

Grand file

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD AT KARACHI
DOUBLE BENCH-I

APPEAL NO. AT-03/2020

M/s Astrotech International,
Office No.1, First Floor, Kaka Jee Market,
Jamil Goth, Super Highway,
Near Burraq PSO Pump, Scheme 33,
Karachi.....Appellant

Versus

1. Commissioner (Appeals-II), SRB,
2. The Assistant Commissioner, Unit-3,
Sindh revenue Board,
Sixth Floor, Shaheen Complex,
M. R. Kiyani Road, Karachi.....Respondents

Date of filing of Appeal 03.02.2020
Date of hearing 29.09.2021
Date of Order 31.01.2022

Mr. Aga Faquir Mohammad Advocate for appellant along with Ms. Sobia Samreen Assistant to the Advocate for appellant.

Mr. Irfan Waheed, AC-Unit-23 and Ms. Uzma Ghory AC-DR 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. 197/2019 dated 22.11.2019 passed by the Commissioner (Appeals-II) in Appeal No. 158/2019 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 299/2019 dated 25.03.2019 passed

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by the Mr. Muhammad Danish Khan, Assistant Commissioner, (Unit-23) SRB Karachi.

02. The brief facts of the case as stated in the OIO were that the appellant got voluntarily registration with Sindh Revenue Board (SRB) on 27.08.2015 under service category of "Inter-City Transportation or Carriage of goods by road or through pipeline or conduit", Tariff Heading 9836.0000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act).

03. It was alleged in the OIO that from the withholding statements of the SRB registered person it was revealed that the appellant during the tax periods from May, 2016 upto October, 2018 had provided taxable services of Inter-City Transportation Tariff Heading 9836.0000 amounting to Rs.48,876,110/- and had also charged SST of Rs.5,058,456/- on its invoices. It was also alleged that the appellant had collected Sindh Sales Tax (SST) of Rs.4,046,764/- from M/s Sindh Solid Waste Management Board (SSWMB), M/s Fisheries Development Board (FDB) and M/s K-Electric Limited (KEL), but had neither deposited the said amount nor had declared any taxable activity with SRB.

04. The appellant through SRB's letters dated 22.11.2018, 29.11.2018 and 01.01.2019 was required to declare all activities in SRB registration profile and was further required under section 52(1) of the Act to provide summary and copies of invoices issued during July, 2016 to October, 2018, copies of Income Tax Returns of 2015-16 and 2016-17, copies of sales tax returns filed with Sales Tax Department other than Sindh, if any and withholding and tax deduction certificates (SSTW-06) on all Inter-city transportation services provided during January-2016 to October-2018 obtained from service recipients with the reason of short payment of SST. In response a letter dated 28-11-2018 was received from M/s Aga Faquir Mohammad & Co. who submitted that the appellant was engaged in the business activity of transportation and disposal of hazardous waste under joint venture with Karachi Municipal Corporation (KMC) within Karachi; and its services were not taxable. Thereafter the appellant was required under



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section 52(1) of the Act to provide a copy of agreement signed with KMC with few sample invoices in order to substantiate its claim, however, no compliance was made.

05. The appellant was served with a Show-Cause Notice (SCN) dated 15.01.2019 to explain as to why SST liability of Rs.4,046,764/- on short declared revenue of Rs.48,876,110/- for the tax periods from May, 2016 to October, 2018, may not be assessed against it under section 23(1A) of the Act read with rule 42G of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules) along with default surcharge under section 44 of the Act. The appellant was also called upon to explain as to why penalties under serial No. 3, 6(d) and 15 of the Table under section 43 of the Act may not be imposed.

06. The appellant filed written reply dated 28.01.2019 stating therein that the appellant was providing intra-city (within city) transportation services to District Municipal Corporation Korangi, Karachi. However the appellant failed to provide the requisite information sought in the SCN thus the assessment was decided on merits on the basis of available information.

07. The Assessing Officer (AO) concluded that the appellant had made suppression by not declaring its taxable services with SRB provided during the above mentioned tax periods which was evident from the declaration of service recipients. The AO assessed SST of Rs.4,046,764/- on short declared revenue of Rs.48,876,110/- for the tax period from May, 2016 to October, 2018 under section 23(1A) of the Act alongwith default surcharge under section 44 of the Act. The AO also imposed penalty of Rs.202,338/= under serial No.3 of the Table under section 43 of the Act, penalty of Rs.100,000/= under serial No.15 of the Table under section 43 of the Act and penalty of Rs.4.046,764/= under serial No.6 (d) of the Table under section 43 of the Act.

08. The appellant challenged the said OIO before the Commissioner (Appeals) by way of filing appeal under section 57 of the Act. The Commissioner (Appeals) dismissed the appeal for non-prosecution on the

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plea that the appellant despite being provided with opportunities remained absent. Resultantly this appeal was filed before this Tribunal.

09. The learned advocate for the appellant submitted as under:-

i) The SST was wrongly charged under Tariff Heading 9836.0000, on the basis of registration without considering the actual nature of services provided by the appellant.

ii) The appellant during the relevant tax periods had provided services of operation and maintenance of land fill sites of SSWMB situated at Deh Jam Chakro, Surjani, Karachi and Deh Gond Pass, Hub River Road, Karachi.

iii) The collection and disposal of garbage and waste material and its transportation to land fill sites and maintenance of incineration plant for the relevant tax periods was not a taxable activity since no Tariff Heading was available in the Second Schedule to the Act.

iv) The collection of garbage and its disposal could not be equated with transportation of goods.

v) The Tariff Heading 9852.0000 (waste collection, transportation, processing and management services) was inserted in the Second Schedule to the Act vide Sindh Finance Act, 2019 effective from 05.07.2019 and no SST with retrospective effect could be levied or charged on this account.

vi) The appeal was erroneously dismissed for non-prosecution without service of notice despite filing of written arguments on 17.09.2019.

vii) The appellant had also filed application under sub-section (7) of section 59 of the Act for transfer of appeal to Tribunal which was not considered before dismissing the appeal for non-prosecution.

viii) The OIA was passed beyond the period prescribed under sub-section (5) read with sub-section (6) of section 59 of the Act and no tax liability under a time barred OIA could be charged.

ix) The appellant had not collected any SST from SSWMB and allegation in this regard was false.



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- x) The respondent had recovered Rs.5,498,369/- from the appellant by way of attachment of bank accounts and the amount recovered was more than the amount of SST determined in OIO.
- xi) The KEL paid an amount of Rs.53,740/= to the appellant after withholding Rs.15,355/=. Furthermore FDB paid an amount of Rs.428,761/= to the appellant after withholding Rs.107,190/=.
- xii) The appellant was entitled to claim refund of the amount recovered through attachment of bank accounts.

10. The learned AC-SRB submitted as under.

i) The appellant itself got voluntarily registration from SRB under Tariff Heading 9836.0000 (inter-city transport or carriage of goods by road or through pipeline or conduit). However it cannot change its instance at Tribunal stage.

ii) The appellant in response to the letters of SRB submitted that it was engaged in the business activity of transportation and disposal of hazardous waste under joint venture with Karachi Municipal Corporation (KMC) within Karachi. Thus its services were not taxable

iii) The appellant in reply to SCN had not challenged the TH under which the SCN was issued but stated that it had provided intra-city transportation services (within city) to District Municipal Corporation Korangi, Karachi.

iv) The appellant failed to provide the requisite information and documents sought in the SCN. Thus the OIO was decided on the basis of available information on merits.

v) The appellant at this belated stage could not change its instance nor it could challenge the Tariff Heading under which it had got voluntarily registration.

vi) It was clear from the reconciliation statement that irrespective of the fact whether appellant had provided taxable services or not it had charged tax on various invoices and on receipt of same did not deposit the tax with SRB. The amount of SST received by the appellant from SSWMB was Rs.3,556,588/= and after deduction of SST deposited Rs.889,147/= with SRB.



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vii) The appellant had provided inter-city transportation services as it had lifted the goods from Karachi and transported the same to landfill site, Gharo, situated outside Karachi.

viii) The appeal was rightly dismissed for non-prosecution as the appellant despite numerous opportunities had failed to appear on the date of hearings.

ix) The filing of application under sub-section (7) of section 59 of the Act was not the right of the appellant thus the same was rightly ignored.

xi) The OIO and OIA were passed within the time allowed by law and thus were not time barred.

xii) T
The bid documents were examined and it appeared therefore that the rate quoted was inclusive of SST and all other taxes.

xiii) T
The invoice issued by the appellant was inclusive of SST and the SSWMB had rightly deducted SST @ 20% and balance 80% was paid to the appellant for deposit with SRB.

xiv) The appellant had collected SST from its service recipients but did not deposit the same with SRB and even if the service was not liable to SST the SST collected had to be deposited with SRB under section 16 of the Act.

xv) The appellant was not entitled to claim refund of the SST recovered from it through attachment of bank accounts.

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

12. In the instant matter the tax was charged on Inter-City Transportation of goods under Tariff Heading 9836.0000 which were allegedly provided by the appellant to SSWMB ,FDB and KEL at Rs.48,876,110/-. The appellant charged SST of Rs.5,058,456/- on the invoices and collected SST of Rs.4,046,764/- during the tax periods from

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July-2016 to October, 2018. It was further alleged that the appellant despite collecting SST did not deposit the same with SRB. The appellant in its reply filed before the AC submitted that it had provided transportation and disposal of hazardous waste under joint venture with Karachi Municipal Corporation (KMC) within Karachi; and its services were Intra-city (within City) transportation services for transportation and disposal of hazardous waste under joint venture with Karachi Municipal Corporation (KMC) within Karachi; and its services were not taxable.

13. The appellant provided the copies of agreement with KMC (joint venture), work order of KMC, work order of DMC Korangi alongwith agreement, work orders of KE, agreement with SSWMB and agreement with FDB. The appellant had also provided the copies of invoices. Tax was charged @ 13 percent and 14 percent on same invoices. It has also been noticed that some invoices did not relate to providing of transportation services.

14. The appellant had admitted that it had received SST of Rs.53,740/= from KEL and Rs.428,761/= from FDB. However the appellant had denied to have received any SST from SSWMB.

15. It is evident from the two contracts with SSWMB and work orders produced by appellant that the same were entered for operation and maintenance of SSWMB landfill site at Deh Jam Chakro, near Surjani Town, Karachi and for operation and maintenance of SSWMB landfill site at Deh Gond Pass, Hub River Road, Karachi. It is established from the above documents that both the landfill sites are situated within the Jurisdiction of Karachi. However if the contention of the department is accepted than the service of transportation of goods of the appellant would fall within the ambit of intra-city transportation and such service for the relevant periods were exempted from payment of SST.

16. The AC was directed to examine all the agreements, work orders and invoices provided by the appellant for resolving the nature of services provided by the appellant and to ascertain whether the service recipients had passed on the SST to the appellant. The AC was directed to prepare

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summary of each agreement and determine the nature of services mentioned in the said agreements and work orders.

17. The AC submitted two Reconciliation Reports, dated 27.01.2021 and 17.02.2021. The first Reconciliation Report dated 27.01.2021 was summarized as under:-

DETAILS PROVIDED BY SERVICE RECIPIENTS (WITHHOLDING AGENTS)						
S. No.	WHT-Name	Tax Period	Value of Service	SST Amount	SST Deducted & Paid by WHT. Agent	SST Received by Atrotech International
01	FDB	201605	3,828,225	535,951	107,190	428,761
02	KE Limited	--	590,535	76,770	15,355	61,415
03	SSWMB	--	44,457,350	--	889,147	--

It is evident from the above Reconciliation report that the appellant had not received any SST from SSWMB. However it had received SST of Rs.428,761/- and 61,415/= (total Rs.490,176/=) from FDB and KEL respectively.

18. The Second Reconciliation Report dated 17.02.2021 furnished by AC has been summarized as under:-

DETAILS PROVIDED BY SERVICE RECIPIENTS (WITHHOLDING AGENTS)							Details of Service as per information / records provided before Appellate Tribunal
S. No.	WHT-Name	Tax Period	Value of Services	Taxable Amount	SST Deducted & Paid by WHT. Agent	Payment made to Astrotech	
01	FDB	201605	3,828,225	535,951	107,190	428,761	Agreement not provided. SST charged on invoices. Nature of services couldn't identified.
02	KE Limited		590,535	76,770	15,355	61,415	Waste collection services (Tariff Heading 9852.0000)
03	SSWMB		44,457,350	4,445,735	889,147	3,556,588	Waste collection services (Tariff Heading 9852.0000)

It is evident from the above Reconciliation that the appellant had provided services of waste collection to KE and SSWMB and the nature of services provided to FDB was not ascertainable. It was alleged in the statement that

appellant had received SST as mentioned in column No. 7 above at Rs.3,556,588/- but the department had failed to establish the same.

19. The AC was further directed to submit Report on 29.09.2021 regarding the nature of services provided by the appellant and whether the amount of SST were passed on to it. The AC submitted that as per the agreement and work orders the appellant had provided services of waste collection, transportation, processing and management services under Tariff Heading 9852.0000. It was also reported that the appellant had received an amount of Rs.3,556,558/= from SSWMB and an amount of Rs.889,147/= was deducted and deposited with SRB by SSWMB.

20. The initial allegation of the respondent was that the appellant had provided service of inter-city transportation of goods. The reply of the appellant was that it had provided service of intra-city transportation of goods. Apparently both the stands taken by the parties were not correct and based on lack of understanding of the subject. No doubt the transportation was used in lifting the garbage and its disposal at landfill sites. However, the transportation of garbage could not be equated with the transportation of goods. The goods should be capable of being used or consumed by humans. The garbage lifted by the appellant was not for re-use or re-cycling and was merely dumped in landfill sites. The word "goods" was defined under sub-section (49) of section 2 of the Act as under:-

2(49) "Goods" Includes every kind of movable property other than actionable claims, money, stocks, shares and securities does not include a service or services described under this Act";

The property generally means land, building. The movable property means the tangible goods capable of moving from one place to other. The garbage could not be termed as movable property though the same is capable of moving from one place to another. The word "goods" is defined in Black's Law Dictionary, Tenth Edition as under:-

As under:-

"Goods" Tangible or movable personal property other than money; esp., articles of trade or items or merchandise <goods and services>.

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Goods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, ‘Goods’ also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty.

It is clear from the above definition that the goods are those which were manufactured and identifiable at the time of sale. The garbage is not identifiable and could not be treated at par with goods.

21. The lifting of garbage is not transportation of goods. The AO had issued SCN and passed OIO invoking a Tariff Heading which was not inapplicable. During the relevant tax periods there was no Tariff Heading in the Second Schedule to the Act to cover the activity of lifting and disposal of garbage. In view of 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 its registered office or place of business in Sindh. The AO had jurisdiction to tax only those services which were listed in the Second Schedule to the Act.

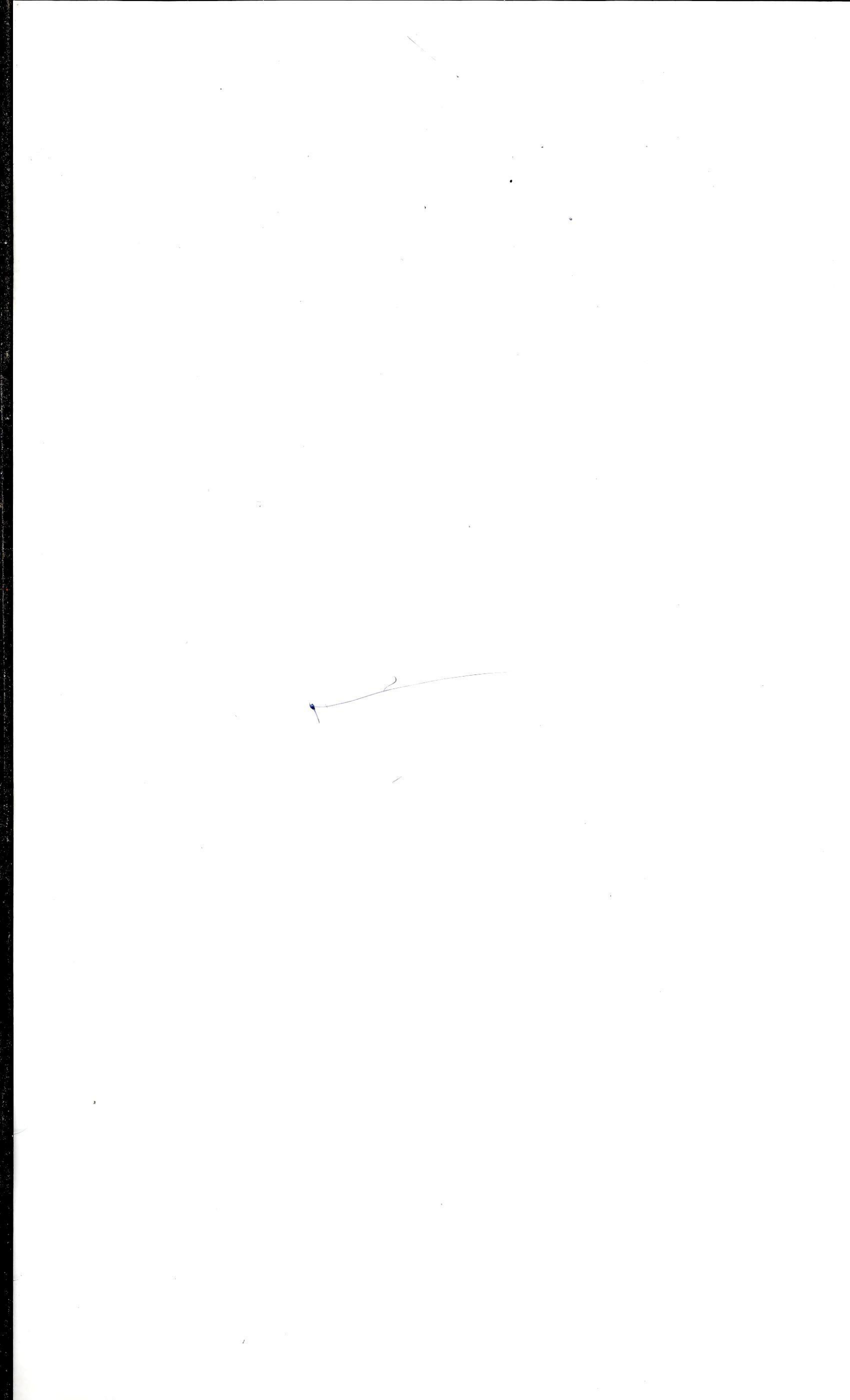
22. The AC in his Reports had submitted that the SST was payable under Tariff Heading 9852.0000 (waste collection, transportation, processing and management services). This Tariff Heading was introduced in the Second Schedule to the Act vide Sindh Finance Act, 2019 effective from 05.07.2019 having no retrospective effect thus no SST could be charged during the tax period involved in this case.

23. The argument of the AC was that the rates were quoted inclusive of all taxes. Here it is pertinent to mention that even if the rates were quoted inclusive of all taxes it would not make any difference as during the relevant tax periods no SST was levied on lifting and disposal of garbage. The other argument of the AC was that the appellant had charged and collected the SST. The perusal of the invoices produced by the appellant showed that it had charged SST in the invoices issued to The Director, Municipal Services, SWM, Karachi Metropolitan Corporation, KEL and FDB.



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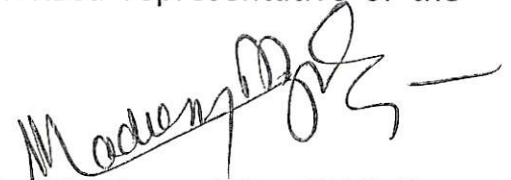


action should be completed within sixty days from the date of receipt of this order.

- iii) The appellant is also liable to pay penalty of Rs.100,000/= prescribed under Serial No. 15 of the Table under section 43 of the Act for non-providing the documents in consequence of Notice under section 52 of the Act.

27. The appeal is disposed of in terms of para 26 above. The copy of the order may be provided to the learned authorized representative of the parties.


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER


(Justice[®] Nadeem Azhar Siddiqi)
CHAIRMAN

Certified to be True Copy


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Karachi:

Dated:31.01.2022

Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
- 2) The Assistant Commissioner, (Unit-04), SRB, for compliance

Copy for information to:-

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

Order issued on 01/02/2022

Order Dispatched on 01/02/2022


Registrar


Registrar

The appellant had not charged SST in the invoices issued to The District Korangi, Landhi Zone, and SSWMB. It was submitted by the appellant that the SSWMB had paid an amount of Rs.43,568,234/- to the appellant after deduction of Rs.889,147/= thus no SST was passed on to the appellant.

24. The appellant is liable to deposit the SST recovered/collected from the recipients of service i.e. from KEL and FDB even if tax was not levied for the relevant tax periods on the strength of sub-section (1) of section 16 of the Act. However, the respondent had failed to establish that Director, Municipal Services, SWM, Karachi Metropolitan Corporation and SSWMB had passed on the SST to the appellant.

25. The department in different cases has invoked different Tariff Headings i.e. 9809.0000 (Contractual execution work or furnishing supplies), 9822.0000 (maintenance or cleaning services) and 9822.3000 (janitorial services). This clearly reflected that department was also not sure about the actual nature of service of lifting and disposal of garbage.

26. In view of the above discussions it is held as under:-



i) The appeal is partly allowed. The OIO and OIA are maintained to the extent payment of SST of Rs. Rs.490,176/= received by the appellant from FDB and KEL alongwith default surcharge under section 44 of the Act and penalty prescribed under Serial No. 3 of the Table under section 43 of the Act.

ii) The matter relating to the allegation of the respondent that SST was charged and collected from SSWMB and was not deposited with SRB is remanded to the concerned AC with the directions to inquire from SSWMB regarding passing on the SST to the appellant. The appellant is also required to submit all necessary documents in support of its claim that no SST was charged and collected from SSWMB. The claim of the refund of SST recovered from the appellant would be subjected to the outcome of the result of the inquiry. The

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