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BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD AT KARACHI

SB-I

APPEAL NO. AT-67/2019

M/s Geo Entertainment Television

Private Limited, Karachi...Appellant

Versus

Commissioner (Appeals), SRB.
Karachi...Respondent

Date of Filing: 22.08.2019
Date of hearing: 19.11.2019
Date of Order: 29.11.2019

Mr. Behzad Haider, Advocate for appellant
Mr. Kaleemullah Siddiqi AC-DR & Mr. Muhammad Ali Keerio, 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 OIA) No.162/2019 dated 08.07.2019 passed by the Commissioner (Appeals-II), SRB in Appeal No. 172/2017 filed by the appellant against the Order-in-Original No. 331/2017 (hereinafter referred to as OIO) dated 05.12.2017 passed by the Assistant Commissioner (Mr. Muhammad Asad Raza) SRB, Karachi.

02. The facts of the case as mentioned in the order-in-original are that the services provided or rendered in respect of "Programme Producers and Production Houses" are chargeable to the Sindh Sales Tax (SST) under section 8 read with Tariff Heading 9832.0000 of the Second

Schedule to Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as "the Act") at the rate of 10% w.e.f. 1st July, 2014, 6% w.e.f. 1st July, 2015 and 08% w.e.f. 1st July, 2016. The appellant bearing SNTN: 4165903-1, was e-signed up as withholding agent with Sindh Revenue Board (SRB).

03. It was alleged in the OIO that SRB vide notice dated October 26, 2017 provided a final opportunity to the appellant to get registration with SRB. In reply a letter was received from M/s Grant Thornton Anjum Rehman on behalf of appellant wherein, they contended that the company was not providing any taxable services, hence, in pursuance of section 24 of the Act, the company was not required to get registered with SRB.

04. It was also alleged that the Appellant was provided sufficient time to get registration with SRB as a service provider under the provisions of section 24 but appellant had failed to do so. Therefore, show-cause notice dated 02.11.2017 was served upon the appellant calling upon it to show cause as to why it should not be compulsorily registered under section 24 (B) of the Act and why penalty amounting to Rs. 100,000/- should not be imposed as prescribed under serial 01 of Section 43 of the Act.

05. Mr. Murtuza Ali, Associate Manager of appellant appeared on November 21, 2017 for hearing and stated that the appellant was not performing any taxable activity and was just providing dramas to M/s Independent Media Corporation (Pvt.) Ltd, on the basis of profit/revenue sharing from revenue earned out of the TV commercials. He further requested for time of two days (i.e. till 23rd November, 2017) to provide the agreement. However on due date neither any one appeared for appellant nor was the agreement provided.

06. The Officer-SRB passed Order of Compulsory Registration of the appellant under section 24B of the Act for the service falling under Tariff Heading 9832.0000 (Services provided or rendered by Programme producers and production house) and also imposed penalty of Rs.100,000/= and while passing the OIO has observed as under:-

"14. It is an admitted fact which cannot be ignored that M/s Geo Entertainment Television Private Limited vide letter dated September 25th 2017, October 13, 2017 and in a hearing held with Mr. Murtaza Ali, Associate manager from M/s Geo Entertainment Television (Pvt.) Ltd, admitted that they are producing dramas, which as elucidated above is a taxable activity".

07. 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 and reduced the penalty from Rs.100,000/= to Rs.10,000/=. The Commissioner (Appeals) in the OIA has observed as under:-

"14. In view of the above provisions of the Act, it is crystal clear that any person or an establishment producing a programme be it any audio or visual matter, whether live or recorded, on behalf of another person or for use by another person" duly falls in the scope of aforesaid taxable service. It is an admitted fact that the appellant vide letter dated 25.09.2017 and 13.10.2017 has admitted that it is producing the dramas, which as elucidated above is a taxable activity. Therefore, in view of the above mentioned facts, it is categorical that despite of knowing the fact that the person providing the aforesaid taxable services is required to get registered with SRB under the provisions of section 24(A) of the Act, read with rule 4 and 5 of the Rules, 2011, the Appellant has failed to get registered with SRB under the supra-cited provisions of the Act, therefore, the Assessing officer has rightly compulsory registered the Appellant".

08. The appellant in its written submissions submitted as under:-

(i) The order passed by learned Commissioner (Appeals), SRB is bad in law and facts of the case.

The Commissioner (Appeals), SRB erred to assume that every company which is involved in production of drama is liable to get registered with SRB (i) Even when drama is produced for itself, (ii) Even when it owns and consumes all risk and reward associated with drama.

Without prejudice to the above, it was duly communicated to the Commissioner (Appeals), SRB that above company is not involved in selling/renting of drama hence, service element is not present in instant case, which is primary requirement to levy Sindh Sales Tax (SST).

(ii) The learned AC erred by not reading the complete Entry No. 9822.0000 which read as "Services provided or rendered by program producers and production houses".

(iii) The appellant is producing its own drama as well as purchasing the drama from other person.

(iv) The appellant owns all the risks associated with the ownership of TV dramas and never sells drama nor rent it out nor grant any right or license in relation to any drama owned by it.

(v) The appellant does not produce drama on behalf of another person or for use for another person.

(vi) The company does not own any TV channel, which can be verified from PEMRA.

(vii) The appellant entered into Joint Venture Agreement for displaying the drama on TV channels with M/s Independent Media Corporation (Private) Limited [IMCPL] and M/s Independent Newspaper Corporation (Private) Limited [INCPL]; whereby the net revenue from telecast of TV drama (i.e. after sales tax) was to be shared between appellant and above cited TV channels.

(viii) The learned officer erred to levying Penalty without appreciating absence of *"mensrea'* on the part of the appellant and without appreciating the fact that appellant was not providing any services.

09. Mr. Behzad Haider the learned advocate further on behalf submitted on behalf of the appellant as under :-

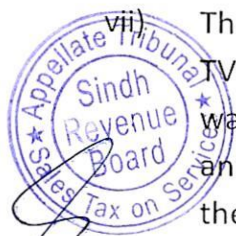
(i) That reference to paras 9 onwards of OIO were given and it was submitted that no proper opportunity of filing reply, documents was provided, nor right of hearing was allowed by AC and the OIO was passed ex-parte. He referred to definition of "production house" sub-section (67A) and "programme producer" sub-section (67C) of section 2 of the Act and submitted that such provisions will only be applicable if the programme was produced for use by another person.

(iii) That reference of para 14 of OIA was given and it was submitted that the Commissioner (Appeals) simply relied upon the above definitions without discussing the condition and to whom the appellant was providing services.

(iv) That mere reference to clause does not entitle SRB to register the appellant and to collect tax on an activity which does not fall in the category of service.

(v) That the appellant was producing dramas for self/ own use and was not providing dramas to other persons. He also submitted that this was a joint venture between the appellant and Independent Media Corporation Limited (IMCL) (owner of Geo Entertainment channel) and Independent Newspaper Corporation (Pvt.) Ltd. (INPCL) (Owner of Geo Kahani) and both these Companies are sister concerns of the appellant and have license to operate TV channels.

(vi) That the registration under Tariff Heading 9832.0000 was applicable in case of appellant when it was established that it provides or renders taxable services to others and this aspect of the case has not been considered by the forums below.



(vii) That reference to Agreement between appellant and (IMCL) owner of a TV Channel Geo Entertainment available at page 133 of the paper book was given and he further referred to Agreement between appellant and (INPCL) owner of TV Channel Geo Kahani available at page 141 of the paper book and submitted that these are the "Joint Venture Agreements" and not come within ambit of providing or rendering services.

(viii) That he also referred to various Agreements between appellant and other parties from whom the appellant had acquired programmes for playing on the TV channels. The Authorized Representative referred to para 13 of the 13 of order of this Tribunal in Appeal No. AT-24/2014 UDL-Modaraba Management V/s SRB and contended that since the consideration of providing programmes were subject to profit thus the same were not "consideration". Para 13 of the order is reproduced below for ready reference:-

"13. The next point is whether the remuneration received by the appellant from the Modaraba is on account of rendering/providing services or on account of profit as claimed by the appellant. The SECP is the regulatory authority of the appellant. SECP through its letter dated 30-11-2012 has informed the Chairman, SRB, that the Modaraba Company is entitled to share the profit which shall not exceed 10% of the annual profit. Rule 16 of the Modaraba Rules framed under the Modaraba Ordinance provides that the profit shall form the basis for the purpose of calculation of the share of profit of the Modaraba Company and the certificate holders (the investors). In the letter it was further stated that it is an arrangement to share the profit from the business carried on by the parties in accordance with the agreed ratio. It was further stated that in the letter if there is no profit, there can be no distribution; hence, the Modaraba Company cannot charge any remuneration or fees unless there is profit. In Section 18 of the Modaraba Companies and Modaraba (Floatation and Control) Ordinance, 1980, the phrase "remuneration of Modaraba Company" has been used instead of fees or service charges. The remuneration of a Modaraba Management Company has been linked with the profit and in case a Modaraba did not earn profit, the Modaraba Management Company is not entitled to any remuneration. Both the forums below have ignored this fact and have come to the conclusion that the remuneration received by Modaraba Management Company is against services provided or rendered. In the detailed orders of forums below, it has not been discussed that what type of services has been provided/rendered by the appellant to the Modaraba and if services have been provided/rendered, the same are covered by the definition "'Management Services' including funds and assets management services." Apparently, the remuneration of services cannot be conditional with earning of profit and if services had been provided or rendered, the charges have to be paid irrespective of whether the recipient of the service has earned profit or not. Mere fact that other Modaraba Management Companies are paying Sindh Sales Tax does not mean to tax the appellant without going into merits of the case. It is the duty of the taxing officers to satisfy the provisions of law before taxing any person. Since none of the forums below has properly discussed and analyzed the nature of service provided/rendered by the

appellant to Modaraba, the orders are suffered from infirmity and cannot be sustained.

10. Mr. Muhammad Ali Keerio learned AC-SRB for respondent submitted as under:-

(i) That the appellant was rightly registered since there was an admission that it was producing programmes/dramas as well as purchasing programmes/dramas from other persons.

(ii) That the appellant and other companies are all limited and independent companies and are separately registered with the SECP, and even sister concerns are independent companies. Apparently the Joint venture agreements were provided to escape from payment of SST.

(iii) This was case of registration only and it is an admitted position that appellant is a drama producer and running a production house and was rightly registered and the activity of appellant is covered by Tariff Heading 9832.0000 (Services provided or rendered by programme producers and production house) and the appellant falls within the ambit of section 2(67A) and 2(67C) of the Act. Moreover the element of economic activity for production of programmes/dramas for others was clearly evident.

(iv) That being a programme producer the appellant can provide or render services to any one and its activities are not limited to providing or rendering services under joint venture agreement and since the appellant is dealing in taxable activity of programme producers and production house it was rightly registered.

(v) He referred to para 15 to 17 of the decision of this Tribunal in the case of Six Sigma versus SRB, Appeal No. AT-29/16 and the relevant paras are reproduced for ready reference as under:-

"15. As regards the argument of making a drama for itself, it also appears Illogical, as the appellant does not own a channel nor it has hired a channel on which it would run its drama. The concept of making something for one's own self has no meaning in economic activity. If

same product or bye product is self-consumed by a manufacturing unit, even that is subject to Sales tax, as held by the higher courts.

16. It is argued that the appellant falls within the definition of "seller" in the sale of goods Act, 1930 and that the provisions of Sindh Sales Tax on Services Act, 2011 are not attracted and are inapplicable in his case. However, it is noted that after the 18th amendment in the Constitution the powers for the imposition, administration, collection and enforcement of taxes on services have been assigned to the provinces, as their sole prerogative. The SST on services Act, 2011 is a specific legislation in this direction, whereas the Sale of Goods Act, 1930 is a general legislation. It is a settled principle of jurisprudence that a special law always over rides a general legislation. Thus the appellant cannot hide behind of the definition in Sale of Goods Act, 1930, after SSToS Act, 2011 has come into force.

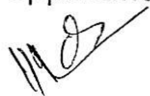
17. In FBR's tax payers online verification, copy of which has been furnished by the appellant the principal business activity has been declared as 'reproduction of recorded media'. In ground No.i, the business of the appellant has been declared as "producing drama, sitcom, film and soap". On this point the definition in Section 2 are referred wherein under sub-section (67C) a programme producer has been defined as under:

Section 2(67C): Programme producer means a person who produces a program on behalf of, or use by, another person. Definition of 'Programme' is available in sub-section (67B) and squarely fits in the production of the appellant as admitted by him. In this sub-section it is clarified that a "programme producer" is a person who,

a) Produces a programme on behalf of another person or
b) Produces a programme for use of another person

The above definition shows that even if a programme is not made on order or under an agreement, after it is produced and subsequently its exhibition rights are given to another person it falls in the said definition".

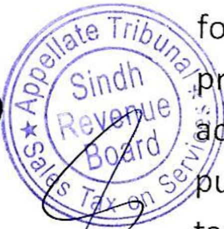
11. In rebuttal Mr. Behzad Haider, Advocate on behalf of the appellant submitted that it was owner of media contents since the



channels hold TV License having expertise to telecast the programmes on its channel and both have worked together to provide advertising services to advertisers.

Heard the learned representatives of the parties and perused the record made available before us.

12. The case relates to compulsory registration of the appellant under section 24B of the Act read with Tariff Heading 9832.0000 of the Second Schedule to the Act. It is pertinent to refer to Section 24 of the Act which provides that registration will be required for all persons who are resident and provide services listed in the Second Schedule to the Act from their registered office or place of business in Sindh. Whereas section 24B provides that if a person is required to be registered under the Act and that person has not applied for registration, the officer of the SRB shall, after such enquiry as it may deem 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 registered with FBR and for principal activity of information and communication/television programming and broadcasting activities and is operating in Sindh. The activity of the appellant is to produce programmes or to acquire or purchase programmes for TV Channels. As per section 3 of the Act a taxable service is a service listed in the Second Schedule to the Act, which is provided by a registered person from his registered office or place of business in Sindh in furtherance of economic activity as provided under section 4 of the Act. The appellant's economic activity involves the provision of providing or intending to involve the provision of service to another/TV channels and is covered by Tariff Heading 9832.0000 to the Second Schedule of the Act.

14. The contention of the appellant that it was working under joint venture agreements with IMCL and INPCL and was not providing services to others and the consideration was not fixed or guaranteed but subject

to earning of revenue by the Channel is farfetched. It is admitted that the appellant and the channel is sharing the revenue earned by TV channels and the appellant is receiving its share. The appellant is also receiving consideration from TV channels to which it is providing the programmes either produced by it or purchased or acquired from other producers. There is no prohibition or restriction on the appellant that it cannot work for other and cannot provide or render services to others.

15. The plea of the appellant is that services were provided to associate/sister concerns for no consideration. In case no consideration was received or services were provided for a consideration lower than the price, sub-clause (ii) of clause (a) of sub-section (1) of section 5 comes into play, which deals with value of taxable services in case the person provides the service and the recipient are associated and provides a mechanism for fixing the value of taxable service.

16. It is evident from the contents of the two agreements between the appellant and INPCL & IMCL produced before me that the substance appears to facilitate playing of the media contents owned by the appellant through other TV channels. This is the service which the appellant is providing to TV channels enabling them to play the programmes either produced by the appellant or purchased or acquired from other service providers. In the 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 as under :-

> *"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".*

In the instant case the substance of the Agreement is to provide programmes by appellant to TV channels. For the purpose of registration it is enough that the appellant's activity is covered under section 3 read with section 4 of the Act read with Tariff Heading 9832.000 of the Second Schedule to the Act.

17. The facts of the decision of the Tribunal in the case of UDL Modaraba are distinguishable from the facts of this case and are not applicable. However the facts of the decision of the Tribunal in the case of Six Sigma are similar to the facts of this case and are squarely applicable.

18. In view of the above discussions I am satisfied that the appellant has been rightly registered, since proper case has been made out for its compulsory registration.

19. As far as imposition of penalty is concerned the Commissioner (Appeals) granted sufficient relief to the appellant by reducing the penalty from Rs.100,000/= to Rs.10,000/= and I do not find any justification to interfere with the discretion exercised by Commissioner (Appeals). Thus the appeal is dismissed. The copy of the orders may be provided to the learned authorized representative of the parties.

Karachi
Dated. 29.11.2019

(Justice ® Nadeem Azhar Siddiqi)
Chairman

Copies supplied for compliance:-

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

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 03/12/19
Registrar

Order Dispatched on 03/12/19
Registrar