

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD

SINGLE-BENCH-II

APPEAL NO. AT-75/2019

Assistant Commissioner SRB, Karachi Appellant
Shaheen Complex 09th Floor M.R Kayani Road
Karachi

Versus

M/s Prolog Pakistan (Pvt.) Ltd. Respondent
Plot No. C-2, Maizinine Floor, Sanam Arcade,
Near K.E.S.C Street 21, DHA, Phase-I, Karachi

Date of hearing 28.11.2019

Date of Order 06.12.2019

ORDER

Imtiaz Ahmed Barakzai This appeal has been filed by the appellant/department challenging the Order-in-Appeal (hereinafter referred to as OIA No. 186/2019 passed by Commissioner (Appeals-II) in Appeal No. 301/2018 filed by the appellant/ taxpayer against the Order-in-Original (hereinafter referred to as OIO) No. 572/2018 passed by Assistant Commissioner (Mr. Muhammad Yousuf Bukhari), SRB, Karachi.

02. The facts of the case briefly stated in OIO are that respondent was voluntarily registered with SRB under the services category of "Inter-city transportation or carriage of goods", Tariff Heading 9836.0000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) chargeable to Sindh Sales Tax effective from 01.07.2014.

03. It was stated in the OIO that the bank statement of Meezan Bank Bank Ltd. of the respondent depicted that consideration of Rs. 8,742,930/- were received by it during only three tax periods from 01.07.2017 to 30.11.2017. However, they had declared sales of Rs. 2,423,392/- during April, 2017 upto December, 2017 including sales of Rs. 958,581/- during July, 2017 to November, 2017. It was mentioned in the OIO that the respondent failed to submit the requisite details besides repeated opportunities thus Show Cause Notice (hereinafter referred to as SCN) was issued on 26.03.2018. In the SCN the respondent was required to



explain as to why Sindh Sales Tax liability of Rs. 622,748/- @ 8% of the short declared Sales of Rs. 7,784,349/- for the tax periods from July, 2017 to November, 2017 may not be assessed under section 23(1A) of the Act read with Clause (71) and (73) of Section 2, and Section 3,8,9 and 17 of the Act, and Rule 42G of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules). Moreover default surcharge and penalty under Serial No. 3 and 15 of the Table under Section 43 of the Act may not be imposed.

04. It was further stated in the OIO that the respondent complied with notices of the department its vide letters dated 28.04.2018 and 04.05.2018 and submitted that out of total amount of Rs. 8,742,930/- an amount of Rs. 4,677,043/- were contra entries relating to returned/dishonored cheques thus only Rs. 4,065,887/- were net receipts of the company during July, 2017. He contended that the amount pertaining to Sindh, were declared with SRB whereas the other amount relating to outside Sindh and the services rendered within the City were not declared.

05. It was concluded in the OIO that the respondent had short declared sales of Rs. 2,378,602/- {Rs. 4,065,887/- (admitted sales) Minus Rs. 1,687,285 (sales declared with SRB)} during the tax periods from July, 2017 upto November, 2017. Finally the Assessing Officer has imposed tax of 8% on the suppressed sales of Rs. 2,378,602/- creating Sales Tax liability of Rs. 190,288/- for the periods from July, 2017 upto November, 2017 along with default surcharge under section 44 of the Act read with clause (71) and (73) of section 2,3,8,9,17 of the Act read with 42G of the Rules. The Assessing Officer also imposed penalty amounting to Rs. 10,000/- under Serial No.3 of Table under section 43 of the Act, and further penalty of Rs. 100,000/- under Serial No. 15 of the Table under section 43 of the Act.

06. The respondent had challenged the OIO before Commissioner (Appeals) who vide has OIA No. 186/2019 dated 20.08.2019 set aside the OIO holding it to be erroneous in terms of calculation of tax payable although being correct on point of law. He further directed the Assessing Officer to issue fresh SCN so that correct amount of tax could be assessed.

07. The Appellant has challenged the OIA on the following grounds that:

(i). The Commissioner (Appeals) in his OIA on the basis of working has held that principal SST should have been Rs. 248,584/- instead of 190,288/- resulting in difference of Rs. 58,296/-. He has held that such evaded tax was liable to be recovered from the respondent along with penalty and default surcharge.

(ii) The Commissioner (Appeals) has erred in law by directing assessing officer to issue fresh SCN for recovery of actual amount of tax as per calculation indicated by him in Para 12 of his OIA. It was contended that the Commissioner (Appeals) does not have the power to direct the department for issuance of fresh SCN.

(iii) This appeal has been filed to challenge the portion of the order by which the learned Commissioner (Appeals) has ordered inquiry under sub-section (2) of Section 59 of the Act through an Officer of SRB. The Appellant submits that since the Commissioner (Appeals) disposed of the appeal under sub-section (1) of section 59 of the Act the powers exercised under sub-section (2) of section 59 were not available with him. It was contended that powers available to the Commissioner (Appeals) under sub-section (2) of section 59 of the Act could only be exercised by him during the pendency of appeal and not through an officer of SRB and that he cannot remand the case for denovo consideration. He further submits that the learned Commissioner (Appeals) in exercise of powers under sub-section (1) of section 59 of the Act can pass such orders as he thinks fit, confirming, varying, setting aside or annulling the decision or order appealed against, but cannot remand the case for denovo consideration nor order inquiry through an Officer of SRB after the disposal of appeal by way of issuance of SCN.

08. The respondent was served with notices on 11th November, 2019 fixing the appeal for hearing on 19th November, 2019 but no compliance was made nor any intimation was received. Thereafter "final notice" was served upon the respondent through TCS and also through the Department but again no compliance was made nor any intimation was received, thus the case is decided on merits and on the basis of documentary evidence available on record and provided by the applicant.

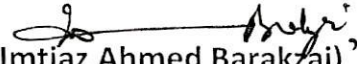
09. I have heard the learned AC and perused the record made available before me.

10. The Main arguments of the learned Assistant Commissioner is that the Commissioner (Appeals) while disposing of the appeal under sub-section (1) of section 59 of the Act cannot exercise powers available to him under sub-section (2) of section 59 of the Act. The contention appears to have force. The Commissioner (Appeals) may make such further inquiry as he may deem necessary provided that he shall not remand the case for denovo consideration. The requirement of section appears to be that the Commissioner (Appeals) may make such further inquiry himself during pendency of the appeal provided he cannot remand the case for denovo trial. Moreover once the appeal is disposed of in exercise of powers under sub-section (2) of section 59 of the Act through an officer of SRB. The Commissioner (Appeals) had exercised jurisdiction under section 34 of the Act which provides that the Board may, by notification in the Official Gazette, appoint in relation to any area, any case or class of cases specified in the notification. The Commissioner (Appeals) was notified as such under section 34. The Commissioner (Appeals) exercised his jurisdiction under delegation of powers by Board and without any specific powers cannot delegate his powers to any other Officer of SRB. Same is the position in respect of sub-section (5) of section 58 of the Act which provides that the Commissioner (Appeals) SRB may, before disposing of any appeal, call for such particulars as the Commissioner (Appeals) SRB may require respecting the matter arising in the appeal or cause further inquiry to be made by the officer of SRB. In this provision also the Commissioner (Appeals) can exercise power of inquiry through an officer of SRB during pendency of appeal and not after disposal of appeal.

11. In view of the above discussions and considering the decision of this Tribunal in identical case bearing Appeal No. AT-40/2014 I am satisfied that the Commissioner (Appeals) while ordering inquiry through officer of SRB by issuance of fresh SCN has exercised jurisdiction, which was not vested in him and the OIA suffers from legal infirmities and consequently the same is set aside. The appeal is allowed and it is deemed to be pending before the Commissioner (Appeals) who

will decide the same on merits within thirty days from the date of receipt of this order after providing proper right of hearing to the parties.

12. The appeal is disposed of in the above terms.


(Imtiaz Ahmed Barakzai)
MEMBER TECHNICAL

Karachi

Dated: 06.12.2019

Copy for compliance:

1. The appellant through authorized Representative.
2. The Assistant Commissioner (Unit- 23), SRB, Karachi.

Copy for information to:-

3. The Commissioner (Appeals), SRB, Karachi
4. Office Copy.
5. Guard File.

Certified to be True Copy


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on

09/12/18

Registrar

Order Dispatched on

09/12/18

Registrar