

(Guard file)

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD AT KARACHI

DOUBLE BENCH-I

APPEAL NO. AT-37/2020

Assistant Commissioner SRB, (Unit-24)
09th Floor, Shaheen Complex Building
M.R. Kiyani Road Karachi.....Appellant

Versus

M/s Genix Pharma (Pvt.) Limited
(SNTN: 0710866-4)44-45-B-66 Korangi
Creek Road, KarachiRespondent

Date of filing of Appeal 06.11.2020
Date of hearing 14.10.2021
Date of Order 20.12.2021

Mr. Waqar Memon AC, (Unit-24)-SRB, along with Ms. Uzma Ghory, AC-DR for
appellant

Mr. Noman Qureshi, ITP and Mr. Shah Hilal, ITP for respondent

ORDER

Justice ® Nadeem Azhar Siddiqi: This appeal has been filed by the Assistant Commissioner (Unit-24), SRB (appellant) Karachi challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.79/2020 dated 11.09.2020 passed by the Commissioner (Appeals) in Appeal NO. 48/2020 filed by the respondent against the Order-in-Original (hereinafter referred to as the OIO) No. 74/2020 dated 25.03.2020 passed by Mr. Awais Raza Assistant Commissioner, (Unit-24), SRB Karachi.

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Nadeem Azhar Siddiqi

02. Briefly the facts of the case as stated in the OIO were that the respondent was covered by the terms of Withholding Agent, as provided under sub-rule (2) of rule 1 of the Sindh Sales Tax special Procedure (Withholding) Rules, 2014 (here-in-after stated as "Withholding Rules, 2014"). Accordingly, on receipt of taxable services, the respondent was liable to withhold and deposit the amount of Sindh Sales Tax (SST) at the applicable rates from the invoiced/billed amount of service providers under rule 3 of the Withholding Rules, 2014.

03. It was alleged in the OIA that from perusal of the copy of audited financial statement of the respondent it was revealed that it had received various taxable services during the tax periods July, 2014 to June, 2016. However the audited financial statements did not show the quantum of services received in Sindh or the due SST required to be withheld and deposited under rule 3 of the withholding Rules, 2014, despite the fact that all these services received were taxable during the relevant tax-periods.

04. The due SST was worked out be Rs.222,171,338/-. However, allegedly the respondent had failed to withhold and deposit due amount of SST with SRB in relation to the services received and disclosed in the financial statement (heads of expenditure) of the fiscal years ended 2015 and 2016. The details of the short-paid/un-paid Sindh Sales Tax amount, as computed from the expenses booked in the financial statement, are tabulated as under:-



M/s Genix Pharma private Limited							
Expense Head	Category	Taxable Service under Tariff Headings	Year ended June, 2015	Sales Tax Involved	Year ended June, 2016	Sales Tax involved	Total SST Payable
Repair & Maintenance	Maintenance & Clearance	9822.2000	17,691,808	1,769,181	69,354,285	69,354,429	8,704,609
Traveling	Tour & Travel	9805.5100	114,408,078	17,161,212	215,387,944	30,154,312	8,704,609
Research & Development	Market Research	9818.30000	203,575,639	30,536,346	300,030,917	42,004,328	72,540,674
Marketing Expenses	Advertisement	98.02	275,796,094	41,369,414	373,150,832	52,241,116	93,610,531
GRAND TOTAL			611,471,619	90,836,153	957,923,978	131,335,185	222,171,338

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05. It was also alleged in the OIO that various letters were issued to the respondent to clarify its position, but the same remained uncomplained. Thereafter the respondent was served with Show-Cause Notice (SCN) dated 20.12.2017, to explain as to why SST of Rs.222,171,338/- should not be recovered from it under section 47 of the Act, 2011 read with rule 1 and 3 of the Withholding Rules, 2014 along with the amount of penalties and default surcharge. The respondent filed written reply on 03.03.2020 and 19.03.2020.

06. The Assessing Officer (AO) held that the respondent being a withholding agent have failed to declare and deposit the withheld amount of Rs.201,774,207/- in violation of the provisions of section 17 of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to the Act) and rule 1, 3, 4 and 5 of the Withholding Rules, 2014. The AO determined the SST at Rs.201,774,207/- and ordered for its recovery under section 47 of the Act along with the default surcharge under section 44 of the Act. The AO also levied penalty of Rs.10,088,710/- (5% of Rs.201,774,207) and Rs.201,774,207 (50,000 rupees or an amount equal to the amount of tax involved, whichever is higher) under Sr. No.3 and 11A, of the Table under section 43 of Act.

07. The respondent had challenged the said OIO by way of filing appeal before the Commissioner (Appeals) under section 57 of the Act. The Commissioner (Appeals) after hearing the appeal had held as under:-

"38. It is evident from the foregoing discussion that the instant Appellant, being a 'company' incorporated in Pakistan [as defined under section 2(28) of the Act *ibid*] and being an FBR- registered person, is in fact 'a person required to withhold tax' as per subsection (IB) of section 47 read with Rule-1(2)(e) and also (partly) under clause (f) [for availing Advertisement services 98.02] of the WHT Rules, 2014. He is therefore, liable to withhold/deduct and pay into Sindh Government treasury, the tax due under the Rules *ibid*, in the mode, manner and time given thereunder. However, the fact remains that the relevant enabling subsection (IB) of section 47 *ibid* was made effective by the Sindh legislature from 01.07.2016 onwards, vide the Sindh Finance, Act, 2016. Since before such date, section 47 did

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not have any provision to enable the officer of SRB to proceed for assessment of tax in respect of a 'person required to withhold tax' under WHT Rules 2014, the impugned SCN, having been issued in ignorance of this legal position, is found to be unsustainable and untenable under law. Even in terms of subsections (1) & (IA) of section 47 *ibid*, that the AC has invoked, the SCN is unsustainable, for the reasons of apparent dichotomy, as already elaborated *supra*.

39. In view of the forgoing deliberations and points of fact and law, I am constrained to hold that although on facts, the respondent department has a good *prima facie* case against the appellant; however their case is not sustainable because of a deficient and untenable show-cause notice issued by the respondent AC, dated 20.12.2017. Since a show-cause-notice is the foundation on which the superstructure of an order is constructed, an untenable show-cause notice cannot give rise to a valid and lawful order. Accordingly, this Appeal is allowed and the impugned Order-in-Original is set aside in toto. The Appeal stands disposed of accordingly".

08. The department has challenged the said OIA by filing the instant appeal before this Tribunal.

09. The AC for the appellant submitted as under:-

The Commissioner (Appeals) has set aside the OIO on the erroneous assumption that before insertion of sub-section (1B) of Section 47 of the Act which was added on 01.07.2016 there was no provision in the Act which enable the Officer of SRB to assess the SST in respect of a person required to withhold tax. The Commissioner (Appeals) while doing so has over looked sub section (1) of Section 47 of the Act which provides the liability of a person and not the taxpayer or withholding agent.

ii. The non-mentioning of specific provision of law in the SCN was a mere technicality having no bearing on the merits of the case. The reliance was placed upon the judgment of the Supreme Court in the case of Collector of Sales Tax and CE, Lahore v. Zamindara Paper and Board Mills and others, 2007 PTD 1804 and the earlier decision of the Tribunal in Appeal No.AT/163/2015, Contact Plus (Pvt.) Limited V/s Commissioner (Appeals), SRB, wherein Appellate Tribunal was pleased to hold that if none

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of the sections (i.e. section 23 and 47 of the Act, 2011) were mentioned in the SCN or OIO, this would not create any illegally, if the facts, reasons and purposes were clearly stated in the SCN or OIO.

iii. That reference was given to earlier decision of this Tribunal in the case of Fatima Fertilizer, Appeal No. AT-52/2018 decided on 25.11.2019 and it was submitted that the assessment could be made under section 47 (1) of the Act.

iv. The Commissioner (Appeals) without considering the merit of the case and the amount involved had allowed the appeal of respondent merely, on technical grounds.

v. The department has challenged the Judgment of the High Court of Sindh in the case of Fatima Fertilizer before the Supreme Court of Pakistan thus the same could not be relied upon.

12. The representative of the respondent Mr. Noman Qureshi, ITP submitted as under:-

i. The Commissioner (Appeals) had rightly allowed the appeal of the respondent on legal grounds.

ii. The SCN was defective as no specific provision of law was mentioned therein, and the OIO was issued merely on the assumption and presumption of the Assessing Officer.

iii. The SST was levied on the respondent being a withholding agent at the applicable rate instead of 20% of the SST as provided in the Withholding Rules, 2014.

iv. In view of the judgment in the case of Fatima Fertilizer v. SRB reported as 2021 PTD 484 (DB SHC), the respondent was not liable to withhold the SST. Moreover section 47 (1B) of the Act was inserted on 1st July, 2016 and before that there was no provision to fix the liability of a withholding agent and recover SST for the tax periods from July, 2014 to June, 2016 (24 tax periods).

13. The learned AC during the pendency of appeal was directed to file statement of tax withheld / deducted by the respondent from service providers and non depositing such actual amount of SST with the SRB. The

respondent was also directed to file proper statement with details and copies of CPRs to show whether it had withheld and deposited SST with SRB wherever applicable.

14. The learned AC submitted Report dated 29.09.2021 stating therein that non-citing of sub-section, clause or sub-clause of any section conveyed in the SCN, OIO or both does not create material illegality to warrant extinction of the unpaid tax recovery. The respondent also submitted Report dated 28.07.2021 alongwith the details which showed that during the tax periods an amount of Rs.2,271,775/= was withheld and deposited.

15. We have heard the learned representative of the parties, perused the reports and written submission filed by them and the record made available before us.

16. The dispute is whether the respondent being a withholding agent was required to withhold and deposit SST on the taxable services received by it. The contention of the department is that the assessment order could be passed under section 47 of the Act without invoking the specific provision of law. The contention of the respondent is that before insertion of section 47 (1B) in the Act which was inserted on 01.07.2016 there was no provision in law to fix the liability of the respondent.

17. There was no dispute that the respondent being the recipient of taxable services within Sindh was a withholding agent as provided under clause (e) of sub-section (2) of section 1 of the Withholding Rules, 2014. Sub-rule (3) of rule 3 of the Withholding Rules, 2014 provided that a withholding agent other than a person or a recipient of taxable services covered by clause (f) of sub-rule (2) of rule 1 of the withholding rules shall deduct an amount equal to one-fifth of the total amount of SST shown in the sales tax invoices issued by the registered person and shall make payment of the balance amount to service provider. The proviso to the said rule provided that where the invoices issued by the registered person does not indicate the amount of sales tax the withholding agent shall deduct and withhold the amount of sales tax, at the rate applicable to the



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services provided or rendered to him, from the amount invoiced or billed or charged by such registered person.

18. It is evident from the above provisions that in case the SST was shown in the invoice the liability of withholding agent was to withhold one-fifth of the SST and to pass on the balance to service provider for deposit with SRB. However in case the SST was not shown in the invoices the withholding agent shall deduct and withhold the amount of sales tax, at the rate applicable to the services provided or rendered to him, from the amount invoiced or billed or charged by such registered person.

19. The question is under which provision of the Act the liability of withholding agent could be fixed and recovered. In our earlier decision in the case of Fatima Fertilizer, supra we had held as under:-

“...23. The object of section 47 of the Act is to recover tax not levied or short levied. Sub-section (1) of section 47 of the Act provides that where by reason of some inadvertence, error or miscalculation any tax or charge has not been levied or has been short levied, the person liable to pay any amount of tax or charge shall be served with a notice, within five years of the relevant date, requiring him to show cause for payment of the amount specified in the notice. In this provision the word “person” has been used and not withholding agent. The word “person” has been defined under clause (a) of sub-section (63) of section 2 of the Act as a “company, an agency or an association of persons incorporated, formed, organized or established in Pakistan or elsewhere”. The appellant is a company established in Pakistan and fully covered by the definition of person. Sub-section (2) of section 47 of the Act provides that “the officer of the SRB empowered in this behalf shall, after considering the objections of the person served with a notice to show cause under sub-section (1), determine the amount of tax or charge payable by him and such person shall pay the amount so determined”. The appellant being service recipient of advertising services is a withholding agent under clause (f) of sub-rule (2) of Rule 1 of Withholding Rules, 2011 and being company fall within the

definition of a person and has short deposited the tax with SRB thus SCN was rightly issued and tax liability was rightly determined under sub-section (2) of section 47 of the Act”.

20. The taxpayer M/s Fatima Fertilizer had challenged our decision before the Honorable High Court of Sindh. The Honorable High Court of Sindh in Fatima Fertilizers versus SRB, 2021 PTD 484 held as under:-

“...6. Section 9 of the Sindh Sales Tax on Services Act, (“Act”) contains the statutory definition liable to tax. It is manifest from the provision that the liability is generally imposed upon the registered person providing the service or the person receiving the service. Section 13 (3) was inserted in the Act vide the Finance Act, 2019 to impose liability upon a withholding agent. The applicant’s case quite simply is that prior to the coming into effect of the finance Act 2019, a withholding agent was not a person liable to tax within meaning of the Act.

21. In the above judgment the Honorable High Court of Sindh had held that section 13 (3) was inserted in the Act vide the Sindh Finance Act, 2019 to impose liability upon a withholding agent and prior to the coming into effect of the finance Act 2019, a withholding agent was not a person liable to tax within meaning of the Act. The Honorable High Court further held as under:-

“The initial imposition of liability upon the applicant was per section 47 (1A) of the Act, however, the learned Tribunal has already disregarded the application of the said provision and instead maintained liability per section 47 (1) of the Act. The period for issuance of the show cause notice read five years at the relevant time; however, the verbiage of section 47 of the Act clearly states that the obligation is placed upon a person liable to pay any tax. There is no cavil to the proposition that the liability upon a withholding agent to pay tax was not imposed until the Finance Act, 2019; hence, any apportionment thereof prior thereto appears to be devoid of a statutory sanction”.

22. It is evident from the above judgment in the case of Fatima Fertilizers that the liability to deposit/pay the withheld amount was connected with the insertion of sub-section (3) of section 13 of the Act which was inserted vide Sindh Finance

Act, 2019 and it was held that before that date the withholding agent was not liable to account for the SST.

23. The above judgment in the case of Fatima Fertilizers is binding on this Tribunal in view of Article 201 of the Constitution of Pakistan. However, it is pertinent to point out to section 16 of the Act which provides for collection of excess sales tax and reads as under:-

16. Collection of excess sales tax: (1) Any person who has collected or collects any tax or charge, whether under misapprehension of any provision of this Act or otherwise, which was not payable as tax or charge or which is in excess of the tax or charge actually payable and the incidence of which has been passed on to the person to whom the service is provided, shall pay the amount of tax or charge so collected to the Government.

(2) Any amount payable to the Government under sub-section (1) shall be deemed to be an arrear of tax or charge payable under this Act and shall be recoverable accordingly.

(3) The burden of proof that the incidence of tax or charge referred to in subsection (1) has been or has not been passed to the person to whom the service is provided shall be on the person collecting the tax or charge.

24. The above section is an independent section and was inserted to safe guard the revenue if collected by a person whether under misapprehension of any provision of this Act or otherwise, which was not payable as tax or charge or which is in excess of the tax or charge actually payable and the incidence of which has been passed on to the person to whom the service is provided, shall pay the amount of tax or charge so collected to the Government.

25. The respondent being a recipient of taxable services is also a withholding agent was bound to withhold one-fifth of the SST amount shown in the invoices and to pass on the balance to service provider for deposit with SRB. However in case the SST was not shown in the invoices the withholding agent shall deduct and withhold the amount of sales tax, at the rate applicable to the services provided or rendered to him, from the amount invoiced or billed or charged by



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such registered person. The respondent in its capacity of withholding agent had withheld the amount and was liable to deposit the same with SRB.

26. In the instant case the incidence of tax was passed on to the respondent being recipient of service and since the SST is an indirect tax the burden is upon the respondent/service recipient to borne the same. In the reported case of Independent Media Corporation Ltd. Versus Government of Sindh, 2018 PTD 1869 (DB-SHC) it was held as under:-

"It is important to note that sales tax is an indirect tax, burden of which is to be borne by the end consumer. After such burden has been passed on to the end user and the amount is so collected, it becomes duty of the vendor to pass on the same to the government accordingly. The vendor has no legal authority to hold on to the amount of sales tax which he recovered from the purchaser as an agent of the government".

27. This aspect of the case was also considered by the Honorable High Court in the case of Fatima Fertilizers, supra and it was held as under:-

14.....The learned counsel for the department had adverted to section 16 of the Act, during the course of arguments, to suggest that the department was competent to seek recovery wrongly collected tax; however, admitted that no notice had ever been sent to the applicant in such regard. It is in this context that we deem it proper to eschew any deliberation in such regard lest it prejudice the legal position of either party in such regard".

28. In the instant case also the AO had not invoked section 16 of the Act in the SCN and for that reason and keeping in view the above observation of the Honorable High Court we are unable to provide the above relief to the department.

29. The Commissioner (Appeals) had held that *the case of the department is not sustainable because of a deficient and untenable SCN issued by the respondent AC, dated 20.12.2017. The Commissioner (Appeal) further held that since a SCN is the foundation on which the superstructure of an order is constructed, an untenable SCN cannot give rise to a valid and lawful order.* There is no cavil to the conclusion drawn





by the learned Commissioner (Appeals). The AC in the SCN neither invoked the relevant sub-section of 47 of the Act nor invoked section 16 of the Act. Superior courts have also deprecated the practice of adjudication on the ground/allegation not mentioned in the SCN. The allegation/ground on the basis of which the OIO was passed was not mentioned in SCN. In the reported case of Collector Central Excise and Land Customs versus Rahim Din, 1987 SCMR 1840 it was held the adjudication based on a ground not mentioned in the SCN, was palpably illegal and void on face of it.

30. We had carefully examined the contents of the SCN. Despite the fact that relevant provision of section 47 of the Act were not invoked and section 16 of the Act was totally ignored. Thus it was evident from the SCN that the same was issued for not withholding and depositing the SST.

31. The Commissioner (Appeals) had incorrectly applied the case of Zamidara Paper Mills, supra. The ratio of the judgment in the Zamidara case was that the Court had to look into the matter from different angles namely as to whether substantial compliance had been made, or if any of the sub-rule (sub-section in this case) had been omitted then what prejudice it was likely to cause to the party to whom the SCN was given. The test was to ascertain the prejudice if any caused to the party by omitting the sub-section or sub-rule. In another latest judgment in the case of M/s AL Khair Gadoon Ltd. versus The Appellate Tribunal & others, 2020 PTD 18 a learned full bench of the Honorable Supreme Court of Pakistan had held as under:-

"11. Keeping in view the judicial consensus on the issue at hand, it would be safe to conclude that quoting of wrong provisions of law in a show-cause notice would not necessarily vitiate the entire process initiated thereunder. What is crucial to note is that, in deciding the legal validity of the show cause notice, it is important to first see whether the recipient/assessee of the said notice has been put to any prejudice in preparing and putting up its defence to the allegations made therein. And whether the issuer of the notice had the authority to issue the same, provided the notice had all the necessary facts leading to the alleged acts or omission of the recipient

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constituting the stated contravention of provisions of law, and thus, to be meaningfully responded by the assessee”.

32. The Commissioner (Appeals) instead of looking to the substance of the SCN had considered the form. No doubt non-mentioning the relevant sub-section is a material illegality but in the instant case the purpose of the SCN was fully evident from its contents and it could not be concluded that the assessee who was recipient of the said SCN had been put to any prejudice in preparing and putting up its defence to the allegations made therein.

33. The AO also committed a mistake in not mentioning the relevant sub-heading and sub-sub-heading of Tariff Heading 98.02. The mentioning of the sub-heading or sub-sub-heading was necessary as Tariff Heading 98.02 contained eight sub-headings out of which Tariff Heading 9802.4000 (advertisement in newspapers and periodicals) was exempted from payment of SST. This aspect was considered by the High Court of Sindh in the case of Citibank NA, 2014 PTD 284, and it was held as under:-

“...The attempt by learned counsel to conclude from the enumeration of the persons that all the services provided by them were included in Heading No.98.13 cannot be accepted. This would render otiose the listing of specific services in the various sub-headings”..... It follows that “the submission by learned counsel for the Department, which would lead to the contrary result, is not tenable and cannot, with respect, be accepted”.

34. It is thus evident that the mentioning of the sub-heading or sub-sub-heading are mandatory without which the SCN notice could not be considered proper.

35. The other mistake committed by the AO was that as per the contention of respondent the services were received across Pakistan and the AO levied SST on such entire amount without working out the services rendered in Sindh, which was not proper. The respondent had provided province wise details of receipt of services. The AO had mentioned in Para 9 of the OIO that the respondent had provided final reconciliation bifurcating all the expenditure heads and the details

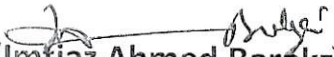
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so provided were also incorporated in para 9 of the OIO. The AO in para 17 of the OIO summarized the pleas taken by the respondent in reply to the SCN. The AO failed to rebut the pleas of the respondent particularly that the expenses, as booked in the financial statement were not associated with Sindh only, and were obtained from the different parts of Pakistan, and had failed to give any reason for disbelieving the contention of the respondent.

36. In view of the above discussions we allow this appeal and set aside both the OIO and OIA. However, the department is at liberty to issue fresh SCN to the respondent under section 16 of the Act if sufficient material is available with the department regarding the non-deposit of withholding tax to the extent of Sindh.

37. The appeal is disposed of accordingly. The copy of this order may be provided to the learned representatives of the parties.


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER

Karachi:
Dated: 20.12.2021

Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
- 2) The Assistant Commissioner, (Unit-24), SRB, for compliance

Copy for information to:-

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


(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN
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REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order Issued on 21/12/2021

Order Dispatched on 21/12/2021

Registrar.

Registrar