

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT-
KARACHI

DOUBLE-BENCH-I

APPEAL NO. AT-08/2021

Assistant Commissioner, (Unt-21) SRB,
09th Floor, Shaheen Complex,
M.R. Kiyani Road, Karachi.....Appellant

Versus

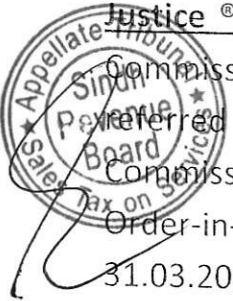
M/s DIC Pakistan Limited,
Shahrah-E-Roomi, P.O. Amersidhu,
Walton Road, LahoreRespondent

Date of filing of Appeal 28.01.2021
Date of hearing 20.04.2021
Date of Order 27.05.2021

Ms. Shumaila Yaar Muhammad, AC-SRB, for appellant
Mr. Mohsin Waheed FCA, for the respondent

ORDER

Justice © Nadeem Azhar Siddiqi: This appeal has been filed by the Assistant Commissioner (Unit-21), SRB Karachi challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.104/2020 dated 16.11.2020 passed by the Commissioner (Appeals) in Appeal No. 34/2017 filed by the respondent against the Order-in-Original (hereinafter referred to as the OIO) No. 78/2017 dated 31.03.2017 passed by Ms. Anum Sheikh, Assistant Commissioner, (Unit-30) SRB Karachi.



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02. The facts as stated in the OIO were that the respondent was registered with SRB and had received taxable "Franchise Services" which was covered under Tariff Heading 9823.000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act), which was chargeable to Sindh Sales Tax at (SST) at the rate of 10% under section 8 of the Act.

03. It was alleged in the OIO that the examination of the Audited Statement of Account of the respondent for the year ended December 31, 2012 depicted that the appellant had paid a total amount of Rs.40,366,000/- for the tax period January, 2012 to December, 2012 and Rs.20,677,500 (41,355,000/-2) for the tax periods July, 2011 to December, 2011, on account of Royalty and Technical Fees. The aforesaid amounts were chargeable to SST at the rate of 10% amounting to Rs.4,036,600 for the tax periods relating to January, 2012 to December, 2012 and Rs.2,067,750/- for the tax periods relating to July, 2011 to December, 2011. However, SRB record revealed that respondent had failed to deposit SST of Rs.6,104,350/- with SRB.

04. The respondent was served with Show-Cause Notice (SCN) dated 30.01.2017 to explain as to why SST amounting Rs.6,104,350/- should not be assessed and recovered under section 23(1) and section 47 (1A) (a) of the Act in addition to the imposition of default surcharge under section 44 of the Act. The respondent was also asked to explain as to why penalties mentioned at Sr. No. 3 and 6(d) of the table under section 43 of the Act should not be imposed.

05. The respondent filed written reply dated 06.02.2017 and submitted that for the periods from July, 2011 to December, 2012, the respondent had erroneously and inadvertently paid Federal Excise Duty (FED) at the rate of 10% on franchise services to Federal Board of Revenue (FBR). However, for subsequent periods, the respondent had paid SST on franchise services to SRB reflecting that the mistake was not willful and intentional, and since FED had already been paid, thus SST if charged by SRB would result in double taxation of the same transaction. It was requested that the SRB may take-up the matter with FBR for



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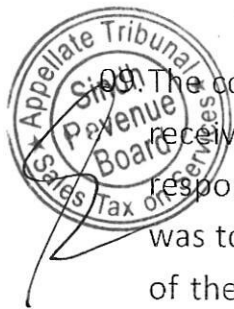
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recovering the erroneously deposited FED for the aforesaid period and to drop the proceeding against the respondent.

06. The Assessing Officer (AO) held that in view of available record and the submissions made by the respondent it was established that the respondent had received franchise services in Sindh from its franchiser M/s. DIC Corporation (DIC) under a Technical License Agreement (TLA), against a consideration chargeable to SST under the provisions of section 9(2) of the Act, read with rule 36(iv) of the Sindh Sales Tax on Services, Rule, 2011 (hereinafter referred to as the Rules-2011). The AO assessed the SST at Rs.5,930,991/- and directed to recover the same from the respondent under section 23(1) and 47(1A) (a) of the Act, along with default surcharge under section 44 of the Act, 2011. The AO also imposed penalty Rs.296,549/- under serial 3 of Table under section 43 of the Act for non-payment of SST.

07. The respondent challenged the OIO before the Commissioner (Appeals), who allowed the appeal mainly on the ground that the respondent was not liable to pay SST before the date of its registration i.e.10.12.2012. He further held that section 23 (1) and section 47 (1A) (a) of the Act could not be simultaneously invoked and the AC had nowhere indicated in the OIO as to whether DIC Corporation was a resident or non-resident person. It was held by Commissioner (Appeals) that SCN and OIO were seriously flawed thus both were dismissed, quashed and set aside. Hence this appeal by Department.

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



The controversy was with regard to chargeability of SST on the franchise service received by a resident person from a non-resident person and whether the respondent was liable to pay SST prior to date of its registration. Moreover it was to be ascertained "whether the SCN was time barred as per the contention of the appellant since the same was issued beyond the period of five years as provided under the then sub-section (2) of Section 23 of the Act which was

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amended vide Sindh Finance Act, 2016 and the period of five years was enhanced to eight years?"

10. After discussing the case with both the learned representatives of the Appellant and Respondent it was agreed that the following point required our consideration and resolution:-

"Whether a resident person being a recipient of service from non-resident person required registration under section 24 read with 24A of the Act?, and whether it was required to pay SST?"

11. In response to the above point the learned representative of the appellant submitted as under.

a) Reference was given to sub-section (3) of section 24 of the Act mentioning that a person who received a services, which was taxable by virtue of sub-section (2) of section 3 of the Act, and was not a registered person shall be deemed to be a registered person for the purposes of the tax periods in which such person "(i) receives the service; (ii) an invoice for the value of the services is sent to the person; or (iii) consideration for the services is paid by the person". Further reference to sub-section (2) of section 9 of the Act was given which provided that where a service was taxable by virtue of sub-section (2) of section 3, the liability to pay the tax shall be on the person receiving the service.

b) Further reference to sub-rule (2) of rule 36 of the Rules was given which provided that "in case where the person providing or rendering the franchise service or the intellectual property service was a non-resident being based in a country other than Pakistan" than the liability to pay the tax shall be on the person receiving or procuring such franchise services or such intellectual property services. It was concluded that the respondent being the recipient of franchise service from abroad was deemed to be a registered person and liable to pay SST for the tax period involved in this appeal.



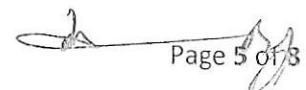
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12. In response to the above point the learned representative of the respondent submitted as under:-

- a) That while referring to the provisions of sub-section (3) of section 24 of the Act and sub-section (2) of section 3 of the Act it was concluded that the respondent had received franchise services which was taxable under sub-section (2) of section 3 of the Act for the reason that the said service was rendered by DIC Corporation Japan which was a non-resident person for the purposes of section 3 of the Act and accordingly the respondent was deemed to be a registered person under section 24 of the Act.
- b) That while referring to sub-rule (2) of rule 36 of the Rules it was submitted that on the basis of sub-section (2) of section 9 of the Act read with rule 36 of the Rules the liability to pay SST on franchise services was on the respondent being a resident person and recipient of a taxable service from a non-resident person.
- c) That the respondent being a resident person was recipient of taxable franchise service from non-resident person. Section 24 of Chapter IV of the Act dealt with the registration. Sub-section (3) of section 24 of the Act provided that "a person who receives a service, which is a taxable service by virtue of sub-section (2) of section 3 of the Act, and is not a registered person shall be deemed to be registered person for the purpose of the tax period in which such person (i) receives the service; (ii) an invoice for the value of the services is sent to the person; or (iii) consideration for the services is paid by the person".

13. Both the learned representatives have agreed that by a deeming provision the resident person receiving services from non-resident person are deemed to be registered person and do not require registration. The deeming provision in a statute was considered by the Honorable Supreme Court of Pakistan in the reported case of "Commissioner Sales Tax and others versus Humza Central Asian Textile and Woolen Mills Limited, 1999 SCMR 526 as under:-



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"21.....Generally the effect of a deeming provision in taxing statute is to bring within the tax net a transaction or an amount, which ordinarily would not come within the tax net. In the judgment in Elahi Cotton Mills' case (supra) certain principles regarding deeming provisions were also recognized.

".....(3) Where a person is deemed to be something the only meaning possible is that whereas he is not in reality that something, the Act required him to be treated as he were with all inevitable corollaries of that state of affairs."

14. In view of the above discussions it is concluded that:

- a) The resident person being a recipient of taxable service from non-resident person does not require registration. However under deeming provision and by implication of law it merely acquired the status of a registered person.
- b) That a resident being a recipient of taxable service from non-resident person was liable to pay tax and under sub-section (2) of section 9 of the Act read with sub-section (2) of section 3 of the Act read with rule 36 of the Rules.

15. It is pertinent to mention that the respondent has not disputed that he was not liable to pay SST on the franchise service received by it from a non-resident person. The plea of the respondent was that for the tax periods the respondent inadvertently deposited the SST with FBR. The learned AC-SRB contended that the deposit of SST by the respondent with FBR could not be treated as inadvertent but such payment was deliberate and willful and the respondent was liable to deposit the SST with SRB. Moreover the SRB was not responsible to get the tax adjusted or transferred from FBR to SRB. It was further submitted that no MOU existed between SRB and FBR in this regard and the Commissioner (Appeals) erroneously concluded that such MOU existed and that the amount was inadvertently paid to FBR which could be lawfully adjusted.




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16. The respondent by inadvertently depositing the SST with the FBR had not committed any default. This view gains support from the following decisions:

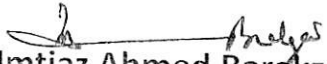
- a) Appeal NO. AT-131/2015, M/s Orient Electronics (Pvt.) Limited versus The Commissioner (Appeals), SRB wherein Mr. Raheel Soomro, Deputy Commissioner, SRB had made a statement before the Tribunal "that the amount deposited with FBR can be recovered by SRB through adjustment under a Memorandum of Understanding signed between SRB & FBR".
 - b) In Appeal No. No.19/2013 (Abbott Laboratories (Pakistan) Limited) the then Commissioner (Appeals) vide order dated 21.02.2014 allowed adjustment of SST wrongly deposited with FBR.
 - c) In Appeal No. AT-18/2016 and AT-23/2016, M/s. Burj Bank Limited versus the Commissioner, SRB the Tribunal allowed similar relief to the tax payer who had inadvertently deposited SST with FBR.
- ii) It is therefore evident from the above decisions of this Tribunal that the respondent by inadvertently depositing the SST with FBR does not become willful defaulter. The department has to prove that amount wrongly deposited was deliberate and with malafide intention, which is lacking in this case.
- iii) The findings of the learned Commissioner (Appeals) on this issue were in consonance with earlier orders of this Tribunal therefore we do not find any illegality and infirmity in such order.

17. The learned Commissioner (Appeals) has erroneously held that the tax demand imposed upon the respondent which pertained to any tax period falling before 10.12.2018 (date of registration), was illegal and not sustainable under the Act. However the learned Commissioner (Appeals) while concluding this issue has failed to consider the fact that the respondent had "received services" and had not "provided services". The registration was not required for service recipient as it is deemed to be a registered person by implication of law. Thus the finding of the Commissioner (Appeals) in this regard is set aside.



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18. In view of the above discussions the appeal is partly allowed to the extent that the registration of the "service recipient" is not required. However the rest of the OIA is maintained. The appeal is dismissed. The respondent is directed to co-operate with the AC-SRB to get the amount adjusted or transferred to SRB.
19. 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: 27.05.2021

Copy Supplied for compliance:

- 1) The Assistant Commissioner, (Unit)SRB, for compliance
- 2) The Appellant 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

16/06/2021

Registrar

Order Dispatched on

16/06/2021

Registrar