

**BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD**

**KARACHI**

**DB-I**

**APPEAL NO. AT-23/2020**

Assistant Commissioner SRB,  
Shaheen Complex 9<sup>th</sup> Floor M.R Kiyani Road,  
Karachi.....Appellant

Versus

M/s Madhani Associates (SNTN:1755623-6)  
Plot No.11-C, Shahbaz Link-1, 3<sup>rd</sup> Floor,  
Shahbaz Commercial Area,  
Phase-IV, DHA, Karachi..... Respondent

Date of Filing of Appeal: 17.07.2020  
Date of Hearing of Appeal: 19.10.2020  
Date of Order: 20.10.2020

Mr. Mukhtiar Ali Memon AC-SRB and Ms. Uzma Ghory AC-DR, for  
Appellant.



**ORDER**

**Justice ® Nadeem Azhar Siddiqi:** This appeal has been filed by the Assistant Commissioner (Unit-30), SRB Karachi challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.47/2020 dated 20.03.2020 passed by the Commissioner (Appeals) in Appeal NO. 04/2017 filed by the respondent against the Order in Original (hereinafter referred to as the OIO) No. 885/2016 dated 12.12.2016 passed by (Ms. Rafia Urooj), Assistant Commissioner, (Unit-11) SRB, Karachi.

02. The facts as stated in the OIO were that the respondent was operating in Sindh as a service provider in the category of "Indenter" which is

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Page 1 of 10

chargeable to Sindh Sales Tax (SST) under Tariff Heading 9819.1200 read with the provisions of section 3 and 8 of the Sindh Sales Tax on Services Act, 2011. (hereinafter referred to as the Act, 2011) at the rate of 14% with effect from 01.07.2015 on the gross amount of consideration including commission or fee, remuneration or royalty on a transaction, received by an indenter from service recipient.

03. It was alleged in the OIO that from perusal of data retrieved from M/s State Bank of Pakistan (SBP) regarding foreign exchange received/commission earned by the respondent from principals on Form/Appendix No.V-97 of Foreign Exchange Manual for the tax period from July-2015 to December-2015. It was evident that the respondent had received remittances/consideration in foreign currencies which was the value of services for the purpose of calculation of (SST) on services of indenting in terms of sub-section (51A) of section 2 of the Act read with rule 41B of Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules) vide notification No. SRB-3-5/12/2015 dated 04-08-2015.

04. It was further alleged in the OIO that the respondent had provided the above services without getting registration from SRB and had not paid SST of Rs.1,978,321/= on the taxable services for the tax periods from July-2015 to December-2015. It was also alleged that the respondent had failed to file monthly sales tax returns despite Notice dated 16.03.2016 and extension Notices dated 22.03.2016 and 30.03.2016 respectively.

05. The respondent was served with a Show-Cause Notice (SCN) to explain as to why the Sindh Sales Tax on "Indenting Services" amounting to Rs.1,978,321/- should not be assessed and recovered from it in terms of the provisions of section 23 (1) and section 47 (1A)(a) of the Act in addition to the imposition of default surcharge under section 44 of the aforesaid Act and also, penalties mentioned at Sr. No. 1, 2, 3, 11, 13 and

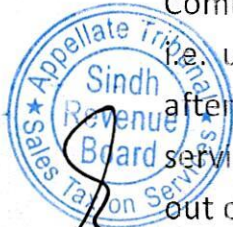


15 of the table under section 43 of the Act, 2011 for the violation of section 2(51A), 3, 5, 8, 9, 17, 24, 30 and 52 of the Act.

06. The respondent submitted its reply dated 15.04.2016 and contended that significant part of these remittance pertained to those indenting services which were already delivered/performed prior to June, 2015 and for which payments were received subsequently. Accordingly, the demand of tax on full amount was not appropriate and against the provision of law as the services tax on indenter was effective from July, 01, 2015. In another Reply dated 09.05.2016 it was submitted that there were three categories of receipt of commission viz: a) Commission received on services rendered prior to promulgation of SST i.e. up to June 30, 2015. b) Commission received on service rendered after promulgation of SST on indenters. c) Commission received on services rendered outside the province of Sindh. It was also stated that out of total commission receipt, majority of the commission pertained to the services rendered up to June 30, 2015 i.e. prior to levy of SST on indenters @ 14%. In support of its contention, the respondent attached a working showing party wise services on which commission was received from principal during July-2015 to December-2015 and dates of services actually rendered.

07. The Assessing Officer (AO) after hearing passed OIO and directed the respondent to deposit SST of Rs.1,942,136/=. Moreover default surcharge was imposed under section 44 of the Act alongwith penalty of Rs.2,854,401/= under serial No. 2, 3, 11 and 13 of the Table under section 43 of the Act.

08. The respondent challenged the said OIO by filing appeal before Commissioner (Appeals) who after hearing held that the respondent was not liable to pay any tax in respect of the tax periods prior to 01.07.2015 as there was no levy of tax on these services during those tax-periods in indenting services and the commensurate commission earned by it. The



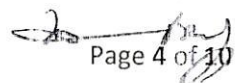
Page 3 of 10

Commissioner (Appeals) further held that the respondent shall be liable to pay its due tax on the indenting commission received by it on or after 1<sup>st</sup> day of July, 2015 in view of invoices issued on or after such date. According to the respondent AC, such taxable part of the commission constituted only 10% of the total indenting Commission. Thus it was held that the appellant was only liable to pay tax for such 10% amount along with due default surcharge under section 44 of the Act, whereas its tax liability, in terms of the impugned OIO, to the extent of the other 90% of the total indenting commission, was set aside, as being unlawful.

09. On filing of this appeal before the Tribunal the Office has raised objection that the appeal was time barred. The learned AC submitted that he had received the copy of OIA from Commissioner (Appeal) on 18.05.2020 and the appeal was filed on 17.07.2020 which was within time provided in clause (d) of sub section (2) of Section 61 of the Act 2011.

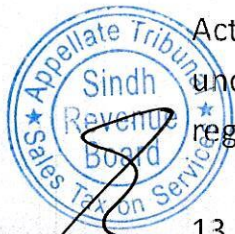
10. An appeal against the OIA can be filed before the Tribunal within sixty days from the date of receipt of OIA. The Commissioner (Appeals) in his report accepted that the OIO was provided to the learned AC on 18.05.2020 and stated the reasons for late delivery of OIA to the learned AC. The explanation offered by Commissioner (Appeals) is accepted in view of the abnormal situation prevailing in Province of Sindh and particularly in the office of SRB due to spread of Covid-19 virus. The supply of copies of OIA to the parties is the responsibility of the Commissioner (Appeals) and his staff. The copies of OIA should be supplied to the parties within a reasonable time after passing of OIA and any slackness in this regard by any one should not be spared and to avoid such slackness in future strict action is required to be taken against the delinquent officers.

11. In view of the above discussions it is held that the appeal was filed within time prescribed by law and the office objection is overruled.



Page 4 of 10

12. On merit the learned AC submitted that the respondent had provided services of indenting and received consideration from principals stationed abroad without getting registration from Sindh Revenue Board (SRB) under the provisions of section 24 of the Act read with rule 4 of the Rules. Moreover it had not paid due tax of Rs.1,978,321/= on the taxable services and got registered on 30 April 2016 under Tariff Heading 9819-1200 (Indenters). He further submitted that the respondent was liable to pay SST as provided in the proviso to sub rule (5) of rule 41B of the Rules. He submitted that the indenting service became taxable before the respondent received the consideration amount and thus was liable to pay SST even if the services were provided before July-2015. The learned AC relied upon legal maxim "*generalia specialibus non-derogant*" and submitted that rule 41B of the Rules was framed for the specific service; therefore the said rule 41B would take precedence over section 17 of the Act. The Commissioner (Appeals) also failed to consider Sr. No. 1 of Table under section 43 of the Act which provides for penalty of non-registration.



13. We have heard the learned AC and perused the record made available before us.

14. The AO levied tax on the alleged indenting services on the basis of consideration received by the respondent during July-2015 to December-2015 without considering the period during which the services were actually provided. The Indenting services was brought to tax net vide Sindh Finance Act, 2015 effective from July, 2015 and the definition of indenter was added vide sub-section (51A) of section 2 of the Act and rule 41B was added to the Rules. The AC did not accept the contention of the respondent that the services were provided prior to July-2015, whereas the payments were received after July-15. The AO while passing the OIO had totally failed to take into consideration the date of invoices and the date of providing services and had only considered the dates on which payments were received by the respondent.

  
Page 5 of 10

15. The respondent during the pendency of appeal before the Commissioner (Appeals) had provided documents in support of its contention. The AO submitted detailed Reconciliation Report to Commissioner (Appeals) which was reproduced on page 5 to 8 of the OIA and the same was summarized the calculation as under:-

Commission pertaining to the period before July-2015	Rs. 14,632,308/=
Commission pertaining to the period after July-2015	Rs. 1,600,222/=
Total	Rs. 16,232,530/=
Bank Service Charges	Rs. (21,414/=)
Grand Total	Rs. 16,211,116/=

16. The learned AC referred to proviso of sub-rule (5) of rule 41 B of the Rules and submitted before us that the tax was payable on receipt of consideration irrespective of the date on which the services were actually provided. However the contention carries no force since the indenting service was taxed effective from July-2015 and such taxability has no retrospective effect since the services provided prior to July-2015 were not taxable. The period could only be taxed once it has been brought to the net and mere receiving the consideration is not sufficient to tax it.

Rule 41B of the Rules was added effective from 04.08.2015, and has no retrospective effect. The rules framed under the Act are subordinate legislation and cannot be retrospectively applied and law is very clear on this point. The proviso to sub-rule (5) of the Rules is applicable prospectively and the payments received for the services provided prior to July-2015 were not covered by such Rules. In the reported case of Government of Pakistan versus Village Development Organization, 2005 SCMR 492 it was held as under:-

*"Executive order which confer rights are beneficial would be given retrospective effect and those which adversely affect or invade upon vested right cannot be applied with retrospective effect".*

18. Section 17 of the Act provides the time, manner and mode of collecting tax. In case of conflict between the provisions of Act and the Rules the provisions of Act will prevail. Furthermore the scope of tax cannot

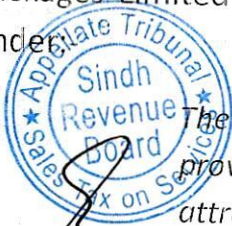
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Page 6 of 10

be enlarged by of framing Rules. In the reported case of Khawaja Ahmad Hassan versus Government of Punjab it was held as under:-

*"The subordinate power of framing rules granted by the statute cannot be exercised to override the express provisions of the statute itself; therefore, rule 14 of the Rules is ultra vires of the Punjab Local Government Ordinance and cannot be given effect to. It is well-settled by now that "a statutory rule cannot enlarge the scope of the section under which it is framed and if a rule goes beyond what the section contemplates, the rule must yield to the statute. (emphasis supplied)*

19. The learned AC relied upon the legal maxim *generalia specialibus non-derogant* and submitted that rule 41B of the Rules was framed for the specific service; therefore the said rule would take precedence over section 17 of the Act. The said maxim as provided in the Black's Law Dictionary, Tenth Edition means "general things do not derogate from specific things, the doctrine holding that the general words in a later statute do not repeal an earlier statutory provision dealing with a special subject". In the reported case of Packages Limited versus M. Maqbool, PLD 1991 SC 258 it has been held as under:



*The maxim "generalia specialibus non derogant" namely that special provisions will control general provisions is, therefore, not really attracted in the circumstances. Moreover, this rule is not to be understood in the sense that wherever there is a particular enactment following a general enactment the particular enactment would overrule the former. On the other hand, it is only where the particular enactment is absolutely repugnant and inconsistent with the general enactment that the Court may declare the special enactment as having been repealed by the general one".*

In the reported case of The State versus Zia Ur Rehman, PLD 1973 SC 49 it has been held as under:-

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Page 7 of 10

*"It is a well-established rule of interpretation that where in a statute there are both general provisions as well as special provisions for meeting a particular situation, then it is the special provisions which must be applied to that particular case or situation instead of the general provisions. Applying this principle of generalia specialibus non derogant, the provisions of Article 295 will have to be applied to the repealed legislative measures and there under it is significant that only acts "duly done" or things "suffered under the law" are protected. Acts done male fide or without jurisdiction or acts which are coram non iudice would clearly not be acts "duly done" and, therefore, the protection would not extend to such acts".*

In view of above reported cases the contention of the AC carries no force since the Rules are subordinate legislation were framed by the executive under the delegated power and can never take precedence over the provisions of the Act. Any Rule which is not in consonance with the Act is not to be followed and if there is any contradiction between the provisions of the Act and the Rules the provisions of the Act shall prevail.

20. The Commissioner (Appeals) while passing OIA has carefully examined all the aspect of the case including the invoices and other material and has also perused the Reconciliation Report compiled by the AC. The relevant para of OIA are reproduced for ready reference as under:-



22. *The reconciliation reports in the matter as submitted by the incumbent AC (dated: 07.11.2019 & that dated: 17.03.2020) have been scanned. Vide the former report; the AC confirmed that 90% of the contentious invoices pertaining were issued before the crucial dated 30.06.2015. She said: furthermore, the invoices and the confirmations, given to the RP by the foreign principals, show that 90% of the total indenting commission pertains to the period before July, 2015, however, the remaining 10% pertains to the period between July-2015 to December-2015."*

21. The Commissioner (Appeals) has rightly based his findings on the Reconciliation Report prepared by the learned AC and has rightly held that



notwithstanding Rule 41B *ibid*, the contentious issue in this matter must be decided in the light of section 17 (2) of the Act because the provisions of substantive law shall always take precedence over the rules made thereunder.

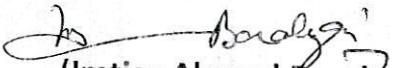
22. The Commissioner (Appeals) in latter portion of para 24 of <sup>#f his order</sup> has rightly held and the relevant portion is reproduced for ready reference as under:-

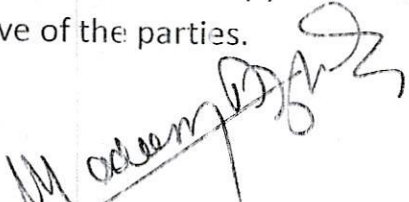
*"However, in this case, it is confirmed that at least 90% of the impugned invoices belong to the period when the services in question were not taxable under the Act, 2011 that is, the Appellant was neither a registered person nor a person liable to be registered under the Act, 2011, not was his indenting commission income subject to section 3 & 8 of the Act, *ibid*. it follows that the service rendered by him as an indenter, as evidenced by the commission received by him there-against, shall be liable to tax under the Act, 2011 only from 01.07.2015 onwards and no tax can be levied for the tax-periods when the tax did not exist for these services".*



23. We have carefully examined the findings recorded by the Commissioner (Appeals) and have also perused the Reconciliation Report prepared by the AC and do not find any infirmity or illegality in the OIA. The Commissioner (Appeals) has rightly held that respondent was not liable to pay any tax in respect of the Indenting services rendered by him and the commensurate commission earned by him that pertained to the tax-periods prior to 01.07.2015, as there was no levy of tax on these services prior to July-2015.

24. In view of above discussions the appeal filed by the department has no merit and the same is hereby dismissed in limine. The copy of this order may be provided to the learned representative of the parties.

  
(Imtiaz Ahmed Barakzai)  
Technical Member

  
(Justice<sup>®</sup> Nadeem Azhar Siddiqi)  
Chairman

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Page 9 of 10

  
REGISTRAR  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD

Order issued on

02/11/2020

Registrar

Order Dispatched on

02/11/2020

Registrar

Karachi

Dated: 20.10.2020

Copy for compliance:

Copy Supplied for compliance:

- 1) The Assistant Commissioner (Unit-30), SRB
- 2) The Respondent through Authorized Representative.

Copy for information to:-

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

