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APPEAL NO. AT-04/2020

M/s Metro Capital Limited.....Appellant

Versus

Assistant Commissioner, Unit-12, SRB, Karachi.....Respondent

Date of Filing of Appeal: 06.02.2020

Date of hearing of Appeal: 17.08.2020

Date of Order: 24.08.2020

Mr. Gohar Manzoor, FCA and Mr. Farid Siddiqui, ITP for appellant.

Ms. Uzma Ghory, AC-DR and Mr. Asad Raza, AC 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.202/2019 dated 10.12.2019 passed by the Commissioner (Appeals-I), SRB in Appeal No. 179/2018 confirming the Order in Original (hereinafter referred to as the OIO) No. 663/2018 dated 24.06.2018 passed by the Assistant Commissioner-Unit 12, (Mr. Tarique Ali) SRB, Karachi.

02. The facts of the case as mentioned in the OIO are that the Appellant was registered with SRB under the service category "Stockbrokers, Future Brokers and Commodity Brokers" falling under Tariff Heading 9819.1000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) chargeable to Sindh Sales Tax (SST).

03. The allegation against the appellant was that the annual audited accounts available with SRB for the tax periods from July, 2011 to June, 2015 revealed that the appellant had provided taxable services which were covered under Tariff Heading 9313.8100 of the Second Schedule to the Act. It was further alleged in the OIO that perusal of the record available with SRB for the tax



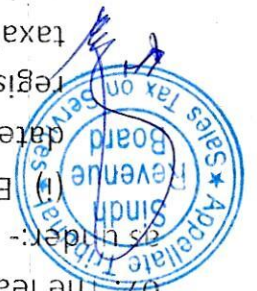
periods from July, 2011 to June, 2015 revealed that appellant have earned taxable revenue of Rs.45,155,098/= but had not declared it resulting in short declaration of Sindh Sales Tax (SST) amounting to Rs.7,118,277/=.

04. A Show-Cause Notice (SCN) dated 24.06.2018 was served upon the appellant under section 23 (2) of the Act calling upon it to explain as to why SST of Rs.7,118,277/= may not be assessed under section 23 (1) of the Act alongwith default surcharge under section 44 of the Act and imposition of penalties under Serial No. 2 & 3 of the Table under section 43 of the Act. The appellant filed reply dated 23.04.2018 and stated that it was registered under the category of commodity brokers but had provided services of commission income and was not taxable under the Second Schedule to the Act.

05. The Assessing Officer after hearing passed OIO directing the appellant to deposit tax of Rs.7,118,277/= alongwith penalty of Rs. 359,914/= under Serial No. 3 of Table under section 43 of the Act and also imposed default surcharge under section 44 of the Act.

06. The said OIO of the Assessing Officer was unsuccessfully challenged by the appellant by way of filing appeal before the Commissioner (Appeals), who dismissed the appeal and upheld the OIO to the extent of balance tax amount of Rs.3,257,128/=, default surcharge and penalty. The said OIA has now been challenged before this forum.

07. The learned representative of the appellant Mr. Gohar Manzoor submitted



Earlier the proceedings were initiated against the appellant vide SCN dated 24.09.2013 under section 24B of the Act for its compulsory registration alleging therein that the appellant was engaged in providing taxable services falling under Tariff Heading 9819.1000 (Stock Brokers and Commodity Brokers) and OIO No. 35/2015 dated 16.01.2015 was passed which was challenged in Appeal No. 43/2015 before Commissioner (Appeals) who dismissed the appeal for non-prosecution vide OIA No. 142/2016 dated 05.09.2016. The said OIA was challenged

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before this Tribunal in Appeal No. 88/2016 which had waived the penalty imposed by the AO.

(ii) The appellant was incorporated in the year 2000 for the core business of "Stock Broker and Allied Business" but the appellant had never provided any services covered under Tariff Heading 9819.1000.

(iii) The appellant was in the business of commission agent which fell under the Tariff Heading 9319.1300 of the First Schedule to the Act which was not part of the Second Schedule for the relevant tax periods and become taxable from 01.07.2015.

(iv) The second proceedings were initiated against the appellant vide SCN dated 16.01.2015 under section 23 (1) of the Act alleging therein that the appellant was engaged in providing taxable services of "Commodity Brokers and Business Support Services" falling under Tariff Heading 9819.1000 and 9805.2000 respectively and OIO No. 118/2015 dated 04.03.2015 was passed determining the tax liability of Rs.2,107,021/= for the tax periods from July, 2013 to June, 2014 which was challenged in Appeal No. 67/2015 before Commissioner (Appeals) who dismissed the same for non-prosecution vide OIA No. 141/2016 dated 05.09.2016. The said OIA was challenged before this Tribunal in Appeal No. 87/2016 which set aside the OIO and OIA vide order dated 20.02.2017 with the direction to the AO to conduct the audit of the accounts of the appellant under section 28 of the Act and on the basis of audit report issue fresh SCN to assess firstly the nature of services rendered by the appellant and its taxability and secondly the value of such services for tax purposes.

The department instead of complying with the Order of the Tribunal for conducting audit under section 28 of the Act issued fresh SCN dated 19.03.2018 for the tax periods from July, 2011 to June, 2015 alleging therein that the appellant had provided taxable services covered under Tariff Heading 9813.8100 (others: including the services provided or rendered by non-banking finance companies, modaraba and musharika companies and other financial institutions) of the Second Schedule to the Act. An OIO No. 663/2018 dated 24.06.2018 was passed determining the SST at Rs.7,111,278/= alongwith default surcharge and



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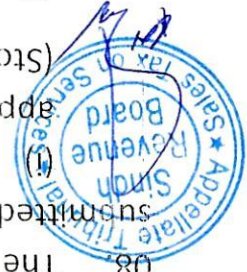
penalty of Rs.355,914/=. The said OIO was challenged in Appeal No. 179/2018 before Commissioner (Appeals) who dismissed the appeal vide OIA No. 202/2019 dated 10.12.2019.

(vi) The appellant in pursuance to audit notice dated 25.01.2018 submitted documents asked for under cover of its letter dated 06.02.2018 which was duly received by the respondent. Earlier to that the appellant was called upon vide letter of SRB dated 29.12.2017 to provide Financial Statements for the tax periods from July, 2011 to June, 2017 which were duly provided vide appellant's letter dated 05.01.2018 despite the fact that various tax periods were not part of earlier SCN. However the respondent issued fresh SCN dated 19.03.2018 without conducting audit which was complied with on 20.04.2018 and thereafter OIO dated 24.06.2018 was passed. However, despite several requests of the appellant and Order of the Tribunal dated 18.02.2020 no Audit Report was provided. This fact is further evident from para 7 of the para wise comments which mention that no audit was conducted and no audit report was prepared. Thus the procedure for conducting audit as provided under section 28 of the Act, was not followed.

(vii) The Order of the Tribunal in Appeal No. AT-206/2015 M/s Elixir Securities (Pvt.) Ltd. V/s Commissioner (Appeals), SRB was referred which had dealt with "management fee" in para 4 (c) and 5 of the order. (viii) The fresh SCN could not be issued without first complying with the direction of the Tribunal and the tax could not be enhanced by including other tax periods not involved in the first SCN.

08. The learned representative of the respondent Mr. Asad Raza, AC submitted as under:-
(i) After receiving SCN from the department under section 24B the appellant got voluntarily registered under Tariff Heading 9819.1000 (Stock Brokers, future brokers and Commodity Brokers).

(ii) The appellant was providing the services of mutual funds distribution as a part of asset management services being part of banking services. Thus the tax was rightly charged under Tariff Heading 9813.8100 (Others including the services provided or rendered by non-banking finance



companies, modaraba and musharika companies and other financial institutions).

(!!!) The appellant on behalf of its clients distributes mutual funds (units) with the Fund Management Companies and Asset Management Companies. The appellant on the basis of the funds/units distributed to such institutions receive commission therefrom.

(iv) A letter dated 29.12.2017 was served upon the appellant for providing Financial Statements for the years 2011-12, 2012-13, 2014-15, 2015-16 and 2016-17 alongwith auditor's certificate indicating deficiency in the payment of SST in view of remand Order of the Tribunal. However, after the financial statements were received the same were examined a letter dated 12.01.2018 intimating the short declared SST of Rs.5,548,303/= was issued to the appellant which was replied on 24.01.2018.

(v) A notice dated 25.01.2018 was served upon the appellant on 27.01.2018 which was received by one Fahmida for providing the relevant record for the purpose of conducting audit, but neither any reply was received nor any documents in compliance thereof were provided. The said notice was issued under the provisions of section 28 of the Act.

(vi) SCN dated 19.03.2018 was served upon the appellant for assessment of tax for the tax periods July, 2011 to June, 2015 which was replied by the appellant and such reply was found unsatisfactory. However the said SCN can justly be considered to be an audit report as it contained all the components of audit report.

(vii) The fresh CIO was passed in compliance to the Order of Tribunal after providing fair opportunity of hearing to the appellant and considering the available record. However, in view of para 2 & 3 of para wise comments the appellant had provided the services of placement of funds which were taxable under Tariff Heading 9813.8100 of the Second Schedule to the Act.

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(viii) The services provided by the appellant were similar to the services provided by banks in Pakistan to the Asset Management Companies, and the same were taxable under Tariff Heading 9813.8100 since July, 2011

The Order of Tribunal in Appeal No. A-78/2014, KASB Securities Ltd. vs. SRB was referred in this regard.

09. The learned representative of the appellant in reply submitted as under:-

(i) No audit was conducted as directed by the Tribunal and fresh assessment order was passed and the tax periods which were not part of the earlier SCN were included.

(ii) The appellant was engaged in marketing of the mutual fund units, seeking investors assistance in filing of relevant forms and formalities and was an independent agent of Asset Management Company and was not engaged in providing Asset Management Services.

(iii) The appellant being a distributor of mutual funds units, distributes such units on behalf of Asset Management Companies as their funds to potential investors and it does not distribute such units to Asset Management Companies.

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

11. The core issue in this matter is to determine the actual nature of service provided or rendered by the appellant. It appears that the department was confused in this regard since the first notice for compulsory registration was served upon the appellant invoking Tariff Heading 9819.1000 and the second notice was served for assessment of tax invoking Tariff Headings 9819.1000 and 9805.2000. The contention of the appellant since inception was that it was in the business of commission agent and fell under the Tariff Heading 9819.1300 of the First Schedule to the Act which was not part of the Second Schedule to the Act for the relevant tax periods. This business becomes taxable from 01.07.2015.

12. To resolve this issue the Tribunal vide Order dated 20.02.2017 directed the Department to conduct audit under section 28 of the Act. The purpose of



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the audit was to ascertain the actual nature of services provided or rendered by the appellant and its taxability and then to assess the value of service for tax purposes.

13. After Remand Order dated 20.02.2017, the Department after lapse of ten months issued notice dated 29.12.2017 for production of financial statements for the years, 2011-2012, 2012-13, 2014-15 and 2015-2016. Whereas it is pertinent to point out that the earlier notice was issued for the tax periods July, 2013 to June, 2014 and other tax periods were not part of such notice. The appellant vide its letter dated 05.01.2018 provided the documents asked for to the department which were duly received by the Department since the letter bears Round Seal of SRB with an initial dated 05.01.2018. The second letter dated 12.01.2018 under the heading "Observation and Short Payment of Sindh Sales Tax" was complied with by the appellant on 24.01.2018. The said reply was also duly received by the Department. The third letter issued by SRB dated 25.01.2018 asking for ledgers, bank statements of all the business accounts, copies of invoices from 2012 to 2017 for audit purpose to ascertain actual nature of service. This letter was also complied with by the appellant vide its letter dated 06.02.2018 alongwith all the relevant documents which was duly acknowledged by the Department by affixing the round seal of SRB with initial dated 06.02.2018. However the AC has malafidely and with ulterior motive denied to have received the reply and such documents.

14. Thereafter the department in disregard of the Order of the Tribunal dated 20.02.2017 and without conducting audit issued fresh SCN dated 19.03.2018. It was alleged therein that the appellant had earned taxable revenue of Rs.45,155,098/- under Tariff heading 9813.8100 for the tax periods from July, 2011 to June, 2015 but had not declared any taxable revenue in the relevant tax periods and accordingly, short declared the revenue by Rs.45,155,098/- resulting in short payment of SST of Rs.7,118,277/-. The appellant as stated above filed reply dated 23.04.2018 and maintained that it was registered under the category of "Commodity Brokers" but provides "Services of Commission Income" which was not taxable under the Second Schedule to the Act. In the fresh SCN it was stated that the services provided were exclusively covered under Tariff Heading 9813.8100 of the Second

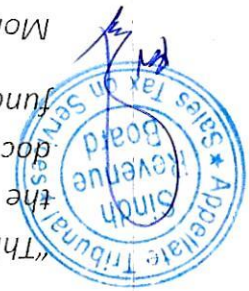


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The above conclusion drawn by the AO was without reasoning. It is not known as to how the AO arrived to the conclusion that the appellant was engaged in the "Service of Distribution of Funds" falling under Tariff heading 9813.8100 and this was also not

Moreover, the main Tariff heading 98.13 covers the definition of other persons, means those persons who are engaged in the similar services as are provided by banks "

"This clearly design that they are engaged into the services which falls under the tariff heading 9813/8100 of the Second Schedule to the act, in this document there is clear statement that they are engaged in the distribution of funds as is depicted above.



17. In para 10 of OIO the AO concluded as under:-

Tariff Heading 98.13. listed therein. The appellant was also not dealing with services listed under dealing in any such services. The appellant was not covered by the institutions foreign exchange dealers, non-banking financial institutions and other persons cooperative financing societies, moudarabas, musharikas, leasing companies, 98.13 are the services provided by banking companies, insurance companies, reasons for drawing such conclusion. The services listed under Tariff heading regarding the nature of services provided by the appellant. The OIO lacked heading 9813.100 of the Second Schedule of the Act-2011". The SCN was silent services of distribution commission on mutual funds are covered under the tariff 16. The AO in the above quoted para had concluded that "a broker providing

"7. It is very to quote here that a person registered in one category cannot be made exempted if he or she is engaged into the services which are also covered into Second Schedule of the Act-2011. A broker providing services of distribution commission on mutual funds are covered under the tariff heading 9813.100 of the Second Schedule of the Act-2011. Before quoting its taxability, its better what type of commission M/s Metro Capital (Private) Limited is rendering and to whom?"

15. The AO in para 7 of the OIO stated as under:-

Schedule to the Act although the nature of services provided by the appellant were not specifically mentioned. The SCN was vague and ambiguous as it did not disclose economic activity of the appellant.

part of SCN. It is now well settled that a plea not taken in SCN cannot be adjudicated. It was held in the reported case of Collector Central Excise and Land Customs versus Rahm Din 1987 SCMR 1840 as under:-

"Order of adjudication being ultimately based on a ground which was not mentioned in the SCN, was palpably illegal on face of it."

(iii) In another reported judgment of Caretex versus Collector, Sales Tax, 2013 PTD 1536 (Caretex versus Collector Sales Tax) it was held that "show cause notice" was not a casual correspondence or a tool or license to commence roving inquiry into the affairs of the tax payer based on assumption and speculations but was a fundamental document that carried definitive legal and factual position of the department against the tax payer".

18. The Commissioner (Appeals) in para 10.01 of the OIA concluded as under:-

"I have gone through the Order, available record, written as well as verbal submissions made by the counsel of the appellant and by the respondent; and have also perused the final report by the respondent and am fully convinced and satisfied with the final report submitted before me. It is to reiterate that out of total liability of Rs.7,118,277/= an amount of Rs.3,861,149/= had already been deposited during the tax period on 6th June, 2015 through CPR No. S12018112800851314014. Hence the liability of SST stands payable amounting to Rs. 3,257,128/= alongwith penalty of Rs. 355,914/= (under section 43 (e) of the Act-2011) and the default surcharge (to be calculated at the time of payment under section 44 of the Act-2011)".

19. From perusal of the OIA it appears such order is a non-speaking order. The OIA runs into four pages out of which three pages and one paragraph on page 4 was consumed in mentioning the facts of the case and the arguments of the parties. Para 10 has been quoted supra was quoted supra and the Commission was drawn in para 11. The Commissioner (Appeals-I) had assigned for reason for his satisfaction with the final report submitted by the Department on the basis of which OIA was passed. He also conveniently ignored the implication of non-compliance of the Order of the Tribunal dated 20.02.2017 by the AO despite mentioning the same in para 4.A of the OIA. This view gains support from the reported case of Collector of Customs and Sales



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Tax vs. Mudassar Traders, 2006 PTD 146 wherein the learned DB of Sindh High

Court held as under:-

"A perusal of the above findings shows that it is bereft of any reason, which is condition precedent for the sustainability of a judicial order. It is violative of the provisions contained in section 24A of the General Clauses Act, 1897".

20. It is therefore clear that both the forums of AO and Commissioner (Appeals) have miserably failed to properly determine the actual nature of services provided or rendered by the appellant. They have also failed to justify that any of these services fell under Tariff Heading 9813.8100 for the purpose of levy of SST which is evident from para 7, 8 and 10 of OIO. It is an admitted position that the appellant is not a banking or non-banking financial institution. The appellant was incorporated in the year 2000 and its Memorandum and Article of Association were amended and its name was changed from Metro Securities (Private) Limited to Metro Capital (Private) Limited on 2.11.2017. The Memorandum of the appellant does not allow it to carry on the business of Asset Management.

21. It was argued before us that the appellant is engaged in the provision of the services of the placement of funds which were taxable under Tariff Heading 9813.8100 and the services provided were similar to the services provided by banks to the Asset Management Companies (AMC). However, the appellant was not registered with SECP as (AMC). The Act does not provide the definition of an AMC. However, AMC has been defined by Google as under

"a firm that invests pooled funds from clients, putting the capital to work through different investments including stocks, bonds, real estate, master limited partnerships, and more. AMC are colloquially referred to as money managers or money management firms".

The AMC was defined in the Non-Banking Finance Companies and Notified Entities Regulations, 2008 (NBFC Regulations) issued by Security Exchange Commission of Pakistan (SECP) as under

"an NBFC licensed by the Commission to provide asset management services".

The Regulations of NBFC further elucidates the position since Regulation No. 3 a NBFC can perform business mentioned therein which include Asset



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Management Service. Regulation 4 provided that a NBFC licensed by the Commission to undertake form of business mentioned in Regulation No.3.

22. Admittedly the appellant is not a NBFC and is not licensed by the Commission to undertake the business of AMC. As per the Agreement for Appointment of Distribution Agent (Agreement), which is an agreement between M/s ABL Asset Management Company Limited (ABL) and appellant executed on 15th March, 2012 the ABL is the Management Company and the appellant is Distribution Agent (Agent). The relevant clauses of the agreement are reproduced as under:-

(i) Under clause (a) of the Agreement ABL is engaged in the business of managing collective investments scheme and related investment plans.

(ii) Under (b) of the Agreement the appellant was appointed as exclusive distribution agent of ABL.

(iii) Under (c) of the Agreement the Agent agrees to be appointed for assisting the ABL in seeking out and facilitating various investors who may at any time be interested in making investments in ABL.

(iv) Under clause 2 of the Agreement the Agent was appointed to market and sell the Investment Products to investors.

(v) ^{Clause 4} The Agent provided for remuneration of the Agent and clause 4.1 of the Agreement provided that the Agent will be entitled to the remuneration as stated in the Fees Schedule attached as Annexure-1 and clause 4.6 provided that the Agent shall only be entitled to the Commission on the net outstanding units calculated on a daily basis at the applicable NAV of ABL.

(vi) The Annexure-1 (Fees Schedule) provided that subject to clause 3, commission of 40% of the management i.e. 1.25 p.a. of the Net Asset Value (NAV) shall be payable to the Agent.

23. From perusal of the above clauses of the Agreement it is amply established that the appellant is not a NBFC nor it is undertaking the business



of asset management or managing any collective investment scheme but is working for ABL against commission.

24. The appellant had also produced the photocopies of two certificates issued by Security Exchange Commission of Pakistan i) License to Act as a security Adviser ii) Certificate of Registration of Broker. From these certificates it is evident that the activity of the appellant does not fall under Tariff Heading 9813.8100.

25. The appellant was engaged in the business of commission agent which fell under the Tariff Heading 9819.1300 of the First Schedule to the Act and for the relevant tax periods. Thus the same was not part of the Second Schedule for the purpose of levying SST and has become taxable from 01.07.2015.

26. The Order dated 20.02.2011 passed by this Appellate Tribunal was a final order in terms of sub-section (8) of section 62 of the Act and had attained finality as the same was not challenged before the High Court of Sindh under referential jurisdiction and is binding upon all the Officers of SRB. The Officers of SRB cannot ignore the order of Tribunal on their whims and any contradictory order if passed, cannot be sustained.

27. We are satisfied that the appellant had not provided or rendered the services falling under Tariff Heading 9813.8100, consequently both the OIO and OIA are set aside and annulled.

28. The copy of order may be provided to the learned representatives of the parties.

Imtiaz Ahmed Barakzai
Member Technical

Justice (R) Nadeem Azhar Siddiqi
Chairman

Karachi, Dated: 24.08.2020

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Copy for Information and compliance:
01. The appellant through authorized Representative.
02. The Commissioner (Appeals), SRB, Karachi
03. The Assistant Commissioner (Unit-), SRB, Karachi.
04. Office Copy. 05. Guard File

14.09.2020

Order issued on 14.09.2020

Order Dispatched on 14.09.2020

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