

General file.

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD AT  
KARACHI

DOUBLE BENCH-I

APPEAL NO. AT-47/2020

Assistant Commissioner SRB, (Unit-04),  
Karachi.....Appellant

Versus

M/s MYN Private Limited,  
Karachi..... Respondent

Date of filing of Appeal: 21.12.2020  
Date of Hearing: 28.01.2021  
Date of Order: 15.02.2021

Mr. Irfan Sohu AC-SRB and Ms. Uzma Ghory AC-DR for appellant.

ORDER

Justice <sup>®</sup> Nadeem Azhar Siddiqi: This appeal has been filed by the Assistant Commissioner (Unit-04), SRB Karachi challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.99/2020 dated 02.11.2020 passed by the Commissioner (Appeals) in Appeal NO. 374/2019 filed by the respondent against the Order-in-Original (hereinafter referred to as the OIO) No. 674/2019 dated 23.09.2019 passed by Mr. Irfan Ahmed Sohu, Assistant Commissioner, (Unit-04) SRB Karachi.

02. The brief facts of the case as narrated in the OIO was that the respondent was registered with SRB under service category of business support service, Tariff Heading 9805.9200 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) at the applicable rate.



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*J. Nadeem Azhar Siddiqi*  
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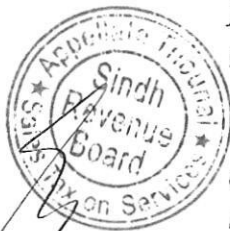
03. It was alleged in the OIO that from the record available with SRB it had transpired that the respondent without being registered with SRB, had provided taxable service to various clients during the tax periods from January-2016 to July-2018 (31 tax periods), which was violation of the provisions of the Act. The value of services provided were Rs. 564,707,205/= involving SST of Rs. 7,111,937/=.

04. The respondent was served with Show-Cause Notice (SCN) dated 13.12.2018 to explain as to why SST amounting to Rs.7,111,937/- should not be assessed under section 23 of the Act and why default surcharge under section 44 of the Act should not be imposed. The respondent was also called upon to explain as to why penalties under serial No. 3 and 15 of the Table under section 43 of the Act should not be imposed for short payment of SST.

05. The respondent in response to SCN filed reply which is reproduced as thereunder:

*"We since the date of registration are faithfully charging and collecting Sales Tax from the recipients of our service. However, before registration, we were not liable to comply with the provisions SSTA .Hence your good self cannot hold us responsible for not collection any sales tax prior to our getting, registered further, your attention is invited to the section 9 and 18 of the SST which places joint responsibility upon the services provider and recipient of service for payment of sales tax. In view of our peculiar circumstances, it is requested that the short paid amount of tax may kindly be recovered from the recipients of our service who are all well-known existing and going concerns. The SRB authorities in similar situations have recovered tax in so many cases including, Lakhra coal development.*

*It is further explained that we provide legal services to our corporate clients so we are a "corporate law firm" in whose case the rate of tax is 8% and not 13% which your good self has proposed to charge. Under the facts and circumstances of the case discussed supra, your goof self is earnestly requested to kindly drop the impugned proceedings and recover the short payment of tax , if any ,from our the recipients of our service ".*



06. It was stated in para 15 of the OIO that on due date of hearing i.e. 8-01-2019 Mr. Muhammad Naeem Director of respondent and Mr.

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Masood Muhammad appeared. The hearing was conducted in the presence of Commissioner-III SRB, wherein the appellant had submitted that they were providing inspection services to check their client's credibility and status against the credit/loan to be given by Banks and also stated that they were providing legal consultancy service to corporate clients which was taxable at the reduced rate of 8%. In response to that, Commissioner-III SRB directed the respondent to immediately deposit the short paid amount of SST which was reflected in SCN and provide the copies of sale invoices issued to the service recipients through which the respondent could justify its tax liabilities, but the respondent neither paid any SST nor provided the copies of invoices.

07. It was further stated in para 16 of the OIO that the on 13.02.2019 Mr. Masood Muhammad, Accountant of the respondent appeared for hearing and accepted that the respondent had provided taxable services of business support services but financially the respondent was not in position to deposit the amount mentioned in the SCN and requested to extend time to arrange the short paid amount.

08. The Assessing Officer (AO) finally passed OIO directing the respondent to pay SST of Rs.7,111,937/- alongwith default surcharge under section 44 of the Act. The AO also imposed penalty of RS.355,597/- under Serial No. 3 of Table under section 43 of the Act and further penalty of RS. 100,000/- under Serial No. 15 of Table section 43 of the Act for failure to provide the documents and information asked for.

09. The respondent challenged the OIO before Commissioner (Appeals) by way of filing of appeal. The Commissioner (Appeals) set aside the OIO on the consideration that the demand and recovery of SST from the respondent prior to the date of its registration was not legal.

10. Mr. Irfan Ahmad Sohu the learned AC-SRB submitted that the OIA passed by Commissioner (Appeals) was erroneous and against the law and facts of the case. He further submitted that the Commissioner



(Appeals) in ignorance of the definition of registered person provided in sub-section (71) of section 2 of the Act exonerated the respondent from payment of SST. He further contended that sub-section (71) of section 2 of the Act provided that the registered person means a person who is registered or is liable to be registered and a person who is providing a taxable services listed in the Second Schedule to the Act is liable to deposit SST. He further contended that the respondent had provided taxable services without registration in violation of section 24 of the Act and it was liable to charge and deposit the SST with SRB.

11. The learned AC further contended that the Commissioner (Appeals) ignored the comprehensive Report dated 06.03.2020 prepared by the AC and signed by the representative of respondent as a token of acceptance of payment of SST.

12. We have heard the learned AC-SRB and perused the record made available before us.

13. It is an admitted position that the respondent was registered with SRB on 01.10.2018. The tax periods involved in this appeal were from January-2016 to July-2018 when the respondent was not registered with SRB. The AO had taxed the services for the tax periods before and after registration without determining the person who was liable to deposit tax for the tax periods before registration of the respondent. The provisions of the Act, The Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules) and The Sindh Sales Tax Special Procedure (Withholding) Rules, 2014 (hereinafter referred to as Withholding Rules) that were existing during the relevant tax periods were applicable.

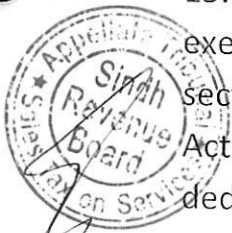
14. This Tribunal would now deal with the point as to "who was liable to pay or deposit tax before registration of the respondent with SRB i.e. service provider or service recipient". Section 3 of the Act deals with taxable service. Sub-section (1) of section 3 of the Act provides that a taxable service is a service listed in the Second Schedule of the Act, which is provided by a registered person from his registered office or place of business in Sindh. This section applies to the registered person



and is not applicable to the appellant before its registration. Sub-section (2) of section 3 of the Act deals with the providing of service by non-registered person to (a) a resident person (b) by a non- resident person in the course of economic activity, including in the commencement or termination of the activity. This provision deals with the services provided by non-resident person to resident person. The service recipients in terms of sub-clause (a) of section (2) of section 3 of the Act are resident as provided under clause (a) of sub-section (73) of section 2 of the Act. Section 9 of the Act deals with the person liable to pay tax. Sub-section (1) of section 9 of the Act provides that the liability to pay the tax is upon the registered person providing the services. This sub-section was not applicable to the appellant prior to its registration with SRB. It is provided in sub-section (2) of section 9 of the Act that where service is taxable by virtue of sub-section (2) of section 3 of the Act the liability to pay the tax shall be on the person receiving the services and sub-section (3) of section 9 of the Act provides for the power of the Government to notify the services or class of services in respect of which the liability to pay tax shall be on the person providing the taxable services, or the person receiving the taxable services or any other person. This provision also does not provide for payment of tax by unregistered person.

15. The SRB with the approval of Government of Sindh (GS) in exercise of powers vested in it under section 72 of the Act read with sub-section (4) of section 3, sub-section (3) of section 9 and section 13 of the Act framed and issued Withholding Rules, 2014 for the purpose of deduction and deposit of SST.

16. The person who can be withholding agent have been specified in sub-rule (2) of rule 1 of the Withholding Rules. Rule 3 of Withholding Rules deals with the responsibility of the withholding agent. Sub-rule (3) thereof provides that a withholding agent having Free Tax Number (FTN), or National Tax Number (NTN) and falling under clause (a), (b), (c), (d), or (e) of sub-rule (2) of rule 1 of the Withholding Rules, shall on receipt of taxable services from unregistered persons, deduct sales tax at the applicable rate of the value of taxable services provided and, unless





otherwise specified in the contract between the service recipient and the service provider. The amount of sales tax for the purpose of this rule shall be worked out on the basis of gross value of taxable services.

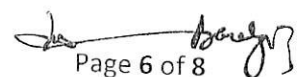
17. It is evident by comparison of sub-rule (2) and (3) of rule 3 of the Withholding Rules that sub-rule (2) of rule 3 of the Withholding Rules provides for the deduction of one-fifth of the total sales tax shown in the tax invoice issued by a registered person. Whereas sub-rule (4) of rule 3 of the Withholding Rules provides that a withholding agent on receipt of taxable services from unregistered persons has to deduct sales tax at the applicable rate of the value of the taxable services provided or rendered to him from the payment due to the service provider. This sub-rule clearly fixes the responsibility of deduction of sales tax upon the service recipient who deals with un-registered person and apparently the unregistered person could neither charge the tax in its invoice nor the withholding agent after withholding the amount of tax can pass on the same to unregistered service provider.

18. In the instant case SCN was issued invoking section 23 of the Act. An assessment order cannot be passed against a non-registered person. Section 23 of the Act as existed for the relevant tax periods is very clear in this regard and provides that "if the officer of SRB is of the opinion that a registered person has not paid the tax due on taxable services provided by him or has made short payment, the officer shall make an assessment of sales tax actually payable by that person".

19. The liabilities of payment of tax is fixed under sub-rule (4) of Rule 3 of the Withholding Rules, <sup>which has</sup> fixed the liability of payment of tax on the service recipient who has received service from unregistered person. It is therefore, apparent that no assessment order can be passed under section 23 of the Act against an unregistered person. The assessment order against the appellant for the tax periods before its registration was therefore, illegal.

20. The learned Commissioner (Appeals) in the OIA concluded as under. The relevant paras are reproduced as under:-

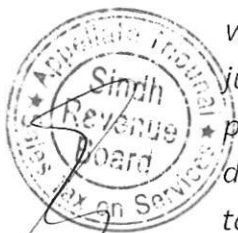


  
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15. However, having said that as above, I am in full agreement with the point of law raised by the instant Appellant vide his letter written to the ACSR (received by him on 25.12.2018. Ref: para-6 of this Order, above). I am unable to understand as under what provision of law the respondent AC could assess and demand from the Appellant SSTS, for the tax periods January-2016 to July-2018 which tax-periods fall before his date of registration that is, 01.10.2018. In this regard the respondent AC has expressly relied upon the definition of 'registered person' under section 2(71) *ibid*, whereby a registered person is said to be 'a person registered or liable to be registered'. However, AC's reliance on section 2(71) *ibid*, is faulty and misconstrued in this case.

16. Superior judicial fora, including the Honorable SRB Appellate Tribunal, in a number of recent judgments, have strongly deprecated mindless application of section 2(71) *ibid* [*pari materia* section 2(25) of the Sales Tax Act, 1990]. Learned Tribunal has variously ruled that tax cannot be demanded from an unregistered person because sales tax is paid by a person (as a service-provider) only after collecting the same from his 'service-recipient' via lawfully issued sales tax invoices (in terms of Rule-29 of the SSTS Rules-2011). Since an unregistered person is not allowed by law to issue a sales tax invoice, how could he be asked to collect and pay tax for the tax-periods during which he was an unregistered person? AC-SRB thus, has had no justification in demanding tax from the Appellant for the tax-periods falling prior to his date of registration in SRB. Tax-demand in the instant matter is therefore unsustainable in law, to the same extent and is remitted accordingly.

17. Further, Rule (1) (2) (g), read with Rule 2(10) and Rule 3(1) of the Sindh Sales Tax Special Procedure (Withholding) Rules, 2014, is quite clear in his regard. These rules suggest that in case taxable services are received by a withholding agent from an unregistered person, it is the responsibility of that withholding agent to withhold / deduct and pay due SSTS on the value of those services, as paid by him to that unregistered service provider (and to remit the balance to him). It is surprising to see




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that despite such crystal clear position of law, the learned AC SRB has framed a tax-demand against the instant Appellant, while he has not brought anything on record to suggest that he has ever taken to task (and raised tax-demands against Appellant's services-recipients, during the under reference tax-periods, as listed At paragraph-3 of this Order above) who were actually liable to withhold/deduct and pay due tax into the Sindh Treasury, under the said Withholding Rules 2014.

21. We have carefully considered the above findings recorded by learned Commissioner (Appeals) and found the same in confirmatory with the provisions of the Act and Withholding Rules. The Commissioner (Appeals) has not committed any error in holding that AC-SRB had no justification in demanding tax from the Appellant for the tax-periods falling prior to his date of registration with SRB.

22. In view of the above discussions the appeal is dismissed in limine. 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: 15.02.2021

Copy for compliance:

- 1) The Assistant Commissioner (Unit- ), SRB, Karachi
- 2) The Respondent through authorized Representative.

Copy for information to:-

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

Certified to be True Copy

  
REGISTRAR  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD

Order issued on

05/03/2021

Order Dispatched on

05/03/2021