

Quarrel file

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD AT
KARACHI

DOUBLE BENCH-I

✓ APPEAL NO. AT-01/2021

M/s Tracking World (Private) Limited,
(SNTN: 4132355-6)
Plot # 51, Ground B, Faisal Town Lahore.....Appellant

Versus

Assistant Commissioner, (Unit-01)
Sindh Revenue Board,
09th Floor, Shaheen Complex,
Complex, M.R. Kiyani Road, KarachiRespondent

APPEAL NO. AT-48/2020

Assistant Commissioner, (Unit-01)
Sindh Revenue Board,
09th Floor, Shaheen Complex,
Complex, M.R. Kiyani Road, KarachiAppellant

Versus

M/s Tracking World (Private) Limited
(SNTN: 4132355-6)
Plot # 51, Ground B, Faisal Town, Lahore.....Respondent

Appeal No. 01/2021

Date of filing of Appeal 01.01.2021
Date of hearing 05.08.2021
Date of Order 11.08.2021

Appeal No. 48/2020

Kas

Agarwal

Date of filing of Appeal 23.12.2020
Date of hearing 05.08.2021
Date of Order 11.08.2021

Mr. Ajeet Sundar, advocate for the appellant.

Mr. Muhammad Faraz, AC-SRB and Mr. Nasir Bachani, AC-DR for the respondent.

ORDER

Justice[®] Nadeem Azhar Siddiqi, Chairman: The appeal No. 01/2021 was filed by the appellant/tax payer challenging the Order-in-Appeal (hereinafter referred to as OIA) No. 95/2020 dated 28.10.2019 passed by the Commissioner (Appeals) in Appeal No. 303/2019 filed by the appellant against the Order-in-Original (hereinafter referred to as OIO) No. 332/2019 dated 07.05.2019 passed by the Assistant Commissioner (Mr. Vickey Dhingra), SRB, Karachi.

02. The other appeal No. 48/2020 was filed by the appellant/department challenging the same OIA passed by the Commissioner (Appeals) in the Appeal filed by the appellant against the same OIO passed by the Assistant Commissioner (Mr. Vickey Dhingra), SRB, and Karachi.

03. The facts and the law points involved in both the above appeals are similar therefore both these appeals are decided by passing a single order.

04. The first appeal was filed by the taxpayer challenging the portion of the OIA by which the Sindh Sales Tax (SST) was levied by the Assessing Officer (AO) on the cost of tracking devices for the tax periods from 07.01.2017 to 30.06.2017 along with default surcharge and statutory penalties which were upheld by Commissioner (Appeals).

05. The second appeal was filed by the department challenging the portion of the OIA by which the (SST) levied by the (AO) for the tax periods 2015-16 and from 01.07.2016 to 06.01.2017 alongwith statutory penalties were setaside by Commissioner (Appeals).

06. The brief facts as stated in the OIO were that the appellant was engaged in providing and rendering taxable services of telecommunication including vehicle tracking falling under Tariff Heading 98.12 and sub-heading thereof including Tariff Heading 9812.9490 (vehicle tracking) of the Second Schedule to the Sindh

Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) read with rule 35 of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules) chargeable to SST.

07. It was alleged in the OIO that during the scrutiny of the audited financial statement of the appellant for the years ended June, 2016 (tax periods: July, 2015 to June, 2016) and June 2017 (tax periods: July, 2016 to June, 2017) (twenty four tax periods) revealed that the appellant had received the consideration of Rs.1,794,892,279/- whereby, the SST was worked out to Rs.333,813,289/-. It was further alleged that perusal of SST returns revealed that the appellant had declared the output tax of Rs.4,943,729/- with SRB, thus, short declared/paid SST amounted to Rs.328,869,560/-. The details are as under:-

Description	2016-17	2015-16	Total
Sales & Services	1,073,267,842	721,624,437	1,794,892,279
Tax Rate	19%	18%	
Due SST	203,920,890	129,892,399	333,813,289
Less: SST Declared	4,943,729	-	4,943,729
Difference Payable	198,977,161	129,892,399	328,869,560

08. It was further alleged that on perusal of the SST profile it was also revealed that the appellant had failed to e-file the monthly sales tax returns and failed to deposit the SST amount for the tax periods July, 2011 to November, 2016.

09. The appellant was served with Show Cause Notice (SCN) dated 15.08.2018 under section 23(2) of the Act calling upon it to explain as to why SST amounting to Rs.328,869,560/- should not be assessed and recovered along with default surcharge under section 44 of the Act. The appellant was also called upon to explain why penalties under Serial No. 2, 3 and 11 of the Table under section 43 of the Act shall not be imposed.

The appellant filed written reply dated 08.10.2018 and on the same date it was required to furnish the invoices and other information and details pertaining to FBR Islamabad Capital Territory (ICT), Punjab Revenue Authority (PRA) and SRB. The appellant furnished invoices and returns for the tax periods 2015-16 alongwith such summary. The contention of the appellant was that its business was not existing in Sindh before December, 2016. It was further stated that vehicle tracking services were provided from Punjab and ICT and sales tax was deposited with PRA. However the appellant started operation in Karachi from



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December, 2016 and started depositing SST on the portion of services provided from Sindh.

11. The Assessing officer did not consider the reply furnished by the appellant, and passed OIO requiring it to pay SST of Rs.21,732,431/- along with default surcharge under section 44 of the Act. The AO also imposed the penalty of Rs.1,086,622/- (being 5% of Rs.21,732,431/-) under Serial No.03 of the Table under section 43 of the Act. The AO also imposed penalty of Rs.180, 000/- (Rs.5, 000 x 36 tax periods from July, 2011 to June, 2014) and Rs.290, 000/- (Rs.10, 000/- x 29 tax periods from July 2014 to November 2016) under Serial No.02 of the Table under section 43 of the Act for not filing of monthly tax returns.

12. The appellant challenged the OIO before Commissioner (Appeals) by way of filing of appeal and the relevant paragraphs of his decision are reproduced for ready reference as under:-

*"...26. In view of the foregoing, this Appeal is partly allowed, in that I hold the tax adjudged against the instant Appellant for the tax year 2015-16 as non-recoverable under law ad remit/ set aside the same in toto. As regards the tax adjudged for the tax year 2016-2017, I remit and set aside the same from 01.07.2016 up to 06.01.2017, and uphold the balance adjudged tax for this FY, that deliberation, along with due default surcharge under section 44 *ibid*. Since, Appellant's offense regarding his willful non-registration in SRB, despite rendering taxable services inside Sindh (prior to 07.01.2017) is proved. I have no hesitation in upholding the statutory penalty imposed on him on this count, by the AC, if any.*

As regards the penalty of Rs.180,000/- imposed by the AC for Appellant's alleged 'non-filing for the tax-periods July-2011 to June 2014 [Rs.5,000/- X 36] I remit the same in toto, in the light of the foregoing points of fact and law. Similarly, the other penalty of Rs.290,000/- for tax-periods July-2014 to November, 2016 [Rs.10,000/- X 29] is also remitted on the same analogy".

Resultantly the appeal has been filed by the appellant before this Tribunal.

13. Mr. Ajeet Sundar, the learned Advocate for the appellant submitted as under:-

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Ajeet Sundar
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- i) The tax periods involved in this appeal were from July, 2015 to June, 2017 (24 tax periods) out of which tax periods from July, 2015 to 6th January, 2017 were before the date registration of the appellant with SRB. Therefore for the later period neither the assessment order could be passed nor SST could be demanded and recovered from the appellant.
- ii) The appellant after getting registration from SRB w.e.f. 07.01.2017 provided services valuing Rs.25,709,879/- in Sindh involving SST of Rs.4,884,877/- which was duly deposited with SRB.
- iii) The appellant deposited SST on rental of tracking devices and annual monitoring fees whereas, the department has wrongly claimed SST on sale of tracking devices (goods). The department failed to consider the fact that the tracking device had remained the property of the appellant and it had charged rent thereon and had duly paid SST on rental income.
- iv) The appellant was providing services in Sindh, Punjab and Islamabad and paying tax to the relevant tax authorities and had already provided all details, invoices, and sales tax returns of SRB, PRA & ICT to the AC which were ignored by him.
- v) The OIA was not proper and suffered from legal infirmities as the SST was levied on sale of goods/tracking devices and the Commissioner (Appeals) erroneously held that the tracking device was an intrinsic, inseparable and essential part of the vehicle tracking services.
- vi) The Commissioner (Appeals) while upholding the contention of the appellant that it was not liable to pay SST before its registration from July, 2015 to 06.01.2017 had ordered for payment of SST from 07.01.2017 to 30.06.2017 without calculating the payable SST.
- vii) The appellant had duly paid SST after acquiring registration from SRB. Thus the Commissioner (Appeals) has wrongly upheld the penalty imposed by AO under Serial No.3 of Table under section 43 of the Act without establishing the *mens rea*.

14. Mr. Muhammad Faraz the learned AC-SRB submitted as under:-

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- i) The OIO was correctly passed after considering all the pleas raised by the appellant.
- ii) The Commissioner (Appeals) disallowed levy of SST prior to the date of registration without considering the definition of registered person provided under sub-section (71) of the section 2 of the Act which provided that the person liable to be registered also fell within the definition of the registered person.
- iii) The SST could only be demanded and recovered from a person liable to be registered, and who had provided services within Sindh before registration and relied upon the case of Commissioner Inland Revenue, Gujranwala versus M/s S. K. Steel Casting, Gujranwala, STR No. 54/2016, of Lahore High Court.
- iv) The appellant before registration had provided services within Sindh and had also collected SST and was liable to deposit the same with SRB.
- v) The appellant despite registration with SRB charged SST but deposited the same with other authorities.
- vi) The appellant had not disclosed the correct value of services provided in Sindh.
- vii) The tracking device sold by the appellant was part of tracking service and the SST was payable on gross amount received by the appellant and the OIA in this regard was proper and legal.

15. The learned advocate for the appellant in rebuttal further submitted as under:-

- i) The case cited by the AC had no relevance and has distinguishable facts. In the cited case the learned High Court had not held that the tax could be recovered for the period prior to the date of registration.
- ii) The Tribunal in its various orders has already held that the SST could not be charged on tracking devices being goods and that no SST



could be charged before for the periods before its date of registration.

16. We have heard the learned representatives of the parties and perused the record made available before us.

17. The core contention of the appellant was that no SST could be charged on sale of tracking devices being goods and that no SST could be charged for the tax periods prior to registration of the appellant. The contention of the respondent was that the tracking device was the part of tracking services and the SST was payable on gross amount and that since the services were provided in Sindh before registration thus the tax could not be charged for the tax periods before its registration.

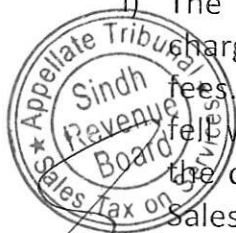
18. For proper appreciation of the contentions of the learned representatives of the parties it appears appropriate to frame the following issues:-

- a) Whether the SST was payable on sale of tracking devices?
- b) Whether the SST could be charged for the tax periods prior to date of registration of the appellant?

19. We will first take up issue No.1 "Whether the SST was payable on sale of tracking devices?". This issue is discussed as under:-

i) The appellant was providing vehicle tracking services and was charging SST on rental of tracking devices and on annual monitoring fees. The tracking device used in providing vehicle tracking services fell within the ambit of 'goods' and taxing of goods was not within the domain of Sindh Legislature and could only be taxed under the Sales Tax Act, 1990. This point was earlier raised in Appeal No. AT-65/2018, Falcon-I (Pvt.) Ltd., versus AC, SRB which was decided by this Tribunal vide its order dated 25.01.2021 and it was held that:

"There are two taxing powers. The taxing power relating to goods vests in the Federation and the taxing power relating to services vests in the Provinces and both could not share the same powers. The Provinces can neither levy tax on goods nor can claim the goods as part of service for the purpose of levying SST. It was also held that the Provincial Legislature is only authorized to levy SST on services. This view gains support from the recent judgment the High Court of Sindh in the case of Sami Pharma and others versus SRB, CP-D No. 5220/2017 and In para 9 of the judgment it was held as under:-



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"9.....but it needs to be appreciated that such authority to impose tax is only on services and not on goods or otherwise (Emphasis supplied). It is only the quantum of service rendered or supplied which can be taxed by Province. By no stretch of imagination either by rules or otherwise, it can be extended to any other goods or amount which is not falling within services (Emphasis supplied).

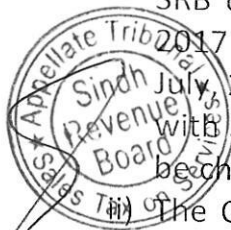
- ii) The charging section is a most important provision and has to be construed strictly and does not provide for inclusion of the cost of goods if the same is used in providing taxable services. Section 5 of the Act which deals with the value of taxable services also do not provide for inclusion of the cost of goods if supplied with the service.
- iii) In view of the above discussions and our earlier order in the case of Falcon-I we are of the view that SRB is not entitled to demand and charge SST on the component of goods or supplies even if the same were part of taxable service.

20. Now we will take up issue No. ii) Whether the SST could be charged for the tax periods prior to date of registration of the appellant? This issue is discussed as under:-

- i) It is an admitted position that the respondent was registered with SRB on 07.01.2017. The SST was charged from July, 2015 to June, 2017 (24 tax periods) these periods included the tax periods from July, 2016 to 6th January, 2017 when the appellant was not registered with SRB. This has been decided in various orders that SST could not be charged prior to registration.

The Commissioner (Appeals) in his various OIAs have held that SST cannot be demanded from a service provider prior to its date of registration, few of such OIA's are mentioned for ready reference as under:-

- a) Appeal No.73/2018, OIA No.97/2020 M/s Sinopec International vs. Assistant Commissioner (Unit-03), SRB dated 03.11.2020
- b) Appeal No.308/19, OIA No.109/2020, dated 02.12.2020 – M/s Fiber Link vs. Assistant Commissioner (Unit0-01), SRB



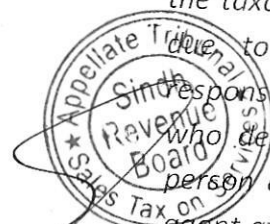
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- c) Appeal No.456/2018, OIA No.110/2020, dated 02.12.2020 – M/s Fiber Link vs. Assistant Commissioner (Unit-01), SRB
- iii) The above view of Commissioner (Appeals) has been upheld in our various pronouncements. Few of such decisions are mentioned for ready reference as under:-
- a) AT-47/2020 dated 15.02.2021 – AC (Unit-04) vs. M/s MYN Pvt. Ltd.
- b) AT-234/2015 dated 26.11.2019 – Nasir Khan & Sons vs. Commissioner (Appeals) & DC (Unit-13), SRB.
- c) AT-30/2019 dated 05.03.2021 -- TCS Logistics (Pvt) Ltd. vs AC, SRB.
- iv) In our above decision in AT-30/2019 dated 05.03.2021, in case of TCS Logistics (Pvt.) Ltd. vs AC, SRB we had held as under:-

“...20. It is evident by comparison of sub-rule (3) and (4) of rule 3 of the Withholding Rules that sub-rule (3) 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. Moreover the unregistered person could neither charge tax in its invoice nor the withholding agent after withholding the amount of SST can pass on the same to unregistered service provider for depositing the same with SRB.

21. 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”.



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22. The liabilities of payment of tax under sub-rule (4) of Rule 3 of the Withholding Rules have been fixed 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 were therefore, illegal.

23. In view of the above discussions it is concluded by us that the SST cannot be demanded from a service provider for the periods prior to its registration”.

v) It was an admitted position that the appellant was registered with SRB on 07.01.2017, therefore it is apparent that the appellant was not registered with SRB during the tax periods from July, 2015 to 6th January, 2017. Thus the AO was not justified to tax the services for the tax periods prior to registration of the appellant.

vi) In view of the above discussions and relying upon our earlier orders we hold that SST could not be charged from the appellant for the tax periods prior to its date of registration.

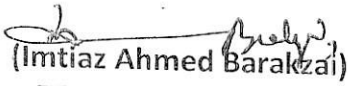
21. The learned Commissioner (Appeals) while accepting the assertion of the appellant that it was not liable to pay tax prior to the date of registration has not determined the tax liability for the tax periods from 07.01.2017 to 30.06.2017. The appellant had submitted that during the periods from 07.01.2017 to 30.06.2017 it has provided services valuing to Rs.25,709,879/- involving SST of Rs.4,884,887/- which was duly paid. The learned AC in his Reconciliation Statement dated 01.04.2021 worked out the value of service at Rs.41,101,789/- involving SST of Rs.18,080,095/-. Resultantly there is vast difference between the value of SST worked out separately by both the parties.


22. In view of the above discussions appeal filed by the appellant is partly allowed. The OIO and OIA are setaside on the issue that SRB was not entitled to demand and charge SST on the component of goods or supplies even if the same were part of supplies. It is also setaside on the issue that no SST could be charged from the appellant for the tax periods prior to date of registration. However the case is remanded back to concerned AC for the period from 07.01.2017 to

30.06.2017 since there was difference between the value of services and SST worked out by the parties. The department may recover SST if found due for this period after proper scrutiny.

23. In view of the finding that neither the SST could be levied on the cost of tracking services nor SST could be levied for the tax periods prior to date of registration the appeal filed by the department / respondent is dismissed. Thus the appeals are disposed of in terms of para 19, 20 and 22 supra.

24. The copy of the order may be provided to the learned representatives of the parties.


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER


(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi

Dated: 11.08.2021

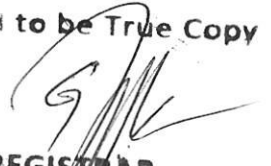
Copy for compliance:

- 1) The Appellant through authorized Representative.
- 2) The Assistant Commissioner (Unit-01), SRB, Karachi.

Copy for information to:-

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

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REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order Issued on 31/08/2021


Registrar

Order Dispatched on 31/08/2021


Registrar