

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD AT KARACHI
DOUBLE-BENCH-I

APPEAL NO. AT-20/2021

M/s House Building Finance Corporation,
(SNTN: 3098611-7),
3rd Floor Finance & Trade Centre,
Shahrah-e-Faisal, Karachi.....Appellant

Versus

Assistant Commissioner (Unit-11),
Sindh Revenue Board,
2nd Floor, Shaheen Complex,
M.R. Kiyani Road, Karachi.....Respondent

Date of filing of Appeal: 19.03.2021

Date of hearing: 15.12.2021

Date of Order: 06.04.2022

Mr. Ali. A. Raheem, (ITP) along with Mr. Aashan Zafar, (Manager Tax) for appellant.

Mr. Irfan Ahmed Sohu, AC (Unit-11), SRB along with Ms. Uzma Ghory, AC-DR, SRB for respondent.



ORDER

Justice[®] Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order-in-Appeal (hereinafter referred to as the OIA) No. 12/2021 dated 24.02.2021 passed by the Commissioner (Appeals) in Appeal No. 402/2019 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 779/2019 dated 25.11.2019 passed by Mr. Javed Ali Hingorjo, Assistant Commissioner, (Unit-11) SRB Karachi.

02. The facts as stated in the OIO were that the appellant was registered with Sindh Revenue Board (SRB) and was engaged in providing or rendering

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taxable services covered under Tariff Heading 9813.8100 (Others, including services provided or rendered by non-banking finance companies, modaraba and musharika companies and other financial institutions) of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) chargeable to Sindh Sales Tax (SST) at the applicable statutory rate read with rule 30 of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules).

03. It was alleged in the OIO that during the scrutiny of monthly sales tax returns and reconciliation with annual audited accounts ended December, 2016, it was observed that the appellant had not discharged due tax liability during the tax periods from January-2016 to December-2016. Such details are reproduced as under:-

Description	Jan-2016 to Jun-2016	July-2016 to December-2016	Total
Profit Commission from an insurance company	77,986,500	77,986,500	155,973,000
Inspection and application fees	8,647,500	8,647,500	17,295,000
Miscellaneous	14,835,000	14,835,000	29,670,000
Total value of services	101,469,000	101,469,000	202,938,000
Tax rate	14%	13%	
SST Payable	14205660	13190970	27,396,630
Value of services Declared	8,082,332	2,020,368	10,102,700
SST Declared	1,131,527	262,648	1,394,175
Short Declared Value of Services	93,386,668	99,448,632	192,835,300
Short Declared SST @ applicable rate	13,074,134	12,928,322	26,002,456

04. An observation letter dated 05.04.2019 was issued by SRB to the appellant in which it was advised to substantiate the facts and figures with supporting documentary evidences. However, the registered person failed

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to submit the satisfactory reply/compliance. Consequently, a Show-Cause Notice (SCN) dated 13.04.2019 was served upon the appellant to explain as to why the amount of SST of Rs.26,002,456/- should not be assessed and recovered under Section 23(1) and 47(1A) of the Act along with default surcharge under Section 44 of the Act. The appellant was also required to explain as to why penalties under Serial No. 2, 3, and 6(d) of the Table under section 43 of the Act should not be imposed for contravention of the provisions of the Act and the Rules.

05. The representative of the appellant filed reply dated 13.05.2019 and submitted that the appellant had charged and paid SST on the Inspection and Application Fee pertaining to the jurisdiction of Sindh and remaining amount pertaining to outside Sindh. It was further submitted that Miscellaneous Income was not liable to tax as same was not covered under the definition of taxable service. It was stated that the Commission from State Life was not liable to tax as the same was refund paid by it. The representative of the appellant appeared before the Assessing Officer (AO) and provided the copy of Renewal of State Life Insurance Agreement, State Life Agreement, BOD Extract and Profit / Commission payment. It was submitted that the appellant had charged SST on application processing and documents processing fee and had duly paid SST on it. He further submitted that the amount appearing in the miscellaneous income was not service income but was profit/interest earned on the loan given to the customers. It was stated that the appellant was not issuing any invoice for the processing fee but specialized deposit slip were issued by it on which customers paid the amount by filing that deposit slip. The representative of the appellant produced customer wise summary of the miscellaneous income pertaining to Sindh vide e-mail.

06. The Assessing Officer (AO) after hearing determined the SST at Rs.24,607,299/-, and directed the appellant to deposit that said amount of SST with SRB under section 23 of the Act along with the default surcharge under section 44 of the Act. The AO also imposed penalty of Rs.120,000/= under Serial No. 2 of the Table under section 43 of the Act, penalty of Rs.1,230,365/= under Serial No.3 of the Table under section 43 of the Act,



and penalty of Rs.50,000/= under Serial No. 6(d) of the Table under section 43 of the Act.

07. The appellant challenged the said OIO by way of filing of appeal under section 57 of the Act before Commissioner (Appeals), SRB who upheld the OIO. Para 17 of the OIA is reproduced for ready reference as under:-

"...17. In view of the foregoing, I see no reason to interfere with the impugned OIO and accordingly uphold the same in toto, without any modifications. Respondent department may verify the amounts said to have already been recovered in the matter, as hinted above, and may also proceed for recovery of the balance recoverable amounts in the matter, if any, as per law and procedure. The Appeal stands disposed accordingly".

Hence, filing of this appeal by the appellant.

08. Mr. Ali Raheem, ITP the learned representative of the appellant submitted as under:-



The instant appeal pertained to tax periods from January-2016 to December-2016, and no SCN was served upon the appellant for these periods.

The SST was levied on Inspection and Application Fees on Pakistan basis without properly bifurcating the share of Sindh and without considering that the same was without element of service. Moreover the details provided in this regard were ignored by the AO as well as Commissioner (Appeals).

- iii. The SST was also charged on Miscellaneous Income comprising of House Building Advance to staff, conveyance advance to staff, amount forfeited from employees / staff for leaving the service without provision of notice, and Interest charged from customers on account of advance payment and no element of service was involved.
- iv. The SST was erroneously charged on the reimbursement received from State Life Insurance in terms of the Agreement. There was no element of providing any service to the State Life, nor the same could be highlighted.

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- v. The SST was charged only on the basis of figures available in the financial statement without linking the same with the provision of service.
- vi. The SST could only be charged on the services provided or rendered in furtherance of such taxable activity which involved the provision of service from one person to another person.
- vii. The SST was charged without establishing the element of provision of service.
- viii. The department imposed heavy penalties without establishing mensrea on the part of the appellant.
- ix. The assessment for the tax periods 2015 was finalized on the basis of services provided in Sindh.

09. Mr. Irfan Sohu, AC-SRB for the respondent submitted as under:-

- i. The SCN was properly served upon the appellant and in response its representative had filed reply through email and submitted details and documents which were duly considered.
- ii. The OIA and OIO were properly passed after providing full right of hearing to the representative of the appellant.
- iii. The assessment was finalized under three heads viz, Profit/Commission from Insurance Company, Inspection and Application fees and Miscellaneous. Moreover the element of provision of services were available.
- iv. The appellant received commission from State Life for acquiring insurance policies for its customers.
- v. The entire services provide or rendered were from Sindh and the SST on the whole amount of services were rightly taxed in Sindh.
- vi. The appellant had failed to provide the complete record of the receipts on account of inspection and application fees. Moreover charging of SST on the basis of financial statement was found correct.
- vii. The appellant had not provided the complete record of the receipts on account of Miscellaneous. This account comprised of Markup on House Building Advance, Markup on Conveyance

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Advance, Miscellaneous Income and Advance Unit Purchase Charges.

- viii. The appellant had failed to provide supporting documents and details in support of its contention that no element of services was involved. Thus the SST was levied as provided under rule 30 of the Rules.
- ix. The default surcharge and penalties were rightly imposed as the mensrea was apparent from record.

10. The learned representative of the appellant in rebuttal submitted that the onus lied upon the Department to establish the availability of the element of provision of service. However the department has miserably failed to discharge its onus. The department has not placed any record or document in its support except the financial statement. Moreover the department has already recovered an amount of Rs.30,234,579/- by way of attachment of bank account as against the SST determined at Rs.24,607,299 and penalty of Rs.1,400,365 (total demand Rs.26,007,664/-). The amount recovered by the department was not payable by the appellant and the department is liable to refund the same to the appellant.

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

12. The appellant is an Institution providing loan for House building/purchasing and other related functions all over Pakistan and its head office is situated at Karachi. The SCN was issued to the appellant on the basis of entries available in the annual audited accounts ended December-2016 and it was alleged that during the tax periods from January-2016 to December-2016 the appellant had short paid SST of Rs.26,002,456/=.The contention of the appellant was that it had charged and paid SST of Rs.6,509,908/- on account of inspection and application fee which pertained to the jurisdiction of Sindh and remaining amount pertaining to outside Sindh. It was further submitted that Miscellaneous income and commission from State Life was not liable to tax as same was



not covered under the definition of taxable service. The SST was charged on the following heads:-

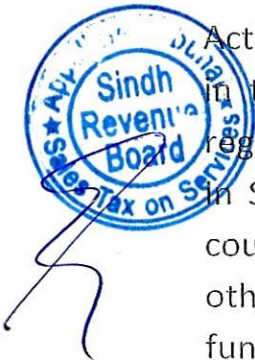
(i) Inspection and Application Fee.

a. The AO In para 6.1 of the OIO stated as under:-

6.1 Inspection and Application Fee. The registered person has duly deposited the SST in SRB on the income from inspection and application fee to the extent of value of service of Rs.6,960,508/= and the remaining revenue has earned from out of Sindh jurisdiction, and provided the bifurcation/summary of revenue pertaining to Sindh and out of Sindh.

Despite the conclusion drawn by the AO in respect of above head the SST was not reduced and the SST was charged on the full amount. In this regard sub-section (1) of section 3 of the Act clearly provided that the taxable service is a service listed in the Second Schedule to this Act, which is provided by a registered person from its registered office or place of business in Sindh. The service which was provided in other provinces could not be taxed in Sindh even if no service tax was paid in other provinces. It was not disputed that the appellant functioned in all provinces of Pakistan. Sub-section (3) of section 3 of the Act provided that for the purpose of sub-section (2), where a person has a registered office or place of business in Sindh and another outside Sindh, the registered office or place of business in Sindh and that outside Sindh shall be treated as separate legal persons. It is therefore clear from this provision that the other office situated in other provinces had nothing to do with the office in Sindh and the SST could only be charged and collected on the services provided in Sindh.

b. The approach of the SRB that since the appellant was not registered and not paying service tax in other provinces was liable to pay SST on entire amount in Sindh was not correct



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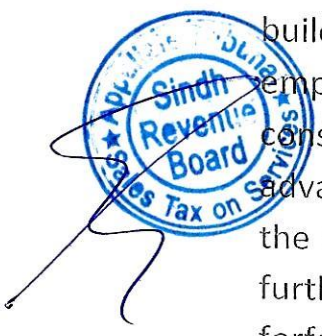
and is against the above quoted provisions of law. The law is clear that the registered office or place of business in Sindh and that outside Sindh are two different and separate legal persons/entities and their activities could not be clubbed for the purpose of charging and collecting SST in Sindh.

- c. In view of the above discussions it is held that the appellant is only liable to deposit SST with SRB on the services which were provided or rendered from the registered office or place of business in Sindh and not otherwise. Moreover since the appellant has already paid SST of Rs.6,509,908/- thus no further tax is payable on this account.

ii. MISCELLANEOUS INCOME

- a. This head includes several other sub-heads as explained by the appellant for which necessary details were duly provided. This head included the receipts received from markup on house building advance charged on the loans provided to the employees of the appellant for the purpose of purchase / construction of houses. It also included markup on conveyance advance charged on the loans provided to the employees of the appellant for the purpose of acquiring motor vehicles. It further included Miscellaneous Income on account of forfeiture from employees who resigned without serving required notice and advance unit purchase charges on account of balloon payment (early payment).

- b. It is therefore evident from the above description that the receipts from above sub-heads did not relate to providing or rendering of services. The above sub-heads may be income of the appellant but surely were not a taxable activity as provided under Section 3 read with Section 4 of the Act. The SST could not be charged on income of a taxpayer, but it was restricted on the value of services provided or rendered in furtherance of economic activity as provided under sub-section (1) of section 4 of the Act. This section provided that an economic activity



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carried on by a person that involves or is intended to involve the provision of services to another person and includes an activity carried on in the form of an business, including an profession, calling, trade or undertaking of any kind, whether or not the activity is undertaken for profit.

- c. Considering the description mentioned above it is clear that no element of services is involved and we hold that no SST could be charged on Miscellaneous Income.

iii. **Profit from State Life Insurance.**

- a. The appellant had produced the copy of Agreement dated 20.8.2008 entered into between the appellant and the State Life Insurance. It was submitted that the profit received from insurance company was erroneously treated as commission against sale of insurance policies. It is evident from perusal of the Agreement that the appellant was not involved in selling the policies of the State Life to its customers nor it was concerned with the recovery of premium.

The recital of the Agreement provided that the parties have agreed to implement a scheme of Group Term Assurance (Scheme) whereby the lives of customer and/or the lives of their guarantors who avail financial facility under Ghar Assan (Flexi) scheme were to be insured under the terms, covenants and conditions provided in the Agreement.

- c. If further appeared from the contents of the Agreement that the appellant had entered into the Agreement with State Life to safe guard itself from financial losses which it may suffer due to death or permanent disablement of the customers of the appellant. Thus as per the Agreement the appellant was liable to pay premium to State Life and in case of any claim, the State Life would make payment to appellant and not to customer.
- d. It is pertinent to mention that the clause 14 of the Agreement provided a mechanism for sharing the profit and loss between



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the appellant and the State Life. The clause provided that the profit would be shared 90%-10% between the appellant and State Life and in case of loss the same will be carried forward to the subsequent periods.

- e. It is evident that the appellant had neither facilitated the sale of insurance policies nor had acted in any way as an agent of the State Life in selling the policies. The appellant was itself a party to the Agreement and the Agreement was entered to safe guard the appellant from losses.
- f. Considering the above discussions it is held that no element of service is involved in entering in an Agreement by the appellant with State Life Insurance and sharing the profit. However if any profit was received by the appellant the same does not fall in any taxable activity relating to services.

13. It is now well established point of law that before a person could be made liable for the payment of tax or any levy, it must be clearly shown that it falls within the category as it is made liable under the law. It is also a trite principle of interpretation of a taxing statute that charging provisions are required to be construed strictly and a tax on any person is to be levied by clear and unambiguous words and the expressions used in charging sections. Moreover such sections are not to be stretched by any process of interpretation, so as to bring a person within the tax net who otherwise was not falling under the clear and plain language of the statute. Similarly it is also a trite principle of interpretation of taxing statute that if there is any ambiguity the same has to be resolved in favour of tax payer. It may be noted that there is no intendment or presumption about a tax and the matter is has to be decided by the language clearly employed by the legislature in the fiscal laws.

14. In this instant case except the inspection and application fee the miscellaneous income and profit from State Life are not taxable services and cannot be taxed nor any SST could be charged.

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15. The department during the pendency of appeal before the Commissioner (Appeals) had recovered an amount of Rs.30,234,579/-. The amount was recovered without providing right of hearing before an independent forum. This action is in contravention to law and procedure as held by various decisions of the superior courts as under:-

- i. 2003 PTD 1746 (Lahore High Court) ZN Export vs. Collector Sales Tax, Section 46(4) of Sales Tax Act, 1990.

"I will agree that before a recovery created by an impugned order by a Department Authority can be effected, an assessee, appellant must be heard by a forum outside the departmental hierarchy. The Tribunal as a forum of first appeal having not disposed of the appeal, the petitioner cannot be blamed on that account. In all fairness, equity and justice, an assessee should not be forced to pay a demand created by Revenue Authority unless the order creating such demand has undergone the scrutiny of at least one independent forum".

- ii. 2006 PTD 2721 (Lahore High Court) SS Tanneries vs. Assistant Collector Sales Tax. In this matter relying on the judgment in the case of ZN Export supra held that "2..... admittedly in this case the impugned liability has been determined by the officers of the respondent-Department and the remedy of the petitioner before the learned Appellate Tribunal provides the independent adjudication of his challenge to the impugned tax liability".

- iii. 2016 PTD 1799 (Isb. HC SB) Huawei Technology Pak vs. Commissioner Inland Revenue.

"6. In view of the aforementioned principle that has been consistently followed by this court in a number of decisions, no coercive measures are to be adopted for recovery of the disputed tax liability till the decision by an independent forum taken".

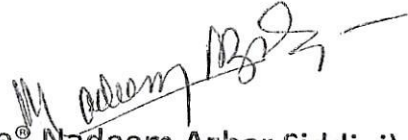
16. In view of the above discussions the instant appeal is allowed. The appellant had already paid/deposited the SST on the services provided in Sindh. The Department has erroneously recovered an amount of

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Rs.30,234,579/= from the appellant which should be properly verified and refunded to the appellant within sixty days from the date of receipt of the copy of this order.


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER


(Justice Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi:

Dated:06.04.2022

Certified to be True Copy


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
- 2) The Assistant Commissioner, (Unit-11), SRB, for compliance

Copy for information to:-

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

Order Issued on

07/04/2022

Registrar

Order Dispatched on

07/04/2022

Registrar