

(Original file)

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD AT KARACHI

DOUBLE-BENCH-I

APPEAL NO. AT-21/2021

M/s Cyber Tech Communication
Suit No. 103-104-105,
1st Floor, Kawish Crown, PECHS,
Shahrahe-Faisal,
Karachi.....Appellant

Versus

Assistant Commissioner (Unit-04),
Sindh Revenue Board, 3rd Floor,
Shaheen Complex, M.R. Kiyani Road
Karachi.....Respondent

Date of filing of Appeal: 24.03.2021
Date of hearing: 13.09.2021
Date of Order: 30.09.2021

Mr. Vishno Raja, Advocate and Syed Riazuddin, Advocate for appellant.

Mr. Mukhtiar Memon, AC (Unit-04), SRB along with Mr. Nasir Bachani, 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. 10/2021 dated 27.01.2021 passed by the Commissioner (Appeals) in Appeal No. 319/2019 filed by the Appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 495/2019 dated 18.06.2019 passed by Mr. Imtiaz Ali, Assistant Commissioner, (Unit-04) SRB Karachi.

02. It was stated in the OIO that the appellant was engaged in rendering and providing services under the services category of "Call Centre Service" covered

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under Tariff Heading 9835.0000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act), which was chargeable to Sindh sale tax (SST) at standard rate and the export of call center service was chargeable to reduced rate of 3% w.e.f. 01.07.2017 under section 8 read with section 3 of the Act and the Rules made thereunder.

03. It was alleged in the OIO that during the scrutiny of record i.e. Proceeds Realization Certificates (PRCs) provided by the appellant for the period of July-2015 to April-2018, it was observed that the appellant had provided taxable services of "Call Centre and Telecommunication services" to various clients amounting to Rs.61,072,654/- involving SST of Rs.8,291,999/-, whereas, monthly sale tax returns filed with Sindh Revenue Board (SRB) revealed that it had merely deposited SST amounting to Rs.566,224/-, which resulted in short payment of SST of Rs.7,725,775/-. The said discrepancies were duly communicated to the appellant vide letter/notice dated 13.12.2018, and the appellant was directed to deposit aforementioned SST along with default surcharge under section 44 of the Act with SRB. However, the appellant deposited Rs.500,000/- vide four CPRs dated 25.02.2019 leaving balance of SST of Rs.7,225,775/-

04. The appellant was served with a Show-Cause Notice (SCN) dated 18.04.2019 under section 23 of the Act to explain as to why principal amount of SST Rs.7,225,775/- should not be assessed and recovered along with default surcharge (to be calculated at the time of payment) under section 44 of the Act. The appellant was also asked to explain as to why penalty under Serial 3 of Table under section 43 of the Act, 2011 should not be imposed for contravention of the provisions of section 3,8,9 & 17 of the Act read with rule 14 of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules).

05. The appellant filed written reply to the SCN dated 23.01.2019 and made following submissions:-

- a) That the registered person has provided/exported the software or IT services which are covered under Tariff Heading "9815.6000" and the export of such services were exempted from levy of Sindh Sales Tax vide notification No.SRB-3-4/7/2013 dated June, 18, 2013.

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06. The Assessing Officer (AO) passed the OIO and assessed and determined the SST under section 23 of the Act at Rs.7,225,775/- on account of provision of call center services during the captioned tax periods and ordered the appellant to deposit SST along with the default surcharge (to be worked out at the time of payment of principal tax) under section 44 of the Act. The AO also imposed penalty of Rs.386,289/= under serial No. 3 of Table under section 43 of the Act.

07. The appellant challenged the said OIO before Commissioner (Appeals), SRB by way of filing appeal. The Commissioner (Appeals) after hearing the parties, dismissed the appeal filed by the appellant and the OIO was fully maintained, hence this appeal.

08. Mr. Vishno Raja the learned Advocate for the appellant submitted as under:-

i) The appellant got voluntarily registration on 09.11.2018 and the tax periods in this appeal were from July-2015 to April-2018. The appellant was not registered for this relevant period and was therefore not liable to pay SST.

ii) The appellant was providing software and IT based services development outside Pakistan and foreign proceeds were received through banking channels in the appellant's business bank accounts on exported services. These foreign proceeds were duly reported by the Appellant's banks to the State Bank of Pakistan as per prescribed procedure.

iii) The said IT based export of services falling under Tariff Heading 9815.6000 were exempted from payment of SST vide SRB Notification No. SRB-3-4/7/2013 dated 18.06.2013.

iv) The telephone bills of the appellant proved that the appellant was not in the business of providing call center service, as no foreign calls were mentioned in the bills.

v) The SST was levied only on the basis of Proceed Realization Certificates (PRC) of Soneri Bank and Habib Bank without considering Form "R" of those banks which clearly reflected that the appellant had provided IT software consultancy services, Code 9182.

vi) The PRCs issued by Soneri Bank showing Code-9102 was rectified showing correct Code-9182 for the current year only. However Soneri



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Bank kept such request for rectification pending for the tax periods involved in the appeal.

vii) The appellant was registered as IT Services provider with Pakistan Software Export Board and such Certificate was produced in support of its contention.

viii) The SST was levied only on the basis of registration of the appellant without examining into question of actual services provided by the appellant.

09. Mr. Mukhtiar Memon, the learned AC-SRB submitted as under:-

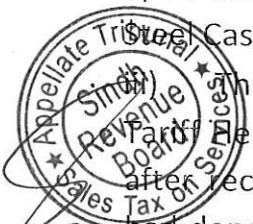
i) The ground that the appellant was not registered during the tax periods involved in this appeal was not taken before the AO, Commissioner (Appeals) and even before this forum. However such ground could not be taken at this belated stage.

ii) The appellant was covered under the definition provided in subsection (71) of Section 2 of the Act which provided that a person liable to be registered was deemed to be a registered person. Therefore such person was liable to pay SST from the date it had provided taxable service in Sindh and in support of this contention reliance was placed upon the case of Commissioner Inland Revenue, Gujranwala versus S. K. Steel Casting. Gujranwala, 2019 PTD 1493 of DB, Lahore High Court.

iii) The appellant got voluntarily registration on 09.11.2018 under heading 9835.0000 (services provided or rendered by call centres) after receipt of SCN dated 13.09.2018 for compulsory registration and had deposited SST and filed SST returns showing the service category of "call centres".

iv) The appellant was served with notice/letter dated 13.12.2018 through which it was intimated regarding the call centres and telecommunication services provided by it. The appellant had voluntarily, without any reservation deposited Rs.500,000/=. However it had failed to deposit the balance amount and thus the plea that it was providing export of IT based services was afterthought.

v) The exemption was available to the services provided under Tariff Heading 9815.6000 to the software or IT-based system consultant on export of services outside Pakistan.



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vi) The SST was rightly levied on the basis of PRCs issued by Soneri Bank Limited and Habib Bank Limited with Code-9102 (Call Centres) whereas Code-9182 relates to receipts on account of export of computer software.

vii) The main function of call centers was to receive calls on behalf of their clients and submission of telephone bills stating that they had not made calls at this stage has no bearing on the merits of this case.

viii) The appellant voluntarily paid SST from July-2018 till November-2018 on account of services of call centres and thereafter stopped paying SST nor it filed its monthly SST returns.

ix) The appellant applied on 08.04.2019 for change of service category from Tariff Heading 9835.0000 to Tariff Heading 9815.6000 which was approved on 04.12.2020 as secondary service category while maintaining the original service category. The change was applied and allowed subsequently to the tax periods involved in this appeal and, thus has no retrospective effect.

10. In reply the learned advocate for the appellant submitted that the legal ground is related to the jurisdiction of SRB to levy SST, which does not require factual inquiry could be raised at this stage and the date of registration is reflected in the OIO and the Registration Profile of the appellant and the Commissioner (Appeals) should, had taken judicial notice of the same.

We have heard the learned representatives of the parties and perused the record made available before us and the written submissions submitted by the appellant and statement filed by the AC.

12. The core dispute is the nature of services provided or rendered by the appellant during the tax periods involved in this appeal. The appellant after getting voluntarily registration and paying SST for some time under service category of "call centres" changed its stand after receipt of SCN and claimed that it had provided services of software or IT based system development consultants, Tariff Heading 9815.6000. However during the hearing of the appeal the advocate for the appellant raised a VERBAL ground that no SST could be levied before the date of registration of the appellant with SRB.



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13. The legal points involved in this appeal, which requires consideration are as under:-

- i) Whether the ground not raised before the forums below could be raised for the first time verbally before this Tribunal?
- ii) Whether the appellant was liable to pay/deposit SST before the date of its registration with SRB.

14. We will first take up the first point: "Whether the ground not raised before the forums below could be raised for the first time verbally before this Tribunal?". The discussions on this point are as under.

- i) The contention of the AC is correct that this ground was not raised before the forums below and this was first time that this point was verbally raised before this forum. It is true that section 61 and 62 of the Act do not provide for allowing additional grounds after filing of the appeal as provided under sub-section (3) of section 58 off the Act. However the Act does not prohibit raising of additional ground after filing of the grounds of appeal. This is a legal ground related to the jurisdiction of SRB and goes to the route of the case. The jurisdiction means to hear and decide the controversy between the parties in accordance with law. The point of jurisdiction is very important and every authority before proceeding with the matter is required to determine its jurisdiction and this should not be left to be raised by the parties. In the reported case of Khyber Tractors versus Pakistan, PLD 2005 SC 842 it has been held as under:-

"The question of jurisdiction of a forum is always considered to be very important and any order passed by a Court or forum, having no jurisdiction, even if it is found to be correct on merits, is not sustainable".

- ii) The department could exercise jurisdiction and levy SST on a service if the same is listed in the Second Schedule to the Act and was provided by a registered person from its registered office or place of business in Sindh. Unless these two conditions are met the department could not assume jurisdiction for the purpose of levying SST. In the reported case of Rashid Ahmad versus State, PLD 1972 SC 271 the



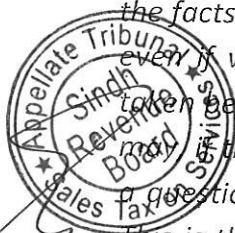
Honorable Supreme Court relying on the observation made in the case of Mansab Ali v. Amir and others, PLD 1971 SC 197 held as under:-

"It is an elementary principle that if a mandatory condition for the exercise of jurisdiction by a Court, tribunal or authority is not fulfilled, then the entire proceedings which follow become illegal and suffer from want of jurisdiction. Any order passed in continuation of these proceedings in appeal or revisions equally suffer from illegality and are without jurisdiction. The learned Advocate-General fully supported this view and asked for dismissal of the appeal."

iii) The ground urged by the appellant is a legal ground. The Tribunal is vested with the power to decide factual as well as legal issues. Moreover the legal ground could be raised at any stage of proceedings and the Act does not specifically prohibit raising of additional ground at later stage. The additional ground raised by the appellant does not require any factual enquiry and matter could be resolved on the basis of material available on record. In the reported case of Caltex Pakistan Limited Versus Collector, Central Excise and Sales Tax it was held as under:-

"6. This is settled principle of law that a question of law arising out of the facts of the case relating to the fundamental issues involved therein, even if was not raised before the lower forum can be allowed to be taken before the higher forum and this Court for doing complete justice in the facts and circumstances of a case so demand, allow to raise a question of law which was not as such taken before the High Court. This is the duty of the Court seized of the matter, to apply the correct law to meet the ends of justice".

iv) The ground raised by the appellant is not a mere technicality since it goes to the root of the case as by levying SST for the tax periods before the date of registration the department had committed an illegality which was not permissible under the Act. It is now well established principal of law that the technicalities should not come in the way of dispensation of justice and every procedure not prohibited by law could be adopted. The Honorable Supreme Court of Pakistan in the reported case of Imtiaz Ahmad versus Ghulam Ali, PLD 1963 SC 382 has held as under:-



".....the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it be essential to comply with them on ground of public policy.....Any system which by giving effect to the form and not the substance defeats substantive rights (and) is defective to that extent".

v) The raising of additional grounds subsequent to filing of appeal is a matter of procedure and could be allowed to be raised to meet the ends of justice. In view of the above discussions the appellant was allowed to raise additional ground.

15. Now we will take up second point for discussions: "Whether the appellant was liable to pay/deposit SST before the date of its registration with SRB?". The discussions on this point are as under:-

i) The department levied SST for the tax periods from July-2015 to April-2018. The appellant got voluntarily registration on 09.11.2018 and the tax periods involved were prior to the date of its registration. The contention of the AC is that the person liable to be registered falls 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.



The relevant provisions dealing with the registration and assessment 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 provide 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; provided they render any of the services listed in the Second Schedule from their registered office or place of business in Sindh. If the contention of the AC is accepted sub-section (1) of section 24 of the Act relating to

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registration and sub-section (1) of section 23 of the Act relating to assessment of registered person become redundant which is not permissible.

iii) 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 if not paid by registered person. However 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 of the Act dealing with specific purposes i.e. assessment of registered persons and registration of the Act 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 provision 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 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....."

v) The status of definition clause was considered by the Honorable Supreme Court in the case of Chairman, Federal Board of Revenue

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versus M/s Al-Technique Corporation of Pakistan Limited, PLD 2017 SC 99 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".

vi) In the instant case the SCN was issued 18.04.2019 under section 23 of the Act for the recovery of principal amount of SST of Rs.7,225,775/-. As discussed above the assessment order could be passed only against a registered person and not against a non-registered person or person liable to be registered.

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

a) Appeal No.73/2018, OIA No.97/2020 M/s Sinopec International vs. Assistant Commissioner (Unit-03), SRB dated 03.11.2020.

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

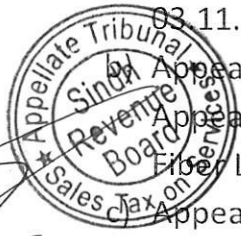
c) Appeal No.303/2019, OIA No.95/2019, dated 28.10.2020, M/s Tracking World vs. Assistant Commissioner (Unit-01), SRB.

viii) 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. The Commissioner, SRB.

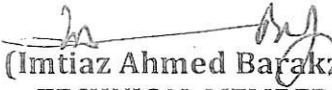


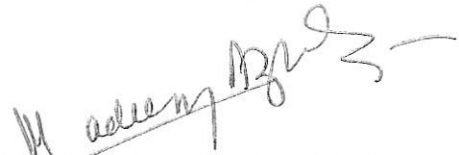
ix) In view of the above discussions it is held that the appellant was not liable to pay / deposit SST before the date of registration with SRB.

16. It is pertinent to mention that the Department needs to elaborate during the subsequent tax periods whether the economic activity performed by the appellant was covered under Tariff Heading 9845.0000 or Tariff Heading 9815.6000? We are of considerate view that 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 lies upon the appellant to prove that it had provided service under Tariff Heading 9815.6000 and not under Tariff Heading 9835.000. However since legal grounds were raised and considered in the instant appeal therefore factual grounds have not been taken up.

17. In view of the above discussions, it is held that no SST could be levied for the tax periods prior to the date of registration, thus the appeal is allowed and the OIO and OIA are setaside.

18. 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
Certified to be True Copy

Karachi:

Dated: 30.09.2021

Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative
- 2) The Assistant Commissioner, (Unit-04), SRB, for compliance

Copy for information to:-

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


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on 26/10/2021

Order Dispatched on 26/10/2021

Registrar

Registrar