

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

**DOUBLE BENCH-I**

**APPEAL NO. AT-04/2021**

Assistant Commissioner SRB, (Unit-03),  
6<sup>th</sup> Floor, Shaheen Complex Building,  
M.R. Kiyani Road Karachi .....Appellant

**Versus**

M/s Nasir Khan & Sons  
B-96, Block-13-D/1, Gulshan-e-Iqbal,  
Karachi.....Respondent

Date of filing of Appeal: 19.01.2021

Date of hearing: 01.06.2021

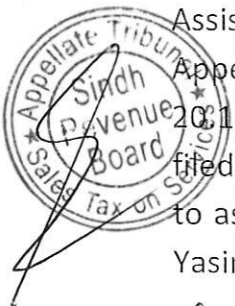
Date of Order: 22.06.2021

Mr. Sanjay Kumar AC, (Unit-03)-SRB, for appellant.

Mr. Aminuddin Ansari and Mr. Furqan Mohiuddin, advocates  
for respondent.

**ORDER**

**Justice<sup>®</sup> Nadeem Azhar Siddiqi**: This appeal has been filed by the Assistant Commissioner (Unit-03), SRB, Karachi challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.108/2020 dated 20.11.2020 passed by the Commissioner (Appeals) in Appeal No. 49/2020 filed by the respondent against the Order-in-Original (hereinafter referred to as the OIO) No. 31/2020 dated 25.02.2020 passed by Mr. Muhammad Yasir, Assistant Commissioner, (Unit-03) SRB Karachi.



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02. The brief facts the case as stated in the OIO were that the respondent was engaged in providing or rendering services of contractual execution of work or furnishing supplies, classified under Tariff Heading 9809.0000 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) under section 8 of the Act.

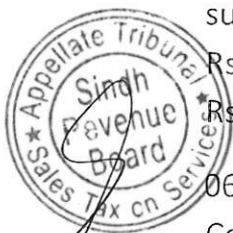
03. It was alleged in the OIO that scrutiny of income tax withholding statement filed by M/s K-Electric (KE) with FBR revealed that respondent had rendered taxable services to KE amounting to Rs.58,644,497/- involving SST Of Rs.9,983,120/- during the Tax Years 2012, 2013 and 2014 respectively. Whereas, the respondent had only paid Rs.4,290,472/- to Sindh Revenue Board (SRB) during the same period and resultantly it had short paid SST amounting to Rs.5,092,472/-.

04. The respondent was served with a Show-Cause Notice (SCN) dated 20.02.2015 to explain as to why the tax liabilities as mentioned above should not be assessed and recovered under section 23 and 47(1A) of the Act along with default surcharge under section 44 of the Act. The respondent was also asked to explain as to why penalties as provided under Serial Numbers No. 1, 2, 3, 5, 6(d), 11, 12, 13 of the Table under section 43 of the Act should not be imposed for violating section 3, 4, 5, 8, 9, 17, 30 and 52 of the Act and the rules made thereunder.

05. After conducting hearings, the Assessing Officer (AO) passed OIO No. 300 of 2015 for recovery of SST of Rs.5,092,472/- along with default surcharge under section 44 of the Act and also imposed penalty of Rs.254,632/- under serial No.3 of Table under section 43 of the Act and Rs.409,625/- under serial No.2 of Table under section 43 of the Act.

06. The respondent had challenged the said OIO before Commissioner (Appeals) who upheld the OIO vide OIA No. 184/2015 dated 10.11.2015. The said OIA was challenged before the Appellate Tribunal, SRB which dismissed the appeal vide order dated 06.06.2016 passed in Appeal No. 234/2015.

07. The respondent challenged the said OIA in Special Sales Tax Reference No. 74 of 2016 before the Hon'ble Sindh High Court which



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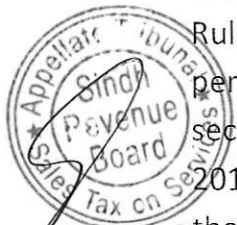
remanded the case to the Appellate Tribunal, SRB with the instructions to decide the appeal on merits, after hearing both the parties.

08. As per the direction of Hon'ble High Court, the case was re-heard by the Appellate Tribunal and after hearing both parties the OIO and OIA were set aside and the case was remanded back to (AO) with the instruction to initiate fresh assessment in accordance with law.

09. After remand, the AO served notice dated 10.12.2019 to respondent for fresh assessment. The respondent submitted a written response vide letter dated 26.12.2019 and submitted that as per the order of the Appellate Tribunal no order could be passed for the period when the respondent was not registered. Furthermore, after registration, for the tax periods from December, 2012 to June, 2014 the respondent had provided services to KE for the sum of Rs.17,690,748/- involving sales tax of Rs.4,394,989/- and as per the OIO No. 300/2015 dated 21.05.2015 it had already deposited Rs.4,290,684/-. Moreover the SRB had already recovered Rs.144,150/- against the outstanding SST of Rs.104,305/- from Bank Account of Respondent. Therefore it was requested by the respondent that the excess amount of Rs.39,845/- may be refunded to it.

10. The AO after re-hearing passed OIO No. 31/2020 for recovery of SST of Rs.5,092,472/- along with default surcharge (*to be calculated as the time of payment*) under section 44 of the Act, 2011. The AO also imposed penalty of Rs.254,624/- (being 5% of the sales tax due) under Serial no.3 of the Table under section 43 of the Act for contravention of section 8, 9 and 17 of the Act read with rule 14 of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules) and penalty Rs.10,000/- per month and fraction thereof under Serial no.2 of the Table under section 43 of the Act for the tax periods from July, 2014 to December, 2014 for violation of section 30 of the Act read with rules 13 and 14 of the Rules.

11. The respondent had challenged the said OIO NO. 31/2020 before the Commissioner (Appeals) who had allowed the appeal and had held that Appellant was involved in providing/rendering the services of "excavation of underground cable laying and supply of labor, excavation



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of underground cable route, and such services were not specifically listed in either the 1<sup>st</sup> or 2<sup>nd</sup> Schedule of the Act, ibid until June, 2019 and further held that the SRB cannot raise any demand of tax in respect of the tax-periods falling before its registration with SRB.

12. The learned ACSRIB briefly submitted as under:-

- i) The appellant by providing taxable services was a person liable to be registered as provided under sub-section (71) of section 2 of the Act and tax liability could be imposed on it for the period prior to registration.
- ii) As per proviso to sub-rule (1) of rule 5 of the Rules the respondent was liable to get registration and was liable to pay SST for the period before registration.
- iii) The proviso is in consonance with the definition of registered person provided under sub section (71) of Section 2 of the Act.
- iv) The nature of services provided to KE by the respondent was covered under Tariff Heading 9809.0000 as the appellant not only provided services but also furnished supplies and the Commissioner (Appeals) erroneously altered the same.
- v) The appellant was paying SST before issuance of SCN. However after receiving SCN the appellant took the plea that it was providing the excavation and laying of under-ground cable route.



The OIO was passed in confirmatory to the order of the Tribunal dated 26.11.2019 and the AO had rightly held that the services provided to KE fell under Tariff Heading 9809.0000 and the respondent was liable to pay SST.

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

- i) The respondent was not liable to charge, collect and deposit SST prior to date of its registration with SRB which was 30.10.2012 and the OIA was in consonance with the earlier orders of Commissioner (Appeals) and this Tribunal.

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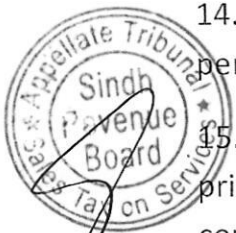
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- ii) Tribunal in its earlier order dated 26.11.2019 had clearly held that no tax could be charged for the period before registration and had also clarified that the actual services provided or rendered by the respondent to KE were of "excavation of underground cable laying and supply of labor, excavation of underground cable route".
- iii) The AC had totally ignored the remand order dated 26.11.2019 of Tribunal which was not challenged and had attained finality and thus was binding upon the AO. Moreover no contra view could be taken by the AC since the Commissioner (Appeals) had rightly adhered to the earlier orders of the Tribunal dated 26.11.2019.
- iv) The respondent after registration had discharged its tax liability, for the tax periods from December, 2012 to June, 2014. The respondent had provided services to KE for the sum of Rs.17,690,748/- involving SST of Rs.4,394,989/- and as per the OIO No. 300/2015 dated 21.05.2015 the respondent deposited Rs.4,290,684/- and against the remainder SST of Rs.104,305/- the SRB had already recovered Rs.144,150/- from Bank Account of Respondent. Therefore, there was no outstanding SST and the respondent requests for refund of Rs.39,845/- deducted excessively from its account.
- v) The respondent has not committed any default. Moreover the default surcharge and penalties were imposed without first establishing mensrea.

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

15. The dispute the between the parties related to charging of tax prior to date of registration, and the Tariff Heading under which the tax could be levied.

16. The tax could not be charged on the presumption and assumption by the officers of SRB. It is now well settled law that to bring the subject to charge and levy of tax, the burden is upon the Revenue to establish that the said subject is chargeable to tax. The tax could only be levied or



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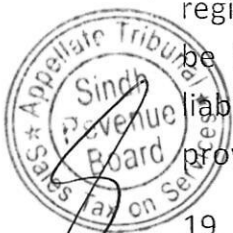
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charged by clear and unambiguous words and the expressions used in the charging sections and are not to be stretched by any process of interpretation so as to bring a person within the tax net, not falling under the clear and plain language of the statute. It was also well settled that while interpreting a fiscal statute one has to look at what is clearly stated in the statute and there is neither any presumption nor room for any intendment.

17. The AO while levying the SST has apparently not followed the above principles and levied SST on the mere presumption that the respondent being a person liable to be registered was liable to pay SST for the tax periods before registration. While doing so the AO ignored sub-rule (4) of rule 3 of the Sindh Sales Tax Special Procedure (Withholding) Rules, 2014 (hereinafter referred to as the Withholding Rules), which provided 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 fixed 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.

18. The AC in his arguments has relied upon the proviso to sub-rule (1) of rule 5 of the Rules, which provided that the person applying for registration after commencement of the taxable economic activity shall be liable to penalties prescribed <sup>under</sup> section 43 of the Act, besides the liability to pay the tax and default surcharge in relation to the services provided or rendered by him before the date of registration.

19. There is apparent conflict between sub-rule (4) of rule 3 of the Withholding Rules and proviso to sub-rule (1) of rule 5 of the Rules. Section 3 of the Act which deals with taxable service does not recognize the services provided by non-registered person as a taxable service, however, it has recognized the taxable services provided to a resident



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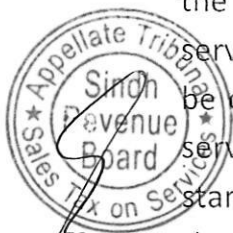
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person by a non-resident person. When section 3 does not recognize the services provided by non-registered person as taxable service the same could not be recognized by inserting it in the Rules. Any provision of Rules which are not in confirmatory with the provisions of the parent Act or in conflict with the parent Act could not be enforced or implemented. In the reported judgment of New Allied Electrical Industries versus Federation of Pakistan 2017 PTD 130 (Sindh) has held as under:-

*"It needs to be emphasized here that the purpose of delegating powers to the Executive to frame rules, devise regulations and issue notifications and guidelines is only to facilitate implementation of laws to the best of their object and mandate. By assuming these powers, the Executive however are not supposed to, and are also not permitted to frame rules or issues notification that are independent of the scheme of the parent law. Any such attempt would render the subject rules, regulations etc., nullity in the eyes of law".*

20. The Rules of 2011 are general in nature and deals generally with the enforcement of the provisions of the Act, whereas the Withholding Rules are specific in nature and deals solely with the withholding of SST and withholding agents. In case of conflict between the Rules and Withholding Rules the Withholding Rules being special law will prevail as the same were framed under section 13 of the Act read with sub-section (4) of section 3, sub-section (3) of section 9 and section 72 of the Act. Out of these provisions sub-section (3) of section 9 of the Act starts with the words "notwithstanding" anything contained in sub-sections (1) & (2) of the Act, Board may by a notification in the official Gazette, specify 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 receiving the taxable service or any other person. Sub-section (1) of section 13 of the Act also starts with the words "notwithstanding" anything contained in this Act, the Board may, by a notification in the official Gazette, prescribe special procedure for the payment of tax, valuation of taxable services, registration, record keeping, invoicing, or billing requirements, returns and other related matters in respect of any service or class of services and subject to such limitations and conditions as may be specified in the notification. Sub-section (2) of section 13 of the Act also start with the



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words "notwithstanding" anything contained in this Act, the Board may, by a notification in the official Gazette, require any person or class of persons, whether registered or not, to withhold full or part of the tax charged from or invoiced to such person or class of persons on the provision of any taxable service or class of taxable service and to deposit the tax, so withheld, with the Government, with such time and in such manner as may be specified in the notification. The provisions which start with the word "notwithstanding" are treated as non-obstante clause and usually indicate that such provision will prevail upon other provisions. In reported judgment of EFU General Insurance Company Limited versus Federation of Pakistan. PLD 1997 SC 700 it was held as under:-

*"A non obstante clause is usually used in a provision to indicate that the provision should prevail despite anything to the contrary in the provision mentioned in such non obstante clause. In case there is any inconsistency between the non obstante clause and another provision, one of the objects of such a clause is to indicate that it is the non obstante clause which would prevail over the other clause".*

21. The Board by framing Withholding Rules under sub-section (2) of section 13 of the Act has fixed the responsibility upon the recipient of taxable service from unregistered person to withhold SST and not upon the unregistered person. In the reported judgment of State versus Zia Ur Rehman PLD 1973 SC 49 it was held as under:-

*"It is well-established rule of interpretation that where in a statute there are both general provisions as well as special provisions for meeting a particular situation, then it is the special provisions which must be applied to that particular case or situation instead of the general provisions.*



22. In view of the above discussions it is held that sub-rule (4) of rule (3) of the Withholding Rules is a special provision and would prevail upon the proviso to sub-rule (1) of rule 5 of the Rules which is a general provision.

23. The Commissioner (Appeals) in the OIA after considering the Agreement between the respondent and KE had rightly held that the

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service provided by the appellant was excavation of underground cable laying and supply of labor, excavation of underground cable route , and such services were not taxable until June, 2019. The Commissioner (Appeals) had also rightly held that department cannot raise any demand of tax in respect of the tax-periods falling before a taxpayer's registration in SRB. In this case, Appellant's tax registration date was 30.10.2012. As such, it was not liable to pay any tax under the Act that pertained to any tax-period falling before such date and the responsibility was upon the service recipient of taxable services as discussed supra.

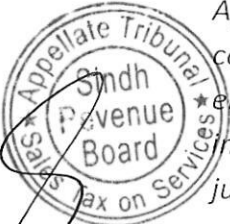
24. The AO thus wrongly invoked the Tariff Heading 9809.0000 and taxed the services provided by the respondent for the tax periods prior to its registration for which he had no jurisdiction.

25. The learned Commissioner (Appeals) in respect of nature of services provided by respondent to KE held as under:-

*"As transparent from the record, during the under-reference tax-periods, Appellant was involved in providing/ rendering the services of "excavation of underground cable laying and supply of labor, excavation of underground cable route" which services were not specifically listed in either the 1<sup>st</sup> or 2<sup>nd</sup> Schedule of the Act, ibid until June, 2019. Hon'ble Appellate Tribunal has properly dissected the whole issue and highlighted the pros and cons of each tariff heading that could possibly be a candidate for accommodation the nature of Appellant's services in this instance (as reflected by his services contract with M/s K-Electric). Learned Tribunal has succinctly elaborated the reasons of non-application of each candidate heading in this matter. Tribunal has also quoted and relied upon its previous judgments found applicable in this matter.*

The learned Commissioner (Appeals) in respect of taxation before registration held as under:-

*"The SRB cannot raise any demand of tax in respect of the tax-periods falling before a taxpayer's registration in SRB, because the charging section 3, read with sections 9, 15, 15A, 23 & 30 ibid, all apply only to the 'registered persons' (as registered under Chapter-IV of the Act, 2011) and not to any unregistered person. As such, an SRB assessing*



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*officer is barred from assessing the tax against an unregistered person nor can he ask such unregistered person to file his tax-returns. In this case, Appellant's tax registration date is 30.10.2012. As such, he is not liable to pay any tax under the Act that belongs to any tax-period falling before such date. SRB Withholding Tax Rules, 2014 fully support this view point.*

The above findings of Commissioner (Appeals) are confirmatory with the provisions of the Act, withholding rules, and his earlier orders. Few of such OIA's are mentioned for ready reference as under:-

- i) Appeal No.73/2018, OIA No.97/2020 M/s Sinopec International vs. Assistant Commissioner (Unit-03), SRB dated 03.11.2020
- ii) Appeal No.308/19, OIA No.109/2020, dated 02.12.2020 – M/s Fiber Link vs. Assistant Commissioner (Unit-01), SRB
- iii) Appeal No.456/2018, OIA No.110/2020, dated 02.12.2020 – M/s Fiber Link vs. Assistant Commissioner (Unit-01), SRB


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 vs. Commissioner, SRB.



26. We have carefully examined and considered the above findings recorded by learned Commissioner (Appeals) mentioned in para 25 supra and found the same in confirmatory with the provisions of the Act, Withholding Rules, the earlier orders passed by this Tribunal as reproduced supra. Therefore in our opinion the Commissioner (Appeals) has not committed any illegality, infirmity or error in the OIA calling for interference.

27. In view of the above discussions the appeal is dismissed having no merits. 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: 22.06.2021

Copy Supplied for compliance:

- 1) The Assistant Commissioner, Unit ( ) SRB.
  - 2) The Appellant through Authorized Representative.
- Copy for information to:-
- 3) The Commissioner (Appeals), SRB, Karachi.
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REGISTRAR  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD

Order issued on

06/07/2021

Registrar

Order Dispatched on

06/07/2021

Registrar