

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

APPEAL NO. AT-44/2020

Assistant Commissioner SRB, (Unit-24)
Sindh Revenue Board,
02nd Floor, Shaheen Complex Building,
M.R. Kiyani Road, Karachi.....Appellant


Versus

M/s Lucky Commodities (Pvt.) Ltd.
(SNTN: 4132355-6) 6-A, A. Aziz Hashmi
Tabba Street, Mohammad Ali Housing
Society, Karachi..... Respondent

Date of filing of Appeal: 14.12.2020
Date of hearing: 08.03.2022
Date of Order: 18.05.2022

Mr. Asif Rahoojo, AC (Unit-24)SRB, for appellant.
Mr. Faiz Durrani and Mr. Ghulam Muhammad, Advocates for respondent.

ORDER

 Nadeem Azhar Siddiqi: This appeal has been filed by the Assistant Commissioner (Unit-24), Sindh Revenue (Board (SRB), Karachi challenging the Order-in-Appeal (hereinafter referred to as the OIA) No. 100/2020 dated 02.11.2020 passed by the Commissioner (Appeals), SRB in Appeal No. 18/2020 filed by the respondent against the Order-in-Original (hereinafter referred to as the OIO) No. 846/2020 dated 26.12.2019 passed by Mr. Ghulam Mustafa Kathio, Assistant Commissioner, (Unit-24) SRB, Karachi.

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02. The facts as stated in the OIO were that the respondent being a withholding agent under sub-rule (2) of rule 1 of Sindh Sales Tax Special Procedure (Withholding) Rules, 2014 (hereinafter referred to as the Withholding Rules) was liable to withhold and deposit the due amount of Sindh Sales Tax (SST) at the applicable rate on receipt of taxable services provided or rendered to it from the invoiced/billed amount of service provider under rule 3 of the Withholding Rules.

03. It was alleged that while scrutinizing the record available with SRB, it was revealed that the respondent had deposited SST amounting to Rs.4,003,388/- till the date of Show Cause Notice (SCN) on the receipt of taxable services provided or rendered to it. However, after the examination of the financial statements of the respondent for the financial years ended June, 2015 and 2016 respectively (24 tax periods), it was observed that the respondent made handsome payments against various heads of expenditures which included number of taxable services, as envisaged in the Second Schedule of the Sindh Sales Tax on Services Act, 2011 (hereinafter to be referred as the Act). It was stated in the OIO that since, the information was limited only to the declaration of expenditures in accounts therefore, the service categories and tax rates were taken on observation basis. The details of expenditures and estimated SST are as



under:-

M/s LUCKY COMMODITIES PRIVATE LIMITED (NTN, 413235-6)								
Expenditure Heads	Description of Taxable Service Category	Taxable Services under Tariff Headings	Year ended June, 2016	Applicable Tax rate (%)	Sindh Sales Tax Involved	Year ended June, 2015	Applicable Tax rate (%)	Sindh Sales Tax involved
(COST OF SALES)								
Handling	Public bonded warehouses	9828.0000	36,704,781	14	4,507,605	33,166,212	15	4,326,028
Stevedoring	Stevedores	9805.2000	31,263,520	14	3,839,380	20,857,934	15	2,720,600
Transportation	Transportation services	9836.0000	74,707,631	14	9,174,621	0	0	0
Sub-Total			142,675,932		17,521,606	54,024,146		7,046,628
(ADMINISTRATION AND DISTRIBUTION)								
Rent	Renting of immovable property service	9806.3000	65,000	6	3,679	0	0	0
Audit fees	Accountants and Auditors	9815.3000	216,000	6	12,226	200,000	5	9,524
Sub-Total			281,000		15,906	200,000		9,524

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(SELLING AND DISTRIBUTION)								
Transportation	Transportation services	9836.0000	59,021,105	14	7,248,206	0	0	0
Commission	Commission Agents	9819.1300	12,186,651	14	1,496,606	0	0	0
Advertisement	Advertisement	98.02	422,218	14	51,851	507,507	15	66,197
Sub-Total,-			71,629,974		8,796,663	507,507		66,197
GRAND TOTAL,-			214,586,906		26,334,175	54,731,653		7,122,348
TOTAL SINDH SALES FOR THE YEAR 2015 & 2016								33,456,523

04. It was further alleged that from perusal of the financial position of the respondent, it was found that the respondent, being a withholding agent in terms of clause (e) of sub-rule (2) of rule 1 of Rules, 2014, failed to deposit due SST amount with SRB.

05. The respondent was served with an advisory notice dated 19.01.2017 wherein, it was required to clarify its position and was also required to provide, relevant record i.e. the copies of all invoices/ bills of supplier, payment proofs etc. for the purpose of reconciliation. However, despite the lapse of considerable time period, the respondent failed to provide any plausible reply or documents for necessary verification of the aforementioned expenditures.

06. The respondent was served with a Show-Cause Notice (SCN) dated 07.03.2017 to explain as to why the SST amounting to Rs.33,456,523/- should not be recovered from it under the provisions of section 47 of the Act read with the relevant provisions of Withholding Rules, 2014. The respondent was also called upon to show-cause as to why default surcharge under section 44 of the Act alongwith penalties under Serial No. 3, 11 & 11A of section 43 of the Act should not be imposed.

07. It was stated in the OIO that the representative of the respondent appeared in response to the SCN and submitted record relevant for the purpose of reconciliation and contended that the major part of the expenditures included transportation services which were in abeyance vide SRB's Circular No.1/2015, Circular No.1/2016 and Circular No.2/2016. Thus the respondent, being withholding agent, was not liable to withhold/deduct the SST, on procuring of transportation services during the tax periods

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involved. It was also contended that the handling expenditure, being the second major expenditure of the accounts, comprised of the payments made for the shifting of coal imported within the area of port and informed that the respondent made payment to the service providers who had filed C.P. No.D-4303 of 2013 in Sindh High Court against such services. Therefore, the service providers neither charged SST nor the respondent deducted the amount of SST. However, the respondent being withholding agent, withheld or deducted the SST in terms of the provisions of the Withholding Rules, 2014 where the SST was applicable and charged by the service providers.

08. The Assessing Officer (AO) passed OIO determining the SST at Rs.603,498/- under section 47 of the Act alongwith default surcharge under section 44 of the Act. The AO also imposed penalty of Rs. 30,175/- under serial No. 3 of the Table under section 43 of the Act, penalty of Rs.30,175/- under serial No. 11 of the Table under section 43 of the Act and penalty of Rs. 603,498/- under serial No. 11A of the Table under section 43 of the Act

09. The respondent challenged the said OIO by way of filing of appeal under section 57 of the Act before Commissioner (Appeals), SRB who allowed the appeal and totally setaside the OIO on the ground that OIO should not be sustained because of the untenable SCN dated 07.03.2017, on which the OIO was based.

Resultantly the appeal was filed by the department before this Tribunal.

10. The learned AC-SRB for the appellant submitted as under:-

- i. The learned Commissioner (Appeals) had annulled the OIO on the ground that the sub-section 47 of the Act was not mentioned in the SCN which was a minor mistake on the part of the AO and should be ignored.
- ii. The Commissioner (Appeals) rejected the plea of the department on a technical Ground and he referred to the decision of the Tribunal in the case of M/s Fatima Fertilizer AT-52/2018 order dated 25.11.2019.

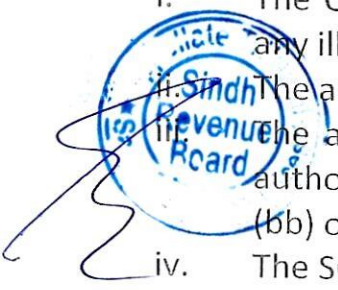
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- iii. The word person used in sub section (1) of Section 47 of the Act covered withholding agent and reference was given to the definition of person provided under subsection (63) of Section-2 of the Act.
- iv. The case of the department covered under sub-section (1A) of section 47 of the Act added vide Sindh Sales Tax on Services Ordinance, 2011 dated 01.11.2011 was converted into Act vide Sindh Sales Tax on Services (Amendment) Act, 2012 dated 26.01.2012 and not under sub-section (1B) of section 47 of the Act as claimed by the respondent.
- v. The allegations in the SCN were clear. However in absence of any ambiguity non-mentioning of sub-section was only a technicality and reference was given to the decision of the Tribunal dated 09.10.2015 in AT-163/2015, M/s Contact Plus (Pvt.) Ltd vs. SRB and the reported case of Collector of Sales Tax and CE, Lahore v. Zamindara Paper and Board Mills and others reported as 2007 PTD 1804.
- vi. The respondent had withheld the SST and was liable to deposit the same with SRB under section 16 of the Act.

11. The learned advocate for the respondent submitted as under:-

- i. The OIA was competently passed and was not suffering from any illegality or infirmity.
The appeal was filed without any cause or justification.
- ii. The appeal was filed by incompetent person without proper authority from the Sindh Revenue Board and referred to clause (bb) of sub-section (1) of section 61 of the Act. .
- iv. The SCN was issued on 07.03.2017 for taxing the periods 2014-15 & 2015-16 and sub-section (1B) of Section 47 was added on 18.07.2016 whereas the sub-section (3) of section 13 was added vide Sindh Finance Act, 2019 dated 05.07.2019 having no retrospective effect. Reference was given to Article-12 of the Constitution of Islamic Republic of Pakistan.
- v. There was no provision in the Act to fix the liability of withholding agent during the relevant tax periods and the respondent was not bound to act as withholding agent.



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- vi. The OIO was time barred having been passed beyond statutory period of 120+60 (180)days provided under sub-section (3) of section 3 of the Act.
- vii. The OIA was also time barred having been passed beyond statutory period of 120+60 (180)days provided under sub-section (5) of section 59 of the Act.
- viii. The sub-section (1) and 1A) of section 47 were not applicable in the instant case.
- ix. The Sindh High Court had already struck-down the SST levied on rental of immovable properties. The matter is now subjudice before the Honorable Supreme Court of Pakistan.
- x. Intra-city Transportation of goods was exempted during the tax periods involved vide SRB's Circulars No.1/2015, Circular No.1/2016 and Circular No.2/2016 respectively.

12. The learned AC in rebuttal submitted that:-

- i. The appeal was competently filed by the AC- SRB appointed under section 34 of the Act.
- ii. The case of the department is covered under sub-section (1A) of section 47 of the Act and not under sub-section (1B) of section 47 of the Act.

The OIO and OIA were passed with the time frame allowed by law.

The judgment of the Honorable High Court of Sindh was challenged in the Supreme Court of Pakistan and the said provision after curing defect pointed out by the Honorable High Court was reenacted with retrospective effect.

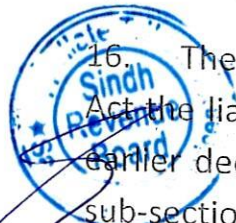
13. We have heard the learned representatives of the parties, perused the record made available before us and the written submissions filed by them.

14. 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 was that the assessment order could be passed under section 47 of the Act without invoking the relevant sub-sections of section 47 of the Act. Whereas the contention of the



respondent was that before insertion of section 47 (1B) in the Act which was inserted on 01.07.2016 and section 13 (3) of the Act which was inserted vide Sindh Finance Act, 2019 dated 05.07.2019 there was no provision in the Act to fix the liability of the respondent during the tax periods from July-2014 to June-2016 (24 tax periods).

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



16. The precise question in this appeal 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 while relying on sub-section (1) of section 47 of the Act 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-

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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".

17. 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 had 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.

18. The Honorable High Court of Sindh in the above judgment had held that section 13 (3) was inserted in the Act vide the Sindh Finance Act, 2019 to impose liability upon a withholding agent. However 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. Sub-section (3) of section 13 of the Act inserted vide Sindh Finance Act, 2019 dated 05.07.2019 read as under:-

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"(3) Where a person or class of persons is required to withhold or deduct full or part of the tax on the provision of any taxable service or class of taxable services, and either fails to withhold or deduct the tax or, having withheld or deducted the tax, fails to deposit the tax in the Government treasury, such person or class of persons shall be personally liable to pay the amount of tax and the default surcharge thereon in the prescribed manner".

19. The position of instant case is identical to that as mentioned at para 18 supra. There was no provision in the Act to fix the liability of withholding agent during the tax periods from July 2014 to June 2016. 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".

20. It is evident from the above judgment in the case of Fatima Fertilizer 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. The implication of sub-section (3) of section 13 was prospective and was not applicable to the tax periods from July-2014 to June-2016. Therefore the above judgment in case of Fatima Fertilizers is binding on this Tribunal in view of Article 201 of the Constitution of Pakistan and no contrary view could be taken.



21. The AC has argued that the respondent had withheld the SST and was liable to deposit the same under section 16 of the Act. It is pertinent to point out section 16 of the Act provides for collection of excess SST, which 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".

22. The burden to prove that the respondent had withheld the SST but has not deposited the same with SRB was on the department. In the SCN the allegation was that the respondent being withholding agent failed to deposit the SST with SRB. The allegation was not that the respondent had withheld the SST but did not deposit the same with SRB.

23. The provision of section 16 is an independent section and was inserted to safeguard 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 was in excess of the tax or charge actually payable. Moreover the incidence of tax which was passed on to the person to whom the service was provided, shall pay the amount of tax or charge so collected to the Government.

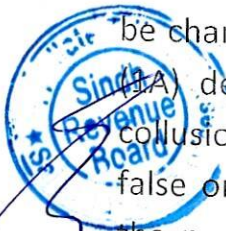
24. The respondent being a recipient of taxable services is also a withholding agent and was bound to withhold one-fifth of the SST amount shown in the invoices and to pass on the balance to service provider for depositing the same with SRB. However, in this case no material evidence is available to establish that the respondent had withheld the SST but not deposited the same with SRB. Moreover, neither this ground was taken nor

section 16 was invoked in the SCN and in absence of a ground in the SCN the same could not be taken at this stage. 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".

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

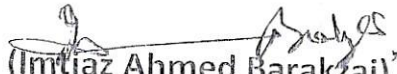
26. The Commissioner (Appeals) in the OIA had held that the impugned OIO could not be sustained because of issuance of untenable SCN on which the OIO was based. There is no cavil to the conclusion drawn by the learned Commissioner (Appeals). The AC in the SCN neither invoked the relevant sub-section of 47 of the Act nor invoked section 16 of the Act. The sub-sections of section 47 of the Act were inserted in the Act to cater different situations. Sub-section (1) dealt with the situation where the SST could not be charged due to some inadvertence, error or miscalculation. Sub-section (1A) dealt with the situation where SST could not be charged due to collusion, abatement, deliberate attempt, misstatement, fraud, forgery, false or fake documents. Sub-section (1B) dealt with the situation where the person required to withhold SST fails to withhold or fails to deposit withheld or deducted amount of the SST. Since all the sub-sections cater for different situations thus unless the relevant sub-section was mentioned in the SCN it was difficult for the tax payer to take appropriate defence. Superior courts have also depreciated the practice of adjudication on the ground or allegation not mentioned in the SCN. In the reported case of Collector Central Excise and Land Customs versus Rahim Din, 1987 SCMR

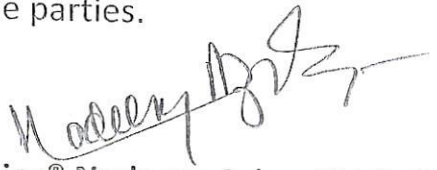


1840 it was held "that the adjudication based on a ground not mentioned in the SCN, was palpably illegal and void on face of it".

27. In view of the above discussions the appeal is dismissed. However if any evidence is available with the department that the respondent despite withholding the SST had not deposited the same with SRB, the department is at liberty to issue fresh SCN to the respondent under section 16 of the Act.

28. 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


(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi:

Dated:18.05.2022

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REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Copy Supplied for compliance:

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

Copy for information to:-

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

Order issued on 20/05/2022

Registrar

Order Dispatched on 20/05/2022

Registrar