

(General file)

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-1

APPEAL NO. AT-74/2019

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

Versus

M/s Jereh Oil & Gas Engineering CorporationRespondent

Date of filing of Appeal: 17.10.2019

Date of hearing: 20.12.2019

Date of Order: 15.01.2019

Mr. Muhammad Yasir, AC-SRB for appellant.

Ms. Cai Mengyang, Consultant along with Mr. Muhammad Salman, Translator for respondent.

ORDER

Justice © Nadeem Azhar Siddiqi: This appeal has been filed by the appellant/department challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.185/2019 dated 20.08.2019 passed by the Commissioner (Appeals-II) in Appeal No. 171/2019 filed by the respondent against the order in original (hereinafter referred to as the OIO) No. 221/2019 dated 20.03.2019 passed by the Assistant Commissioner (Mr. Bakht Ali Dahio) SRB, Karachi.

02.The facts as stated in the OIO are that the respondent is registered with SRB under the service category of "Construction" falling under Tariff Heading 9824.0000 of the Second Schedule to Sindh Sales Tax on Services Act, 2011 (herein after referred to as the Act) subject to levy of Sindh Sales Tax (SST) at applicable rate.

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03. The allegation against the respondent as stated in the OIO was that it had adjusted/claimed input tax adjustment amounting to Rs.14,795,939/= during the tax periods from July, 2017 to October, 2018 against the various purchase invoices. It was further alleged that the adjusted amount of input tax by the respondent was inadmissible in view of rule 22A and 42B of Sindh Sales Tax on Services Rules, 2011 (herein after referred to as the Rule) read with section 15 and 15A of the Act.

04. A show-cause notice (SCN) dated 07.12.2018 was served upon the respondent calling upon it to show-cause as to why tax liability of Rs.14,795,039/= may not be assessed and recovered under section 23 and 47 of the Act along with default surcharge under section 44 of the Act and penalties under Serial No. 2, 6d and 11 of the Table under section 43 of the Act. It was mentioned in the OIO that the respondent failed to attend nor filed any reply besides being provided with opportunities on 28.12.2018 and 18.01.2019.

05. Finally the Assessing Officer (AO) passed order disallowing the input tax amounting to Rs.14,795,039/= on the ground that respondent had failed to provide the acknowledged copy of Form "C" submitted to SRB under Rule 42B of the Rule for the tax periods July, 2017 to June, 2018. The AO also imposed penalty of Rs.160,000/= under serial No.2 of Table under section 43 of the Act for non-filing of true monthly tax returns for the tax periods involved, penalty of Rs.14,795,939/= under serial No.6d of Table under section 43 of the Act for adjustment of inadmissible of input tax and penalty of Rs.739,797/= under serial No.11 of Table under section 43 of the Act for non-fulfilling of the conditions, limitations or restriction prescribed in a notification issued under the Act.

06. The respondent challenged the OIO by way of filing appeal before the Commissioner (Appeals-II) who set aside the OIO and allowed the appeal on the grounds that (i) the SCN was incomplete and sketchy (ii) the OIO was passed without proper opportunity of hearing to the respondent (iii)



non-service of SCN as provided under section 75 of the Act, and (iv) adjudication beyond the contents of SCN. The learned Commissioner (Appeals) while setting aside the OIO allowed the appellant/department to re-invoke the contentious issues involved in the matter through a fresh SCN.

07. The appellant/department aggrieved by the said OIA has challenged the same by way of this appeal. Mr. Muhammad Yasir, the learned AC for the appellant submitted as under:-

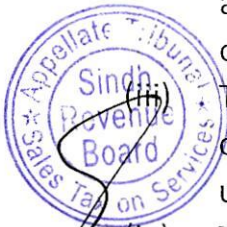
(i) The appeal has been filed challenging the order of Commissioner (Appeals) setting aside the OIO and particularly in respect of Para 12 of OIO through which the department has been left at liberty to re-invoke the contentious issues involved in the matter through a fresh SCN.

(ii) The respondent got voluntarily registration on 27.06.2016 under service category of "construction", Tariff Heading 9824.0000 and the tax periods involved were from July, 2017 to October, 2018 and the amount of input tax claimed was Rs. 14,795,939/= and output tax deposited amounted to Rs. 14,729,438/=.

The OIA was against the provisions of Act, and allowing issuance of a fresh SCN amounted to denovo trial which was prohibited under sub-section (2) of section 59 of the Act.

(iv) The SCN was properly issued seeking full particulars as the respondent had claimed inadmissible input tax on "construction services". However, the learned Commissioner (Appeals) has erroneously held that the SCN was incomplete and sketchy and was issued without confronting the respondent regarding the claim of inadmissible input tax adjustment.

(v) The appellant had provided construction services under Tariff Heading 9824.0000 and thus was liable to pay reduced rate of tax at 8% under Notification No. SRB-34/8/2013 dated 1st July, 2013. However, if the respondent wanted to pay tax at statutory rate of 13% it was required to opt for the same by submitting Form "C" as provided in the Notification No. SRB-3-4/5/2015 dated 1st July, 2015 and rule 42B of the Rules (proviso to Rule 6) It was submitted that no such form was submitted although the



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respondent before issuance of show cause notice dated 07.12.2018 was asked to submit the same.

- (vi) The Commissioner (Appeals) was not vested with the power to direct the department to issue fresh SCN which amounted to directing denovo trial.
- (vii) The adjudication was made strictly in accordance with the contents of SCN. However, the Commissioner (Appeals) without any justification has held that AC traveled beyond the contents of SCN.

08. Ms. Cai Mengyang, learned Consultant for respondent submitted as under:-

- (i) The respondent has not caused any financial loss to exchequer. However under the law it was entitled to claim input tax adjustment from output tax declared in the returns.
- (ii) The department never informed the respondent regarding charging of reduced rate of SST. The Notifications under which such reduced rate was announced were not published in official gazette and despite direction of Tribunal no such copy was placed on record.
- (iii) The tax was to be levied on the basis of actual services provided or rendered and not on the basis of registration under a specific Tariff Heading. Moreover the contract was a composite contract of supply of goods/machinery and construction service for EPRF-II Revamp Project and all details were provided in the write up.
- (iv) The input tax adjustment was rightly claimed as the respondent had provided taxable service covered under Tariff Heading 9809.0000 of the Second Schedule to the Act.
- (v) The order of Commissioner (Appeals) had properly appreciated the position of respondent. Mere non-filing of Form "C" was not sufficient to deprive the respondent from paying tax at statutory rate and to claim adjustment as provided in law.
- (vi) The contract was signed between Jereh & ENAR Petroleum to revamp its existing facility by procurement of VDU, FIRED HEATERS, THERMAL CRACKERS, PRE-HEAR TRAIN and other



process Equipment, Utilities, Storage, loading & Decanting facilities (copy of Original Contract was Annexed & confirmed via Para 2). However, for the execution of the contract the scope of work included the Procurement of Machinery, Procurement of Construction Material, Installation of plant and machinery /Erection of equipment, pre-commissioning and providing start-up assistance. The following breakup of material purchased has been mentioned in the contract which was duly annexed and confirmed vide para 3.

Supply of Material & Equipment as per contract

Mechanical/ Piping	1353127.82USD
Civil & Structural Material	370353.67 USD
Electrical Equipment	1307380.09 USD
Instrumentation material	1091867.28 USD

- (vii) The appellant had voluntarily registered with SRB and had made payments at statutory rates whenever any services were rendered.



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

09. The department being aggrieved by the order of Commissioner (Appeals) filed appeal before this Tribunal on the plea that Commissioner (Appeals) while allowing the appeal left the department at liberty to invoke the contentious issues involved in the case by issuing fresh SCN.
10. The learned AC has failed to point out any other defect in OIA despite repeated queries except that the direction issued by the Commissioner (Appeals) for issuance of fresh SCN amounted to denovo trial and such powers was not vested in Commissioner (Appeals) in view of sub section (2) of Section 59 of the Act which specifically provided that the Commissioner (Appeals) should not remand the case for denovo consideration.
11. The AC further submitted that the respondent was registered under Tariff Heading 9824.0000 (construction services) and was not entitled to

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claim input tax adjustment as the construction service was subject to the reduced rate of 8%.

12. The AC has passed the Assessment Order (AO) in unnecessary haste without waiting for the reply of the respondent. Although the AC in the OIO had stated that the respondent failed to make compliance despite service of multiple hearing notices dated 28.12.2018 and 08.01.2019 but has failed to produce any copy of notice or other evidence as per section 75 of the Act to show that proper opportunity of hearing was provided to the respondent.

13. The AC had disallowed input tax adjustment on the basis of registration of the respondent under a specific Tariff 9824.0000 without considering the actual nature of services provided or rendered by it. From the copy of contract and invoices produced by the respondent before us as well as before Commissioner (Appeals) it is clear that the services provided by the appellant was not simply construction services under Tariff Heading 9824.0000 but the services provided or rendered were "For Procurement & Construction of EPRF-II Revamp Project". Unnumbered paragraph 3 of the Contract provides as under:-

Whereas EPRF invited bids from Procurement & Construction (PC) Contractors for execution of EPRF-II Revamp Project involving procurement (supply), construction, installation/erection of equipment, pre-commissioning, and providing start up assistance (including performance testing) of the Project (hereinafter referred to as "Works").

14. The contract apart from the above clause contained full description of supplies and construction work. Thus it was evident from perusal of contract that it was not simply a Contract of Construction but the same was a complete contract of procurement (supply), construction, installation/erection of equipment, pre-commissioning, and providing start up assistance and was thus fully covered under Tariff heading 9809.0000 (services provided or rendered by persons engaged in



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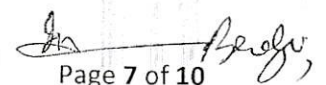
contractual execution of work or furnishing supplies). The respondent has rightly claimed input tax adjustment as there was no conditions or restrictions prescribed by SRB in this regard.

15. The Commissioner (Appeals) in para 10 (a) of the OIA had rightly pointed out the deficiencies in the SCN which simply stated that adjustment of input tax of Rs.14,795,939/= was inadmissible in view of Rule 22A and 42B of the rules read with section 15 and 15A of the Act. No reason was assigned for disallowing the input tax adjustment in the SCN. In view of section 15 of the Act a taxpayer can claim input tax adjustment subject to conditions and restrictions as may be prescribed by SRB. The conditions and restrictions have been prescribed under section 15A of the Act and rule 22A of the Rules which mentions input credit not allowed. However in the SCN no specific provision from section 15, 15A of the Act and rule 22A of Rules were cited or mentioned.

16. The AO in the OIO gave two reasons for disallowing input tax adjustment. (i) Non-providing of acknowledged copy of "Form-C" and (ii) rule (viii) b of Rule 22A of the Rules. Both these grounds and reasons were not part of SCN and the adjudication of the grounds not mentioned in SCN amounts to adjudication beyond the contents of SCN which is not permissible. In the reported case of Collector Central Excise and Land Customs versus Rahm Din it was held that "*order of adjudication being ultimately based on a ground which was not mentioned in SCN, was palpably illegal on the face of it*". Moreover no such rule (viii) b of Rule 22A is available in the Rules. In our view the Commissioner (Appeals) had rightly held that the SCN was incomplete and sketchy and had also rightly held that the OIO travels beyond the scope of the SCN.

17. The non-submissions of "Form C" has no relevance since the respondent has not only provided construction services but also provided service of furnishing supplies and execution of works. More over the respondent claimed input tax for tax periods from July, 2017 to October, 2018, but the appellant has failed to inform the respondent regarding claiming of inadmissible input tax adjustment. The appellant produced a letter

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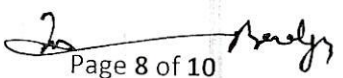
dated 12.10.2018 purportedly issued to the respondent before issuance of SCN without support of any postal receipt or courier receipt stating there in that the respondent claimed input tax adjustment for the tax periods from June, 2017 to June, 2018 whereas the SCN was issued for the tax periods from July, 2017 to October, 2018. The said letter cannot be accepted unless admitted by the respondent or the appellant produced evidence of service in terms of section 75 of the Act. The AC despite specific directions failed to provide the Gazette Notification under which such reduced rate was announced. However it is suffice to cite a judgment of the Honorable Supreme Court in the case of Chief Administrator Auqaf versus Amna Bibi, 2008 SCMR 1717 in which it has been held that *"It has been laid down by the superior Courts that a notification which curtails or extends rights of citizens will take effect from date of its publication in Gazette and not from any prior date."*

18. The disallowance of input tax adjustment only on the basis of registration without considering the actual nature of service provided or rendered was not proper and legal. The tax payer got registration under a Tariff Heading not liable to tax for the time being but was involved in providing or rendering taxable services under some other Tariff Heading, was liable to tax on the basis of actual services rendered or provided.

19. The respondent claimed that it had filed "Form C" on 27.06.2016 but the AC refuted the same and submitted that in absence of acknowledgement "FORM C" could not be accepted as validly filed. Whereas on the other hand AC wants that we accept the service of letter dated 12.10.2018 without proof of acknowledgement. Such plea is thus not acceptable.

20. The only argument advanced by the AC before us was that the direction issued by the Commissioner (Appeals) for issuance of fresh SCN was amounted to denovo trial and that he was not vested with such power in view of sub section (2) of Section 59 of the Act. This section specifically provides that the Commissioner (Appeals) should not remand the case for denovo consideration. We find that this argument has force. The

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issuance of fresh show-cause notice amounts to denovo trial as after issuing the fresh SCN the AO will again adjudicate the same matter and will pass fresh order. The term "denovo trial" is defined in the Black's Law Dictionary, Tenth Edition at Page 1737 as "*a new trial on the entire case-that is, on both questions of fact and issues of law-conducted as if there had been no trial in the first instance*". Sub section (2) of Section 59 of the Act permits the Commissioner (Appeals) to make such further enquiry as may be necessary provided that he shall not remand the case for denovo consideration. If law prohibited from doing something it cannot be done at all even under exercise of lawful jurisdiction. Since the law specifically prohibited Commissioner (Appeals) from remanding the case for denovo consideration the powers of remand for denovo consideration was not available with Commissioner (Appeals) and the Commissioner (Appeals) had committed an illegality in this regard. In the reported case of Ummatullah Versus Province of Sindh. PLD 2010 K 236 it has been held that "*It is a settled principle of law that what cannot be done directly cannot be done or allowed to be done indirectly. It is also trite principle of law; what is not possessed can neither be conferred nor delegated.*"



21. Before concluding this appeal it is necessary to point out that the Commissioner (Appeals) though illegally provided an opportunity to the department to raise the contentious issues involved in the instant matter via a fresh SCN. However, the department instead of availing such opportunity unnecessarily challenged the OIA before this forum without visualizing the consequence of filing such appeal. Apparently the concerned Commissioner without properly considering the grounds of appeal has mechanically allowed the AC to file this appeal which is in no way beneficial to the interest of the department. The appeal should have been filed by the respondent to challenge the right of fresh SCN provided to the department but no such appeal was filed meaning thereby that the respondent was not aggrieved by the order of issuance of fresh SCN. Apparently the concerned Commissioners are not following the instructions of the Board in letter and spirit contained in the Standing Order NO. 1 dated 3rd June, 2019.


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22. It is also pointed out that at one stage Mr. Kaleemullah, DR agreed to consult the Management of SRB to withdraw the appeal as reflected by the respondent in its letter dated 10.12.2019 addressed to the Registrar of the Tribunal, but no action was subsequently taken.

23. In view of the above the appeal is allowed and the OIA is annulled to the extent of issuance of fresh SCN. The remaining part of OIA is maintained.

24. The appeal is disposed of in the above terms. Copy of this order may be provided to the learned representatives of the parties.


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER


(Justice[®] Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi. Dated: 15.01.2020

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Order issued on 20/01/2020


Registrar

Order Dispatched on 20/01/2020


Registrar