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BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD AT KARACHI

DOUBLE BENCH

✓ APPEAL NO. AT-18/2021

M/s Web DNA works (Private) Limited

SNTN: 2178183-4)

6-A, Block-S, Gulberg-II, Lahore.....Appellant

Versus

Assistant Commissioner (Unit-11),

Sindh Revenue Board,

Shaheen Complex, M.R. Kiyani road,

KarachiRespondent

Date of filing of Appeal 15.03.2021

Date of hearing 13.09.2021

Date of Order 16.11.2021

✓ APPEAL NO. AT-17/2021

Assistant Commissioner (Unit-11),

Sindh Revenue Board,

Shaheen Complex, M.R. Kiyani road,

Karachi Appellant

Versus

M/s Web DNA works (Private) Limited

SNTN: 2178183-4)

6-A, Block-S, Gulberg-II, Lahore..... Respondent

Mr. Talha Shahid, ITP for the appellant

Mr. Mehrab Khan, AC-SRB and Mr. Nasir Bachani, AC-DR, SRB for respondent

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ORDER

Justice[®] Nadeem Azhar Siddiqi: Both These appeals have been filed by the parties challenging the Order-in-Appeal (hereinafter referred to as the OIA) No. 07/2021 dated 15.01.2021 passed by the Commissioner (Appeals) in Appeal No. 389/2018 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 931/2018 dated 07.11.2018 passed by the Mr. Naheed Ahmed Meerani, Assistant Commissioner, (Unit-11) SRB Karachi.

02. The first appeal was filed by the tax payer/appellant challenging the portion of OIA through which the Commissioner (Appeals) maintained levy of SST under Tariff Heading 9813.7000 for the period after registration of the appellant. The appellant also filed appeal challenging the imposition of default surcharge under section 44 of the Act and penalties under Serial No.2 and 3 of the Table under section 43 of the Act.

03. The second appeal was filed by the department/respondent challenging the portion of OIA by which the Commissioner (Appeals) had disallowed the levy of SST under Tariff Heading 9813.7000 for the period before registration of the appellant. The respondent also challenged the reduction of the penalties imposed in the OIO under Serial No.2 and 3 of the Table under section 43 of the Act and deletion of the penalty under Serial No.12 of the Table under section 43 of the Act.

The facts as stated in the OIO were that the appellant got voluntarily registered with Sindh Revenue Board, SRB, and was engaged in providing or rendering services. These services were covered under Tariff Heading 9813.7000 (Automated Teller Machine, Operating, Maintenance and Management) 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 (SST) under Section 8 read with Section 3 of the Act.

05. It was also stated that the Financial Statements of the appellant for the periods ending June, 30, 2014, 2015 & 2016 were perused, and as per Note No. 1 therein, it has been declared that the appellant was engaged in principal activity of telecommunication system including installation of ATMs, system signals, data

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or messages. The said fact was corroborated from para 3 of the Memorandum of Association of the appellant which read as under:

"...3. To engage in setting up and operations of all kinds of Payments System related services like Electronic Payment Gate way, Payment Scheme, Clearing House, ATM Switch, POS gateway and Commerce gateway etc. and or acting as an intermediary for multilateral routing, switching and processing of payment transactions and to acquire any and all licenses, permissions, consents as may be applicable from time to time".

06. It was alleged in the OIO that appellant earned services revenue amounting to Rs.332,909,169/-, which was reflected in the Financial Statements of the appellant for the periods ending June 30, 2014, 2015 & 2016 and was taxable. It was covered under Tariff Heading 9813.7000 of the Second Schedule to the Act, read with rule 30 of Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules). However, from the scrutiny of the tax profile, it was found that the appellant failed to discharge the liability of payment of SST of Rs.49,893,275/- against the taxable services of Rs.332,909,169/- provided by the appellant during the above tax periods from July, 2013 to June, 2016 (thirty six tax periods). It was also alleged that the appellant also failed to e-file SST returns for the above periods in contravention to Section 30 of the Act read with Chapter-II of the Rules.



The appellant was served with a Show-Cause Notice (SCN) dated 23.05.2018 to explain as to why SST of Rs.49,893,275/= should not be assessed under section 23 of the Act. The appellant was also called upon to explain as to why default surcharge under Section 44 of the Act and penalties at serial No.2, 3, 8 and 12 of Table under section 43 of the Act should not be imposed.

08. The appellant filed written reply dated 19.03.2018 stating therein that its registered office was situated at Lahore and it was engaged in the business of import of ATM machines. It lent these ATM machines on rent to various scheduled banks and installed the same on desired location/ places and being owner the maintenance and other cost of ATM machines were borne by the company. The appellant charged rent from banks against installation of ATM and the bank withheld tax U/S 236 of the Income Tax Ordinance, 2001 under the head

of Payment for use of Machines and Equipment at the time of payment of rent. The appellant had installed more than 90% ATM machines on rent and generated revenue from these machines outside the province of Sindh.

09. The appellant submitted another reply dated 05.04.2018 stating therein that the appellant owned ATM Machines and earned rental income. However the Sindh Sales Tax on Services was levied only on Automated Teller Machine operations, maintenance and management. It was also stated that the appellant installed only three machines in the province of Sindh in Karachi PNS Mehran, Gul Plaza and Awami Markaz and charged fixed rent of machines from these financial institutions. Details of rent of machines for the year 2015 and 2016 are given below:-

S. No	Location	Region	2015	2016
1	PNS Mehran	Karachi	12,000	15,000
2	Gul Plaza	Karachi	25,000	25,000
3	Awami Markaz	Karachi	25,000	25,000
Total Per Month Rent			62,000	65,000
Per Year Rent			744,000	780,000

10. The Assessing Officer (AO) sent e-mail dated 17.05.2018 to M/s Askari Bank Limited (ABL) for providing details of commission/transaction fee paid to the appellant during the periods from July, 2013 to June, 2016. The appellant was also required to submit principal agreement as mentioned in para 1.19 of agreement dated 13th March, 2017. The AO also sent a letter dated 17.05.2018 to National Bank of Pakistan (NBP) for the submission of information pertaining to amount of commission/transaction fee paid to the appellant during the above periods against ATMs deployed, installed and maintained by the appellant in Sindh. The NBP was also required to submit copy of the master agreement entered into between the appellant and NBP.

11. In response to the e-mail sent to ABL a reply dated 25.05-2018 was received providing the copy of agreement and the details of transaction fee/commission paid to the appellant pertaining to the periods from January-2015 to June-2016. However the extension of time was allowed for providing such details for the remaining period.



12. The NBP submitted a reply dated 22.05.2018 in response to letter sent to it and challenged the furnishing of such details under section 52 of the Act. It was further stated that the agreement contained sensitive information relating to National Defence Institutes and it was requested to co-ordinate with WDWPL for seeking required information. However after exchange of correspondence the NBP informed the AO that an amount of Rs.281,604,085/= was paid to the appellant which pertained to whole of Pakistan.

13. The AO passed OIO and determined the value of service at Rs.332,909,169/- for the tax periods from July, 2013 to June, 2016 and assessed SST of Rs.49,893,275/- under section 23 of the Act alongwith payment of default surcharge under section 44 of the Act. The AO also imposed penalties of Rs.360,000/- (10000x36) under Serial No. 2 of the Table of section 43 of the Act, penalty of Rs.2,494,663/- (5% of Rs.49,893,275/-) under serial No. 3 of the Table of section 43(3) of the Act and penalty of Rs.2,494,663/- (5% of Rs.49,893,275/-) under serial No. 12 of the Table of section 43 of the Act.

14. The appellant challenged the said OIO before Commissioner (Appeals) by way of filing of appeal under section 57 of the Act. The Commissioner (Appeals) maintained the OIO to the extent of levying SST under Tariff Heading 9813.7000 for the tax periods after registration of the appellant and setaside the SST levied for the periods the appellant was not registered with SRB. The Commissioner (Appeals) also reduced the penalties imposed under Serial No. 2 and 3 of the Table under section 43 of the Act to the extent of Rs.180,000/- and Rs.60,000/- respectively and deleted the penalty imposed under Serial No. 12 of the Table under section 43 of the Act order. Hence, filing of these appeals by both the parties.

15. Mr. Talha Shahid, ITP the learned representative of the appellant submitted as under:-

- i. The appellant was a Lahore based company and had no office in Sindh and thus had not provided any services in Sindh as claimed in the SCN.
- ii. The appellant was in the business of importing ATM machines and providing the same to its clients on rental basis.



- iii. The appellant was registered with SRB on 13.01.2016 and was not liable to pay SST prior to date of its registration and the OIA in this regard was based on law.
- iv. The appellant was wrongly registered under Tariff Heading 9813.7000 (Automated Teller Machine operations, Maintenance and Management) and was not liable to pay SST as claimed by the department.
- v. The providing of ATM machines by the appellant on rental basis was not a taxable service in Sindh during the tax periods involved in this appeal.
- vi. The providing of ATM machines on rental basis was not covered under Tariff Heading 9813.7000. (Automated Teller Machines operations, Maintenance & Management) and the OIA in this regard was bad in law.
- vii. The renting of machinery, equipment, appliances and other tangible goods were brought to tax net by inserting Tariff Heading 9806.6000 to the Second Schedule to the Act vide Sindh Finance Act, 2019. Moreover sub section (72CC) of Section-2 of the Act was also inserted by the same Act and tax under a wrong heading could not be charged before that date.
- viii. The Tariff Heading 9806.6000 was not part of Second Schedule to the Act during the tax periods involved in this appeal. Thus no SST could be charged on the assumption and presumption of the department.
- ix. The certificate of Chartered Accountant produced by the appellant certifying the revenue earned in Sindh was ignored by both the forums and consequently SST was incorrectly levied.
- The Commissioner (Appeals) had not worked out the SST payable after the date of registration of the appellant and fell in legal error in leaving the same to be worked out by the AO after the disposal of the appeal.

16. Mr. Mehrab Khan, the learned AC-SRB submitted as under:-

- i. The appellant got voluntarily registration with SRB under Tariff Heading 9813.7000 and thus could not challenge the same.
- ii. The appellant despite voluntarily registration on 13.01.2016 neither deposited due SST nor filed monthly SST returns.

M. Mehrab Khan

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iii. The appellant before registration was liable to be registered as it had provided services in Sindh. Moreover the person liable to be registered was covered under the definition of registered person as provided sub-section (71) of Section-2 of the Act and deemed to be a registered person for the purpose of collection of SST.

iv. The person who had provided taxable services in Sindh without registration was not only liable to pay SST, but was also required to file monthly tax returns. It was thus liable to pay penalty under Serial No. 1 and 2 of the Table under section 43 of the Act.

v. The appellant without registration under section 24 & 24B of the Act had provided taxable services in Sindh and was liable to pay SST even before registration and the OIA to this extent was bad in law. he referred to para 8 of the Order of M/s Gulf Construction, Appeal No. AT- 20/2013 decided by this Tribunal.

vi. The charging of SST before registration of the tax payer was maintained by the Lahore High Court in the reported case of Commissioner Inland Revenue, Gujranwala versus M/s S.K. Steel Casting, Gujranwala, 2019 PTD 1493. This case was also confirmed by the Honorable Supreme Court of Pakistan.

vii. The stand of the appellant that it had provided ATM machines on rental basis was in contravention to the Financial Statements, Agreements and the sample Invoice submitted by the appellant. Thus the SST was rightly levied under Tariff Heading 9813.7000.

viii. The Commissioner (Appeals) erroneously and against the provision of Law held that no SST way payable before the date of registration.

ix. The Commissioner (Appeals) erroneously reduced the penalties imposed under Serial No. 2 and 3 of the Table under section 43 of the Act and deleted the penalty imposed under Serial No. 12 of the Table under section 43 of the Act.

x. The Commissioner (Appeals) failed to discharge his function by not determining the SST payable by the appellant and left the same to be determined by the AO after disposal of appeal.

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



18. The following points involved in this appeal require consideration:-
- Whether the appellant was liable to pay SST before the date of its registration with SRB?
 - Whether the services provided by the appellant were rightly taxed under Tariff Heading 9813.7000?
 - To what extent the services were provided in Sindh after registration?

19. The first point is "Whether the appellant was liable to pay SST before the date of its registration with SRB"? The discussions on this point are made as under:-

i. The Commissioner (Appeals) in his various orders has held that no SST was payable by a taxpayer before the date of its registration. Such orders have been confirmed by us and till date the same have not been set aside by the Honorable High Court in referential jurisdiction. Few of such orders are mentioned 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.

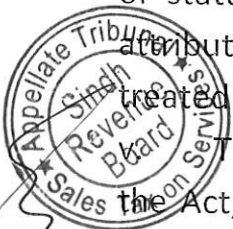
b) Appeal No.308/19, OIA No.109/2020, dated 02.12.2020, and Appeal No.456/2018, OIA No.110/2020, dated 02.12.2020, M/s Eber Link vs. Assistant Commissioner (Unit-01), SRB.

c) Appeal No.303/2019, OIA No.95/2019, dated 28.10.2020, M/s Tracking Work vs. Assistant Commissioner (Unit-01), SRB.

ii. The department levied SST for the tax periods from July-2013 to June-2016. Whereas the appellant had got voluntarily registration on 13.01.2016 under Tariff Heading 9813.7000. The tax periods from July-2013 to 12.01.2016 were prior to the date of registration of the appellant with SRB.

iii. The Contention of the AC was that the person liable to be registered was deemed to be a registered and fell within the definition of registered person provided under sub-section (71) of section 2 of the Act and was liable to pay SST even before its formal registration with SRB. This contention needs to be legally examined.

iv. The relevant provisions dealing with the assessment and registration are sub-section (1) of section 23, and sub-section (1) of section 24 of the Act. Moreover sub-section (71) of Section 2 of the Act provides that registered person means a person who is registered or is liable to be registered under this Act. Sub-section (1) of section 23 of the Act deal with the assessment of tax and contemplates that in case the registered person has not paid tax due on taxable services provided by him or has made short payment, the officer of SRB shall make an assessment order. Sub-section (1) of section 24 of the Act provided that registration will be required for all persons who are residents; and provide or render any of the services listed in the Second Schedule from their registered office or place of business in Sindh. If the above contention of the AC that the person liable to be registered was deemed to be registered person is accepted sub-section (1) of section 24 of the Act relating to registration and sub-section (1) of section 23 of the Act relating to assessment of registered person would become redundant which is legally not permissible. It is a cardinal principle of statutory interpretation that redundancy or superfluity must not be attributed to the Legislature, and that no part or word in a statute could be created as superfluous.



There is an apparent conflict between Sub-section (71) of section 2 of the Act, sub-section (1) of section 23 and sub-section (1) of section 24 of the Act. Sub-section (71) of section 2 is a general provision which is declaratory in nature, whereas sub-section (1) of section 23 of the Act particularly deals with assessment of tax when such tax is not paid by registered person. Moreover sub-section (1) of section 24 of the Act deals particularly with registration of all persons who are residents and provide services listed in the Second Schedule to the Act from their registered office or place of business in Sindh. The provisions of section 23 and 24 of the Act are specific provisions dealing with specific purposes i.e. assessment of registered persons and registration of the persons providing taxable services within Sindh and will prevail over sub-section (71) of section 2 of the Act. Furthermore in case of apparent conflict between the two provisions of the same Act the subsequent provisions i.e. section 23 and 24

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of the Act will prevail. In the reported case of Mst. Sakina Bibi versus Crescent Textile, PLD 1984 SC 241 it was held as under:-

"...Moreover, section 81 being a later provision would obviously control section 73 in case there is any conflict regarding the scope of both the provisions".

This view further gains support from the decision of Lahore High Court in the case of Commissioner Inland Revenue, Gujranwala vs. S.K. Steel Casting Gujranwala, 2019 PTD 1493 (relied upon by the AC-SRB) wherein it was held as under:-

".....16. Needless to say that under the law, a definition clause in a statute is of a declaratory nature. Though normally the definitions provided for in the definition clause are to be read into the provisions of the Act while interpreting the defined terms/words, but if the contents of the provisions of the Act indicate otherwise, the definition clause cannot override a main provision of the statute. Definition clause is foundational when construing provisions of law....."

vi. The status of definition clause was considered by the Honorable Supreme Court of Pakistan in the case of Chairman, Federal Board of Revenue versus M/s Al-Technique Corporation of Pakistan Limited, PLD 2007 SC 99 and it was held as under:-



It is settled that a definition clause is foundational when construing provisions of law. The definition given in the Act should be so construed as not to be repugnant to the context and would not defeat or enable the defeating of the purpose of the Act. It must be read in its context and the background of the scheme of the statute and the remedy intended by it".

It is therefore evident that the definition clause cannot override a main provision of the statute.

vii. 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 its registered office or place of business in Sindh. It is clear from mere reading of this section that it applies to the registered person and not to person liable to be registered and is not applicable to the appellant before its registration. Sub-section (2) of section 3 of the Act deals with the service that is not provided by a registered person and such service shall be

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treated as a taxable service if the same is listed in the second schedule to the Act and is provided to a resident person by a non-resident person. In the explanation appended below it was provided that this sub-section dealt with the services provided by non-resident persons to a resident person.

viii. It is thus apparent from the above provisions of the Act that the services recognized by law are those services which are provided by registered persons from its registered office or place of business in Sindh and such services are provided by a non-resident person to a resident person. However this provision does not recognize the service provided by a non-registered person.


ix. 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. Since the words used are "registered person" this sub-section was not applicable to the appellant prior to its registration with SRB. Sub-section (2) of section 9 of the Act provides 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 commencing with the word "Notwithstanding" 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.

x. The sub-section (1) of section 13 of the Act commences with the words "notwithstanding anything contained in this Act" and provided that 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 commences with the words "notwithstanding anything contained in this Act" and provided that 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, within such time and in such manner as may be specified in the notification. The provisions commencing with the word "notwithstanding" are treated as non-obstante clause and are usually used to indicate that such provision will prevail upon other provisions of the Act. By inserting sub-section (2) of section 13 of the Act the Board was authorized to shift the burden of payment of tax on any person.

xi. The words used in sub-section (2) of section 13 of the Act "require any person or class of persons, whether registered or not to withhold full or part of the tax charged". These words are indicative of the legislative's intention that where the legislature wants that the tax is to be withheld by non-registered person it was clearly mentioned in the section. The word "notwithstanding" is considered to be a non-obstante clause and was considered in the reported judgment of EFU General Insurance Company Limited versus Federation of Pakistan. PLD 1997 SC 700 wherein 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".*

xii. The Board with the approval of the Government of Sindh had framed Sindh Sales Special Procedure (Withholding Rules) 2011 (hereinafter referred to as the Withholding Rules, 2011) in exercise of power 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. However after these were repealed, the Board with the approval of Government of Sindh framed Sindh Sales Special Procedure (Withholding Rules) 2014 (hereinafter referred to as the Withholding Rules, 2014) effective from 01.07.2014. The tax periods involved from 01.07.2013 to 30.06.2014 was covered under



Withholding Rules, 2011 and the tax periods from 01.07.2014 to 30.06.2016 was covered under Withholding Rules, 2014.

xiii. The responsibility of withholding agent was provided under Rule 3 of the Withholding Rules, 2011. Sub-rule (3) of the rule 3 of the Rules, 2011 provided 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, shall on receipt of taxable services from unregistered persons, deduct sales tax at the applicable rate of the value of taxable services provided or rendered to him from the payment due to the service provider 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".

xiv. The responsibility of withholding agent was provided under Rule 3 of the Rules, 2014. Sub-rule (4) of the rule 3 of the Rules, 2014 provided that "a withholding agent having Free Tax Number (FTN) or National Tax Number (NTN) or Sindh sales tax registration number (STN) and falling under sub-rule (2) of rule 1, shall, on receipt of taxable services from unregistered persons, deduct the amount of sales tax, at the tax rate applicable to the taxable services provided or rendered to him, from the amount invoiced or billed or demanded or charged by such unregistered service provider 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 {under the tax fraction formula)".

xv. It is evident from reading both the above provisions framed under section 13 of the Act that these have overriding effect over other provisions of the Act it was clear that the responsibility for payment of SST was shifted upon the recipient of taxable service from unregistered person. Section 13 of the Act is a special provision which deals with the responsibility of payment of SST and has an overriding effect on the other provisions of the Act. In the reported judgment of State versus Zia-Ur-Rehman PLD 1973 SC 49 it was held as under:-



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"...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.

xvi. We have gone through the judgment of S.K. Steel relied upon by the AC as discussed supra. The operative part whereof reads as under:-

"...17. In view of the above, our answer to the proposed questions is that he combined reading of the provisions of the Act of 1990 and the Rules framed thereunder manifestly disclose the intention of the law maker that, where a person is liable to be registered, the applicant-department is first required to register that person compulsorily or otherwise in accordance with law, and then charge sales tax from it under section 3 of the Act, 1990, and may proceed against that person regarding prior to registration contravention of the provisions of the Act of 1990, if any. In that eventuality, tax payer shall be entitled to raise all factual and legal objections against the proceedings so initiated or to be initiated by the applicant-department which are not dealt with in this judgment".

xvii. The issue before the Court in the above judgment was whether the ATIR was justified to set aside the orders passed by both the authorities below holding that the Order-in-Original was finalized without registration compulsory registration, ignoring that a person liable to be registered was also included in the definition under section 25 (2) of the Sales Tax Act, 1990. It is apparent from the reading of the Order that where a person is liable to be registered, the department is first required to register that person compulsorily or otherwise in accordance with law, and then charge sales tax from it under section 3 of the Act, 1990. However regarding prior to registration contravention of the provisions of the Act of 1990, if any, could also be proceeded against that person. No impression appears that the Court had held that the tax before registration was to be charged.

xviii. The Withholding Rules 2011 as well 2014 by specific provision shifted the responsibility of deduction and payment of SST upon the service recipient and not upon the non-registered service provider. No such provision is available in the Sales Tax Act, 1990 or rules framed there



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under. Thus the facts of the reported case of S.K. Steel supra are not applicable.

xix. There is another provision i.e. sub-section (3) of section 15A of the Act which clarifies the position as under:-

“(3) No person other than a person registered under sections 24, 24A or 24B of this Act shall claim or deduct or adjust any input tax in respect of sales tax paid on any goods or services received or procured by him for use or consumption in the provision of taxable services”.

xx. The contention of the AC-SRB that “all persons providing taxable services within Sindh are deemed to be registered persons” if accepted than there was no need to enact section 24, 24A and 24B of the Act. The acceptance of contention of the AC-SRB in this regard will make these provisions of the Act redundant and nugatory. Redundancy or superfluity of an Act of Parliament and a provision of law cannot be readily accepted.

xxi. In view of the above discussions it is held that the appellant was not liable to pay/deposit SST before the date of its registration with SRB and the OIA is maintained in this regard.

20. The second point is “Whether the services provided by the appellant were rightly taxed under Tariff Heading 9813.7000”? The discussions on this point are as under:-

The company of the appellant was statedly a Lahore based company and got voluntarily registration with SRB on 14.01.2016 under Tariff Heading 9813.7000. The appellant at the time of voluntarily registration was fully aware about the services provided by it in Sindh. In the instant matter the SCN was issued on 13.03.2018 under section 23 of the Act for the recovery of principal amount of SST 49,893,275/- against the taxable services of Rs.332,909,169/- provided by the appellant.

ii. The appellant despite voluntarily registration neither paid/deposited the SST nor filed monthly sales tax returns. However apparently after receipt of SCN dated 13.03.2018 as an afterthought, and to avoid payment of SST changed its stance that it had not provided



services under Tariff Heading 9813.7000. The appellant in its reply admitted that it had provided services in Sindh during the year 2015 and 2016 but despite registration on 14.01.2016 did not deposit tax and file monthly sales tax returns. The appellant had not applied for change of service category from Tariff Heading 9813.7000 to other applicable Tariff Heading.

iii. The appellant even before us has failed to produce any convincing material or evidence in support of its contention that it had provided ATM machines on rental basis. The appellant had placed three agreements on record in support of its contention.

iv. The SST was levied on the basis of "Notes to the Audited Accounts". The Note 1 of the Audited Accounts provided that the appellant was engaged in principal activity of telecommunication system including installation of ATM system, signals, data or messages. This find support from clause 3 of Memorandum of Association which provided that *"To engage in setting up and operations of all kinds of Payments System related services like Electronic Payment Gate way, Payment Scheme, Clearing House, ATM Switch, POS gateway and Commerce gateway etc. and or acting as an intermediary for multilateral routing, switching and processing of payment transactions and to acquire any and all licenses, permissions, consents as may be applicable from time to time"*.

v. The first Agreement was executed between the appellant, National Bank of Pakistan (NBP) and Pakistan Army which was signed on 05.03.2009 for a period of five years. The term was extended for another two years Addendum dated 11.09.2014. The agreement provided that the NBP was interested in establishing and providing outsourced ATM and related services at Army Garrison in the country including Azad Jammu and Kashmir and Tribal areas at about 139 locations as per List attached as Annexure "D". The appellant as per the agreement was entitled to receive Rs.48,000/= per ATM per month and if the transaction exceeded 2000 per month than Rs.10.80 per successful and billable amount would be paid by the NBP to the appellant. In clause 5 of the agreement it was mentioned that the appellant was the absolute owner of the branded ATMs. The



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appellant as per the agreement was responsible for the smooth and uninterrupted and error free maintenance and continuous working of the ATMs. The appellant was also responsible for all the maintenance of the ATM hardware and software including repairing/replacing of any hardware and upgradation of the hardware and software. It was evident from the list of the Locations where ATMs were installed that atleast 21 ATMs were installed within the jurisdiction of Sindh and according to the working of the appellant for the tax periods from 01.07.2016 to 30.06.2017 it had received Rs.5,630,155/= from 9 active ATMs.

vi. The second Agreement was executed between the appellant and ABL on 13.03.2017 and provided that the appellant was a private limited company engaged in the business of "off premises ATM installation and software development". The Agreement further provided that the appellant "is desirous that the ABL should use the off-premises ATM operations to facilitate its prospective ATM card holders". The remuneration of the appellant fixed in the agreement was not rental but Rs.26/- per transaction/month. The appellant was exclusively responsible for the maintenance and continuous working of the dedicated communication line and the second line maintenance of the ATM hardware and software including replacement, repair and upgradation of hardware and software. As per the Schedule attached to the Agreement ATMs were installed at three places in Karachi-Sindh.

vii. The third Agreement was executed between the appellant and First Microfinance Bank (FMFB) on 11th September, 2017. In this agreement it was provided that Bank will pay a sum of Rs.29,500/= per ATM per month exclusive of any tax and for clarity any such tax shall be considered over and above Rs.29,500/=. The appellant as per this agreement was responsible for all maintenance of the ATM hardware and software including the repairing, replacing and upgradation of the hardware and software. Annexure D to this Agreement showed that ATMs were installed at Mirpursakro-Sindh, Karimabad-Karachi, Landhi-Karachi, Garden-Karachi, Dadu-Sindh and Aminabad-Hyderabad.



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viii. It is evident from the perusal of the above three agreements that these agreements were not simply for providing ATMs on monthly rental basis but the same were coupled with providing services. In all the three agreements the appellant was also responsible for the operation, management, maintenance, replacement of hardware, software and repairs of the machines. All these functions are covered under the definition of "automated teller machine operations, maintenance and management provided under sub-section (16) of section 2 of the Act, which provide as under:-

"(16) "automated teller machine operations, maintenance, and management" means a service provided in relation to automated teller machines and includes site selection, contracting of location, acquisition, financing, installation, certification, connection, maintenance, transaction processing, cash forecasting, replenishment, reconciliation and value added services;

ix. It is clear from the bare reading of the above provision that the services include operations, maintenance, and management". The service provided in relation to automated teller machines as discussed above is part of the above three agreements.

x. The conduct of the appellant is very important which deciding this appeal. In the instant case "the appellant by its conduct made the respondent believe that it had provided service under Tariff Heading 9813 7000". The appellant once voluntarily accepted to have provided the service in a specific category it could not deny the same and was under law estopped from changing the stand. Article 114 of the Qanun-e-Shahadat Order 1984 deals with such situation and read as under:-

"114. Estoppel: When one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing".

xi) It is now well established principal that no evidence is admissible in any proceeding to deny such fact for which any person, by his act and omission, intentionally caused or permitted the other party to believe the



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same to be true. The above provision of law was considered in the reported case of Dr. Muhammad Javaid Shafi versus Syed Rashid Arshad, PLD 2015 SC 212 and it was held as under:-

"8..... a person is estopped by his own conduct, if he though was aware of certain fact(s), which is likely to cause harm to his rights and adversely affect him and is prejudicial against him, avowedly or through some conspicuous act or by omission, intentionally permits and allows another person to believe a thing to be true and act on such belief without taking any steps to controvert or nullify such adverse fact and instead he sleeps over the matter. In other words, where a person who is aggrieved of a fact, he has a right, rather a duty to object thereto for the safeguard of his right, and if such a person does not object, he shall be held to have waived his right to object and subsequently shall be estopped from raising such objection at a later stage. Such waiver or estoppel may arise from mere silence or inaction or even inconsistent conduct of a person".

xi. We are conscious of the fact that the SST could not be levied on the basis of mere registration under a specific Tariff Heading but on the basis of actual service provided or rendered by the appellant. The burden was upon the appellant to prove that it had not provided service under Tariff Heading 9813.7000 but it has failed to discharge such burden.

xii. In view of the above discussions we hold that the Tariff Heading 9813.7000 (Automated Teller Machine, Operating, Maintenance and Management) was rightly invoked.

21. The third point is "To what extent the services were provided in Sindh after registration?" The discussions on this are as under:-

In para 19 supra we had already held that the appellant was not liable to pay SST before the date of its registration with SRB. The appellant was registered on 14.01.2016. The periods after registration for which the SST were payable were from 14.01.2016 to 30.06.2016.

ii. The AO in the OIO calculated the SST year wise and not on the basis of tax periods. The Commissioner (Appeals) in the concluding para of the OIA upheld that the appellant's registration under Tariff Heading 9813.7000 was correct whereas the tax amount of Rs.49,983,275/= was upheld to the

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extent of the tax periods falling after registration. The Commissioner (Appeals) had not worked out the liability for the tax periods after the registration and left it to the AO, which was improper approach. The Commissioner (Appeals) by virtue of sub-section (5) of section 58 of the Act may call for such particulars as he may require respecting the matters arising in the appeal or cause further inquiry to be made by the officer of SRB. Sub-section (2) of section 59 of the Act also gives power to Commissioner (Appeals) to make such further inquiry as may be necessary, provided he shall not remand the case for denovo consideration.

iii. The Commissioner (Appeals) after deciding that the appellant was liable to pay SST after registration, should had determined the SST, and he could not leave it to be determined by the AO after disposal of appeal by him.

iv. The perusal of the agreements revealed that the services were provided in the entire Pakistan and none of the forums below bifurcated the service revenue earned in Sindh and other provinces. The NBP in its reply to the AC submitted that an amount of Rs.281,604,085/= was paid to the appellant from 25.07.2013 to 02.06.2016, (out of which the SST was payable from 14.01.2016 to 02.06.2016), such amount pertained to across Pakistan. However this statement was not considered in its true perspective and for want of details from NBP the amount pertaining to Sindh and other provinces could not be bifurcated. The ABL in response to the query of AO disclosed that it had paid an amount of Rs. 70,832/= to the appellant during the period from January-2015 to Jun-2016. Out of this period the SST was payable from 14.01.2016 to 30.06.2016.

In view of the above discussions it is held that the appellant was liable to pay SST to the extent of the services provided or rendered by it in Sindh from the date of its registration i.e. 14.01.2016 onward under Tariff Heading 9813.7000. However, for want of proper details and value of services provided or rendered in Sindh after the date of registration the SST could not be determined by this forum.

22. In consequence of the above discussions the appeal filed by the appellant/taxpayer is partly allowed. The OIO and OIA are maintained to the


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extent of charging SST under Tariff Heading 9813.7000 after the registration of the appellant with SRB. The case is remanded to the AO to determine the value of services provided in Sindh after the date of registration of the appellant with SRB.

23. The AC in his appeal had challenged the portion of OIA by which the levy of SST prior to the date of registration was set aside and penalties were reduced. The question in respect of levying of SST prior to the date of registration has been replied in para 19 above. As far as the imposition of penalty and default charge under section 43 and 44 of the Act are concerned, since no demand was created in this order and the matter is remanded to the AO to pass fresh OIO no discussions is required in this regard. However, while passing fresh OIO the AO may consider imposition of penalty and default surcharge as per law and facts of the case. The appeal filed by the respondent/department has no merits and is dismissed.

24. The appeals are disposed of accordingly. The copy of the order may be provided to the learned representatives of the parties.


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER


Karachi:
Dated:16.11.2021

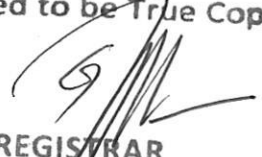
Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
- 2) The Assistant Commissioner, SRB, for compliance

Copy for information to:-

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


(Justice[®] Nadeem Azhar Siddiqi)
CHAIRMAN
Certified to be True Copy


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on 17/11/2021

Order Dispatched on 17/11/2021

Registrar

Registrar