the respondent as while issuing show-cause notice three tariff headings as mentioned above were invoked which though overlapped with each other (as held by the High Court in ABAD case) but inserted into Second Schedule to cater different types of services. A person at the same time may involve in providing or rendering all three services and can be registered for the principal taxable activity, but the department before issuing the show-cause notice should be confident in issuing such show-cause notice which is lacking in this case. The department should not make a roving or fishing inquiry or issue a notice by merely shooting in dark in the hope that it will be able to find out some ground to register the respondent.

13. As far as the arguments of the AC that the respondent has not filed petition and the Judgment in the case of ABAD is not applicable are concerned, it is suffice to say that the point of law and fact declared by the High Court vide its judgment is binding on all other Courts, Tribunals and Executive authorities throughout the Province of Sindh. It is also now well settled that if a point has been decided by the High Court in exercise of its Constitutional Jurisdiction which covers the case of others who have not approached the Court, they are entitled to the benefit of the judgment. In the reported case of Sadaqat Ali Khan versus Collector



Land Acquisition, PLD 2010 SC 878 a larger Bench of the Supreme Court in para 16 page 895 has held as under:-

"16. And what is further deducible from the long line of judgments, some of which has been quoted above, is that once a judicial determination, be it of a point of fact or of a point of law, has been made and if such a determination covers not only the ones litigating before the Courts but some others also, then the dictates of justice would command that the benefits accruing from such a determination should not be restricted only to the litigating parties but should be extended even to those who had not indulged in litigation unless there were some extra ordinary un-exceptional reasons to the contrary and that all powers, including the powers inherent in the courts be invoked for the purpose. This would not only ensure justice for all but would also have the effect of elimination un-necessary litigation. And respectfully following these judgments, we endorse the views expressed therein".

14. The show-cause notice issued to the respondent is similar to the notice issued to the Petitioners in ABAD case supra and the Commissioner (Appeals-II) rightly allowed the appeal relying upon the judgment in the ABAD case supra.

15. The petition was filed by the Association of Builders and Developers on behalf of its members and some other petitions were also filed and disposed of along with the petition of ABAD. The High Court has quashed all the notices and orders impugned in the petitions and restrain the respondent from taking or continuing with, any action or proceedings in terms or in respect thereof. However the High Court has observed that this not prevent the SRB or the departmental authorities from initiating fresh proceedings or taken action anew in accordance with the Act (if at all such proceedings and/or action are lawfully sustainable), but at all times and in manner only that is consistent with what has been held and laid down in this judgment.

16. There is no prohibition from the High Court as well as from the Commissioner (Appeals-II) against the appellant from initiating fresh proceedings or action in accordance with law as are lawfully sustainable.



17. In view of the above the appeal is dismissed in limine. The copy of the order may be provided to the learned representative of the parties.

W. Nadeem Siddiqi

Karachi.

(Justice Nadeem Azhar Siddiqi)

Dated: 30.07.2019

CHAIRMAN

Copies supplied to:-

1. The Assistant Commissioner, SRB, Unit No. Karachi.
2. The Respondent through Authorized Representative.

Copy for information to:-

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

Certified to be True Copy

[Signature]
REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on

05/08/18

Registrar

Order Dispatched on

05/08/18

Registrar