BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DOUBLE BENCH-I

APPEAL NO. AT-02/2020

M/s Grid Solution Pakistan (Pvt.) Ltd.
Suit No. 219, Glass Tower 2nd Floor,
Frere Road, Clifton, Karachi.....Appellant

Versus

Assistant Commissioner (Unit-01)
Sindh Revenue Board,
09th Floor, Shaheen Complex,
M.R. Kiyani Road, Karachi. .....Respondent

Date of Filing of Appeal: 22.01.2020
Date of hearing: 24.11.2020
Date of Order: 10.12.2020

Mr. Amir Ali, FCA and Mr. Uzair Memon, FCA for appellant.
Mr. Manzoor Ahmad, 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 the OIA) No.3/2020 dated 20.01.2020 passed by the Commissioner (Appeals) in Appeal NO. 307/2018 filed by the appellant against the Order in Original (hereinafter referred to as the OIO) No. 769/2018 dated 13.09.2018 passed by Mr. Barkat Ali Dahio, Assistant Commissioner, (Unit-03) SRB Karachi.

02. Brief facts of the case as stated in the OIO were that the appellant under sub-rule (2) of rule 1 of Sindh Sales Tax Special Procedure (Withholding) Rules, 2014 (hereinafter referred to as the Withholding Rules) being a withholding agent was

liable to withhold and deposit the amount of Sindh Sales Tax (SST) at the applicable rates on receipts of taxable services provided or rendered to it by providers under these Rules.

03. The appellant having SNTN: #3679264-7 was registered with SRB under the category of Contractual Execution of Work or Furnishing of Supplies (Tariff Heading 9809.0000).

04. It was alleged in the OIO that during the scrutiny of the Financial Statement provided by the appellant it was revealed that during the tax periods January, 2015 to December, 2016 it had acquired the taxable services of "Franchise" (Tariff Heading 9823.0000) under the name of "management fee". This falls under the definition of "franchise services" chargeable to SST from its parent company M/s Alstom Grid situated at France.

05. It was further alleged in the OIO that as per sub-section (46) of section 2 of the Act read with rule 36 of Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules) it had failed to declare the services amounting to Rs.369,954,000/=. Moreover being the withholding agent it had failed to deposit the SST amount of Rs.36,995,400/= with SRB.

06. The appellant was served with Show Cause Notice (SCN) dated 05.03.2018 to explain as to why the SST amounting to Rs.36,995,400/- should not be assessed under section 23 of the Act and recovered from It under the section 47 of the Act read with relevant provisions of Withholding Rules. It was also called upon to show cause as to why default surcharge under section 44 of the Act should also not be imposed alongwith penalties under clause 3, 6(d), and 11(A) of the Table under section 43 of the Act.

07. The Appellant filed reply on 15.03.2018 and submitted that out of total management fee declared in the audited accounts, trade mark fee fell in the ambit of franchise fee. The Breakup of management fee as on December, 2016 was stated to be as under:-

S. No.	Description	Total Amount in Rs.
1	Trademark fee	37,817,842
2	Sector fees	152,594,998
3	Corporate & Network fee	18,374,160
Total		208,787,000

The Breakup of Management Fees as on December, 2015 was statedly as under:-

S. No.	Description	Total Amount in Rs.
1	Trademark fee	32,057,178
2	Sector fees	129,109,822
Total		161,167,000

08. The Assessing Officer (AO) passed OIO and ordered for recovery of SST of Rs.20,878,700/- on the value of service of Rs.208,787,000/= from the appellant. Moreover, the AO also imposed penalty of Rs.1,043,935/- under serial No.3 of Table under section 43 of the Act (for failing to deposit the amount of tax due). Penalty of Rs.20,878,700/- under serial 6(d) of Table under section 43 of the Act (for violation of section 2(94) of the Act) and penalty of Rs.20,878,700/- under serial 11A of the Table under Section 43 of the Act (for failing to comply with the provisions of the rules or notifications issued in relation to withholding or deduction of tax or payment of the tax).

09. The said OIO was challenged by the appellant before the Commissioner (Appeals) by way of filing of appeal, who maintained the OIO to the extent of principal amount of tax determined by the AO and the penalty to the extent of Rs.100,000/= along-with default surcharge under section 44 of the Act, hence this appeal.

10. The learned representative of the appellant submitted that the franchise was neither goods nor services but a right granted by the franchise to the franchisee. He relied upon the case of Arshad Mehmood versus Government of Punjab, reported as PLD 2005 SC 193. He further contended that appellant was not liable to pay SST for the reason that in the audited account of 2017, such amount was reversed as it was no longer payable to the Foreign Service provider for want of permission from State Bank and the Foreign Service provider had waived the said amount. It was also contended that the amount shown in the financial statement against management fee was not on account of franchise services but was related to the reimbursement of expenses to foreign associate. It was further contended that the appellant was a registered service provider of SRB and the tax liability was shifted upon it under reverse charge mechanism under sub-section (2) of section 3 of the Act Moreover it was alleged that the appellant had received franchise services from

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it associate abroad and that the appellant being a service recipient as well as service provider could not issue prescribed debit and credit note at same time.

11. The learned representative of the appellant further contended that tax amounting to Rs.208,787,000/- was charged for the tax periods January, 2015 to December, 2016 on account of Management Fees on the basis of entries available in the Accounts for 2015 and 2016. Such tax was charged on the basis of total payable shown in the Accounts commencing from 27.12.2010 onwards i.e. from the date of incorporation of the company relating to its first Tax Year i.e. 2011 onward. He further submitted that the definition of franchise was added in the Act vide Section 2(46) effective from 11th July, 2013. He further contended that after refusal of the State Bank of Pakistan to allow remittance such payable Management Fees was reversed in the Audited Accounts for the year December, 31st 2017 i.e. Tax Year 2018 and an amount of Rs.142.893 million was shown in Note No.11.1 of the Accounts and it was offered for tax for the years under consideration. He concluded that since no service of franchise was acquired from the parent company and no payment was remitted to it, the appellant was not liable to pay any SST. He further pointed out that the balance amount of Rs.46,904,000/= was reflected in the Accounts and the SST of Rs.4,456,691/= was paid under Amnesty of 2020 on this account.

12. The learned AC for SRB referred to Note 11.1 of Audited Accounts 2016 and submitted that in the Note it was stated that Management Fee was payable to parent company for the use of their name. He referred to Rule 36 of the Rules which provides mechanism for payment of franchise fees/management fee. The AC contended that service was already received and such payments became due in view of operation of section 17 of the Act. He then referred to Note 18.1 of the Accounts of 2017 and submitted this Note provided for reversal of amount on the basis of adjustment of accounts between the appellant and Grid Solutions SAS, Dubai UAE, which was another associate company of appellant. The AC further contended that reversal was made after issuance of SCN as an afterthought to avoid payment of SST.

13. In rebuttal the learned representative of the appellant submitted that the Notes 18.1 referred to liability written back and the same has nothing to do with Note 11.1 of the Audited Accounts.

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

15. The dispute between the parties was whether the "Management Fee" was covered under the definition of "Franchise Fee". The definition of Franchise as provided under sub-section (46) of section 2 of the Act read as under:-

*"**Franchise**" means an authority given by a franchiser, including an associate of the franchiser, under which the franchisee is contractually or otherwise granted any right to produce, manufacture, distribute, sell or trade or otherwise deal in or do any other business activity in respect of goods or to provide service or to undertake any process identified with franchiser, whether or not against a consideration or fee, including technical fee, management fee or royalty or such other fee or charges, irrespective of the fact whether or not a trade mark, service mark, trade name, logo, brand name or any such representation or symbol, as the case may be, is involved;*

16. From the above definition of Franchise it is evident that the Management Fee is part of Franchise. The appellant has admitted its reply that trade mark fee falls in the ambit of Franchise Fee. It was not disputed that M/s Alstom Grid situated at France was the principal of the appellant and it was also not disputed that the appellant was using the name of its principal and receiving technical assistance and the process of services rendered by the appellant was identified with the franchiser. The substance of the matter is that appellant received/acquired services from its associate situated abroad and had shown the value of services in its annual accounts since 2011, but neither declared such services in its returns nor paid due taxes. The Commissioner (Appeals) has rightly held that franchise consideration was paid in the name of management fee. it is also true that before 01.07.2013, the words 'management fee' were not part of the definition of "franchise" as provided under section 2(46) of the Act. However, the impugned tax-periods in this case are 01/2015 to 12/2016 when 'management fee' is very much a part of the above cited definition. Appellant's assertion is thus misplaced.

17. In view of the above discussions we hold that the "Management Fee" is part of "Franchise".

18. The other argument of the learned representative of the appellant was that franchise was neither a good nor service hence SST cannot be levied. The argument is misconceived. The franchise is a service and sub-section (1) of section 3 of the Act provides that taxable service is a service which is listed in the second schedule to the Act. The franchise service was listed in the Second Schedule to the Act as per Tariff Heading 9823.0000 (Franchise Services). The judgment cited by the learned representative is distinguishable as the same was rendered in some other context before the enactment of the Act, 2011 in relation to section 69-A of the West Pakistan Motor Vehicle Ordinance, 1965. Moreover in the above referred case it was not held that the franchise was not a service. Furthermore both the provisions speak about granting an authority or permission by a franchiser to use its facilities by others.

19. The AO in the SCN claimed that the value of service was 369,954,000/= involving of SST of Rs.36,995,400/=. Apparently when the SCN was issued the AO was not aware about the facts of the case and no material was available with him to determine the value of service and tax payable. The issuance of SCN without any material available before the AO amounts to a roving inquiry or merely shooting in dark which practice was deprecated by the Honorable Supreme Court. This view gain support from the reported case of Assistant Director Intelligence and Investigation, Customs versus B. H. Herman, PLD 1992 SC 485. The OIO was passed in the sum of Rs.20,878,700/= on the value of service of Rs.208,787,000/=. The said amount of Rs.208,787,000/= comprised of other tax periods also for which no SCN was issued. The tax could not be levied on such amount which, were not part of SCN and was not confronted. The tax could only be levied for the tax periods from January, 2015 to December, 2016 and this fact was also ignored by Commissioner (Appeals). The Honorable Supreme Court of Pakistan in the case of Collector Central Excise and Land Customs versus Raham Din, reported as 1987 SCMR 1840 has held that the order of adjudication being ultimately based on a ground which was not mentioned in the SCN, was palpably illegal on face of it.

20. The AC was directed to file corrected Reconciliation Statement which was filed on 02.11.2020. As per the Reconciliation the value of service for 2015 was Rs.21,552,000/=. However an amount of Rs.8,246,000/= was shown on account of

shared service cost. The value of service for 2016 was Rs.47,040,000/= and Rs.3,349,000/= was shown on account of shared service cost. The SCN did not mention the shared service cost; therefore the amount which was not mentioned/included in the SCN could not be adjudicated upon subsequently.

21. The value of services as per the Reconciliation Statement dated 03.11.2020 prepared by the AC for the tax periods from January, 2015 to December, 2016 amounts to Rs.68,592,000/= and SST at 10% on such amount work out to Rs.6,859,200/=. Out of such amount the appellant paid Rs. Rs.4,456,691/= under the Amnesty of 2020.

22. The defence of the appellant was that since the Management Fee was not remitted due to the objection of the State Bank of Pakistan the same was reversed and income tax was paid on the said amount. However, the question arises that since the amount was not paid to service provider whether the appellant by reversing the Management Fee could escape payment of SST. Section 17 of the Act has a reply to this which provides that:-

".....17. Time, manner and mode of payment: 1[(1) The tax in respect of a taxable service provided or rendered during a tax period shall be paid by a person by the due date prescribed for payment of tax.]

(2) For the purposes of sub-section (1), a taxable service shall be considered to have been provided in the tax period during which:
(i) it was provided to the recipient;
(ii) an invoice for the value of the taxable service was sent to the recipient; or
(iii) consideration for the same was received; whichever is earlier.

(3) Notwithstanding anything contained in sub-section (1), the Board may, by a notification in the official Gazette, direct that the tax in respect of all or such classes of taxable services, as may be specified in the aforesaid notification, shall be charged, collected and paid in any other way, mode, manner or time as may be specified therein.

(4) The tax due on taxable services shall be paid by any of the following modes, namely:-

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(a) through deposit in a bank designated by the Board; or
(b) through such other mode and manner as may be specified by the Board.

23. It is evident from the perusal of clause (i) read with clause (iii) of sub-section (2) of section 17 of the Act that that a taxable service shall be considered to have been provided in the tax period during which it was provided to the recipient; irrespective of the fact whether the amount was paid or not. In the instant case the services were received/acquired by the appellant and the payable amount was reflected in the accounts but the due tax was not paid. The SRB was entitled to recover tax from the appellant as and when services were received/acquired and the value of services were reflected in the accounts and not from the actual payment. If the argument of the appellant that tax will become due only on actual payment or remittance is accepted clause (i) and clause (iii) of sub-section (2) of section 17 of the Act become redundant which is not permissible.

24. The reversal of amount was considered by Commissioner (Appeals) in OIA, which read as under:-

> *"Appellant's argument regarding 'reversal via credit notes' is unsubstantiated and even otherwise frivolous, in the light of section 17 of the Act, ibid, that delineates as to when and how 'taxability' is registered under the Act, 2011".*

We are in full agreement with the Commissioner (Appeals) relating to the fact that the appellant was showing the "Management Fee" in the accounts since the year 2011 but had failed to deposit due tax in terms of section 17 of the Act, which clearly reflects malafides on its part.

25. In view of the above discussions we are of the opinion that the appellant is liable to pay SST of Rs.6,859,200/= on account of the "Management Fees" for the tax periods from January, 2015 to December, 2016 on the value of taxable service of Rs.68,592,000/=. However, subject to limitation the department is at liberty to issue notice on this account for the earlier years not covered by earlier SCN.

26. The appeal is partly allowed. The OIA is maintained to the extent of payment of SST of Rs.6,859,200/= and the penalty of Rs.100,000/= and default surcharge imposed by Commissioner (Appeals) is also maintained. However, the amount deposited by the appellant under Amnesty 2020 may be adjusted from the tax due.

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27. The 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: 10.12.2020

Certified to be True Copy

REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

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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), SRB, Karachi.
4. Office Copy.
5. Guard File.

Order issued on 29/12/2020

Registrar

Order Dispatched on 29/12/2020

Registrar