

**BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT
KARACHI**

DOUBLE BENCH-I

APPEAL NO. AT-30/2020

M/s AZ- Engineer (Pvt.) Limited
Karachi.....Appellant

Versus

Assistant Commissioner, SRB,
Karachi.....Respondent

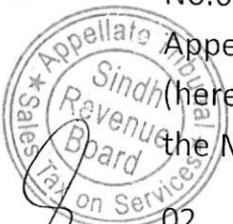
Date of Filing of Appeal: 31.08.2020
Date of hearing: 03.12.2020
Date of Order 21.12.2020

Syed Hafiz Ali, advocate for appellant
Mr. Ghulam Mustafa Kathio 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.62/2020 dated 10.07.2020 passed by the Commissioner (Appeals) in Appeal NO. 44/2020 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 44/2020 dated 03.03.2020 passed by the Mr. Sanjay Kumar Assistant Commissioner, (Unit-03) SRB Karachi.

02. The appellant is a registered person and it was stated in OIO that the appellant had rendered taxable services of contractor of building (including water supply, gas supply, and sanitary works), electrical and mechanical works (including air conditioning), multi-disciplinary works (including turn-key projects) and similar other works under Tariff Heading 9814.2000 of the



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Second Schedule to the Sindh Sales Tax on Services Act, 2022 (hereinafter referred to as the Act).

03. It was alleged in the OIO that during the Scrutiny of records, it was observed that the appellant supplied goods which were directly consumed in the services rendered by it but issued separate invoices for goods and services. The value of goods that were supplied to Habib Bank Limited amounted to Rs.18,347,195/- involving Sindh Sales Tax (SST) of Rs.3,119,021/= (The tax was calculated @ 17 percent and not 13 percent).

04. The appellant was served with a Show Cause Notice (SCN) dated 30.07.2018 to explain as to why the amount of SST of Rs.3,119,021 shall not be assessed and recovered under section 23 of the Act. Moreover it was confronted as to why default surcharge under section 44 of the Act and penalties may also not be imposed under Serial No. 2, 6(d), 3 ad 13 of Table under section 43 of the Act.

05. A Reply dated 20-08-2018 was received from the appellant in which, it was submitted as under:

"Our client's primary business consists of supplies of specified machinery and equipment to banks. Our Client's secondary engagement is providing installation and/or repair services of the machinery supplied only when needed. This can easily be adduced by the supplies made amounting to Rs.19,849,681/= and services/ contracts rendered at Rs.4,487,521/= declared in the Annual Return of income filed for the tax year, 2017 (Period from July, 2016 till June 2017). Copy of the Return of income enclosed for your kind perusal.

Furthermore, as per your contention that our client is in violation as defined by explanation provided under sub-section 79 of section 2 of the Act, 2011; it is utterly speculated and in this context we would like to quote the provisions of sub-section (35) of Section 2 of the Sales Tax Act, 1990; wherein clause (b) the taxable activity is defined as "activity that involves the supply of goods, the rendering or providing of services or both to another person,".



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As explained above, our client's primary source of Income is from supply of goods which are subjected to sale tax @ 17% chargeable under section 3 of the Sales Tax Act, 1990. Therefore, the jurisdiction lies with the Inland Revenue Services, Federal Board of Revenue and thus our client is registered with Sales Tax Department of Inland Revenue Services of the Federal Board of Revenue under the Sales Tax Act, 1990 and is filing its monthly Sales Tax Return accordingly. In addition to that, these supplies of goods are also being subjected to deduction of Income Tax Withholding @ under the provisions of Clause (a) of Sub-Section (1) of Section 153 of Income Tax Ordinance, 2001.

06. The Assessing Officer (AO) passed OIO directing the appellant to deposit (SST) amounting to Rs.3,119,021/- along with default surcharge (to be calculated at the time of payment) on the value of services amounting to Rs.18,447,195/- for the tax periods July, 2016 to June, 2017. The AO also imposed the penalty of Rs.120,000/- (being total 12 tax-periods @ Rs.10,000/- per period from 07/2016 to 06/2017) under section 43(2) of the Act for violation of section 30 of the Act, penalty of Rs.155,951/- under section 43(3) of the Act for violation of section 8 & 17 of the Act, penalty of Rs.50,000/- under section 43 (6d) of the Act for failing to pay or deposit of the actual amount of tax.

07. The said OIO was challenged by the appellant before the Commissioner (Appeals) by way of filing of appeal, who maintained the OIO, alongwith default surcharge and penalties imposed by the AO.

08. Syed Hafiz Ali, advocate for the appellant submitted that the appellant is a Private Limited Company and was engaged in the business of sale of ATM Machines to M/s Bank Al-Habib Limited (BAHL). It also provided installation and repairing services as and when needed. The appellant was never involved in the business of contractor of buildings, Tariff Heading 9814.2000 and it was wrongly registered as such. He further submitted that sale of ATM Machines to BAHL had nothing to do with Tariff Heading, relating to contractor of buildings and unless the actual Tariff Heading was properly determined with reference to the



actual nature of business the SST cannot be levied on the basis of presumption. He further submitted that on the sales of goods (ATM Machines), Sales Tax (ST) was paid to Federal Board Of Revenue (FBR) @ 17% under the provisions of Sales Tax Act, 1990 (ST Act) and on the component of services the tax was paid to SRB and the Punjab Revenue Authority (PRA). However the SRB was also demanding SST on the goods and the services provided in Punjab despite providing all relevant documents vide letter dated 10.06.2020 which was ignored by the AC as well as Commissioner (Appeals).

09. Mr. Ghulam Mustafa Kathio, learned AC-SRB submitted that the sale of goods is part of service without which ATM Machines are of no value and the SST is required to be paid on gross amount of invoices (Goods and services). He further submitted that one component of contractor of buildings, Tariff Heading 9814.2000 was "electrical and mechanical works (including air conditioning)" therefore the Tariff Heading 9814.2000 was rightly invoked. He further submitted that the supplies were made by the appellant to Punjab from its office situated in Sindh and SST was payable on the gross amount of invoices in Sindh and the same could not be paid to FBR and PRA.

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

11. The main contention of the appellant since inception (in its reply to SCN) was that *"Our client's primary business consists of supplies of specified machinery and equipment to banks. Our Client's secondary engagement is providing installation and/or repair services of the machinery supplied only when needed"*. The supplies of specified machinery whether it was service or sales had nothing to do with the contractor of building, Tariff heading 9814.2000. The registration of the appellant under a Tariff Heading which does not match with its actual activity or business was not correct and proper. The activity of the appellant cannot be taxed on the basis of a wrong Tariff Heading. The tax can only be levied on the basis of actual

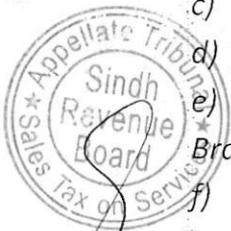


taxable services provided or rendered by the appellant. Moreover the tax could only be levied if it was covered under any Tariff Heading of Second Schedule to the Act and not on the basis of mere registration under a wrong Tariff Heading. The tax cannot be levied on presumption of the Taxing Officer. Therefore both the forums viz AO and Commissioner (Appeals) had totally ignored the basic contention of the appellant that its "primary business consists of supplies of specified machinery" and taxed the activity of the appellant under a misplaced and wrong Tariff Heading.

12. It is an admitted position that main business of the appellant was sale of ATM Machines to BAHL and on sales of goods the ST was paid to FBR which was evident from the Chart appearing in the OIO as well as in OIA. In both the Charts the activity in Column No. 5 was mentioned as "Value of Sales (goods)". The AO in para 12 of OIO held that the appellant had rendered taxable services which involved consumption of materials and goods for its provision to BAHL and Dadex Eternit Limited without further enquiry as to under which Tariff Heading the said activity of consumption of materials and goods fell. The AO held that the appellant had further rendered services/supplies for the following matters /issues of service:-

- a) *Electrical Works at IB Abul Hasan Isphani Road, Karachi and Glisten-e-Jauhar, Block 13, Karachi.*
- b) *Electrical Works at Gul, Plaza Branch, Karachi.*
- c) *Harnessing of cable required at Orangi Town Branch, Karachi.*
- d) *ATS panel issue at Dadu Branch (Electrical Issue).*
- e) *Electrical issue at Allama Iqbal Road Branch and Qasimabad Sindh Hotel Branch.*
- f) *Electrical Fluctuation issue at Deh Gad Branch, Badin.*

On the basis of evaluation of above services/supplies the AO held that the appellant had provided the taxable service of contractor of building. Tariff Heading 9824.0000 (construction of service) was available in the Second Schedule to the Act since its inception and to cover the other



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activities relating to construction not covered by construction services (9824.0000) a new Tariff Heading 9814.2000, contractor of building (including water supply, gas supply, and sanitary works), electrical and mechanical works (including air conditioning), multi-disciplinary works (including turn-key projects) and similar other works) was inserted in the Second Schedule to the Act vide Sindh Sales Tax on Services (Amendment) Act, 2012. The activities covered under Tariff Heading 9814.0000 are not independent but related to contractor of building and the activities specified are all relating to construction services which are not covered under Tariff Heading 9824.0000 and can only be taxed if provided or rendered in relation to construction of a building. The Tariff Heading 9814.0000 cannot be invoked to tax such activity/services which had nothing to do with construction of building. The items identified by the AO in the OIO had no relevance with contractor of building as none of them was related to contractor of building.

13. Both the forums below without first identifying the proper or correct Tariff Heading under which the activities of the appellant fell levied SST on the basis of voluntarily registration of the appellant. These forums ignored that tax could not be levied merely on the basis of registration but on the basis of actual activity of providing service to another person. The Commissioner (Appeals) in para 13 of the OIA held that *"Appellant's nature of business, unchallenged by the respondent department, is that he is involved in "supply" and "installation" of ATM Machines (to M/s Bank AL Habib Limited) and provides/renders such services at various of its branches"*. However while concluding this, Commissioner (Appeals) failed to consider and appreciate that at no stretch of imagination such activity of "supply and installation of ATM Machines" could be covered under Tariff Heading 9814.0000 (contractor of buildings).

14. On the basis of above discussions we are inclined to set aside both the OIO and OIA as the same were based on misinterpretation of Tariff Heading 9814.0000. Thus we are not commenting on the point "Under



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what provision of Sindh Sales Tax on Services Act, 2011 the SRB was demanding Sindh Sales Tax on sale of goods ?” framed by us on 07.10.2020 and other points involved in this appeal so that the case of either party may not be prejudiced by our observations in this Order.

15. In view of the above discussions both OIO and OIA are annulled and set aside. The AO is directed to first identify the correct and proper Tariff Heading and thereafter accordingly correct the principal activity of the appellant in the Registration Profile after providing proper opportunity of hearing to the appellant once such correction of Registration Profile has been made the AC/AO is at liberty to issue fresh SCN to the appellant and decide the case afresh after hearing the appellant without being influenced within OIA passed in this matter or the instant order.

16. The appeal is disposed of in the above terms. The copy of this Order may be provided to the learned authorized representatives of the parties.




(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER


(Justice[®] Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi: Dated: 21.12.2020

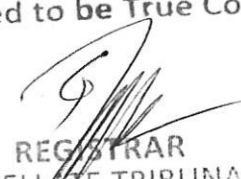
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Copy Supplied for compliance:

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

Copy for information to:-

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


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on

05/01/2021

Order Dispatched on

05/01/2021

Registrar

Registrar