

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD, AT  
KARACHI

Double Bench - I

APPEAL NO. AT-34/2021

M/s Wemsol (Private) Limited  
Karachi.....Appellant

**Versus**

The Assistant Commissioner (Unit-28), SRB  
Karachi.....Respondent

Date of Filing of Appeal: 22.06.2021

Date of hearing: 15.09.2021

Date of Order: 22.09.2021

Mr. Iftakhar Hussain Advocate and Mr. Shamim Siddiqui Advocate for appellant.

Ms. Rafia Urooj, AC-SRB and Ms. Uzma Ghory, AC-DR for respondent.

ORDER

**Imtiaz Ahmed Barakzai:** This appeal has been filed by the appellant challenging the Order-in-Appeal (hereinafter referred to as the OIA) No. 34/2021 dated 29.04.2021 passed by the Commissioner (Appeals) in Appeal No. 133/2020 filed by the appellant against Order-in-Original (hereinafter referred to as the OIO) No. 226/2020 dated 22.10.2020 passed by Mr. Muhammad Ali Siddiqui, Assistant Commissioner, (Unit-28) SRB Karachi.

The brief facts of the case as stated in the OIO were that the appellant was registered with Sindh Revenue Board (SRB) under the category of "Software and IT System Development Consultant" Tariff Heading "9815.6000" of the Second

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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 rate.

03. It was alleged in the OIO that during the course of reconciliation of the documents provided by the appellant, it had surfaced that the appellant had charged the SST, but failed to deposit the same with SRB. Such details as provided by the registered person vide letter dated 25.11.2018 are mentioned here in under:-

Period	TRANSACTION VOL	Gross/ MDR/commission/ Service charges	SALES TAX
Period 2016-2017	5,431,786,870	88,584,779	12,801,395
Period 2017-2018	25,499,268,611	409,444,601	60,121,738
Period 2018-2019	57,601,760,825	914,196,328	134,853,517
	<b>88,532,816,306</b>	<b>1,412,225,707</b>	<b>207,776,651</b>

04. It was further alleged that in view of the taxability of the aforementioned service, liability to pay the SST and the mandatory obligation to e-file the true and correct SST returns, the appellant had neither declared the aforementioned service nor have deposited the SST and same tantamount to tax fraud read with section 2(94) of the Act.

05. It was further alleged that despite providing sufficient opportunities, the appellant had failed to deposit the SST amounting to Rs. 207,776,651/-. Therefore, the appellant was served with Show-Cause Notice (SCN) dated 26.12.2019 to explain as to why the aforementioned amount should not be assessed and recovered under section 23 and 47 of the Act. The appellant was called upon to explain as to why penalty under Serial No. 3, 6(d) and 12 of section 43 of the Act should not be levied and recovered along with default surcharge under section 44 of the Act.

06. The appellant submitted written reply dated 02.01.2020 and 16.03.2020 respectively through its representative. Thereafter the appellant was served with Notice dated 16.07.2020 under Section 52 of the Act by the Department for production of documents pertaining to their previously submitted agreement with SRB.



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07. During the course of proceedings, the registered person has repeatedly contended that the confronted amount of Sindh Sales Tax of Rs. 207,776,651/- has been deposited by M/s Bank AL HABIB, being a settlement bank partner, on their behalf, in the respective treasuries including SRB. They emphasized that the corresponding SST (as confronted in the SCN) has been duly discharged directly / indirectly and the question of payment of SST for the same service/transaction tantamount to double taxation. Their calculation sheet is tabulated for ready reference as under:-

	Sales Tax on Services rendered by Wemsol Bank in areas						Total
	For ICT territory deposited in FBR Multan	For Sindh Provinces deposited in Sindh (SRB)	For Punjab Provinces Deposited in Punjab Revenue Authority	For KPK Provinces Deposited in Khyber Pakhtunkhwa (KPK)	For Balochistan Provinces Deposited in Balochistan Revenue Authority	For AK territory Deposited in Mirpur AK Territory	
2016-17	1,005,254	6,588,076	5,499,946	18,032	5,615	2,790	13,119,712
2017-18	6,554,338	23,115,207	29,608,841	351,438	58,470	37,588	59,725,882
2018-19	16,346,387	48,812,243	67,276,371	1,391,449	216,039	261,667	134,304,155
Total	23,905,979	78,515,526	102,385,157	1,760,918	280,124	302,046	207,149,749

08. The above contention of the appellant regarding payment of SST by Bank AL-Habib was out rightly rejected as per the OIO for being baseless and misleading. The Assessing Officer (AO) passed OIO determining the SST at Rs.207,776,651/= under section 23 and 47 of the Act alongwith default surcharge under section 44 of the Act. The AO also imposed penalty of Rs.10,388,832/= under Serial No. 3 of the Table under section 43 of the Act. The AO also imposed penalty of Rs.207,776,651/= under Serial No. 6(d) of the Table under section 43 of the Act.

09. The appellant challenged the said OIO before Commissioner (Appeals), SRB by way of filing of appeal. The Commissioner (Appeals) passed OIA and conditionally dropped all the allegations against the appellant framed in the SCN and OIO and directed the department to conduct thorough system audit of the payment processing system of Bank Al-Habib Limited (BAHL) under section 29 of



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the Act in respect of Financial Years (FY) 2016-17, FY-2017-18 and FY-2018-19 to determine as to whether or not such system, run by BAHL was in accordance with the requirement of the Act and/or the Rules made thereunder and to determine short payment/non-payment of due SST and such audit to be completed within sixty (60) days.

10. The appellant being aggrieved with the conclusion drawn by Commissioner (Appeals) in para 24 of the OIA has filed this appeal.

11. The learned advocate for the appellant Mr. Iftakhar Hussain submitted as under:-

- i) The impugned OIA was suffering from legal infirmities and the same was a non-speaking order and was violative of Section 59(2) of the Act.
- ii) That the OIA was time barred under section 59 (5) of the Act and was passed beyond the statutory period of 120 days and extension of 60 days.
- iii) The Commissioner (Appeals) while disposing of the appeal was not justified/authorized to direct the department to conduct a thorough System Audit of the payment processing system of BAHL under section 29 of the Act, in order to determine 'short payment / nonpayment' of tax due, if any. These directions are in excess of his jurisdiction and also amount to remand back of the case in the hands of the department for 'de-novo consideration'.
- iv) It was an admitted position that the entire alleged demand has been deposited by BAHL on behalf of the appellant which has been confirmed in para 05 of the Audit Report and therefore no SST was due and payable and no loss of revenue was caused to the exchequer.
- v) The services were provided to merchants through BAHL which deducted the entire SST amount and deposited the same with SRB.
- vi) The appellant and BAHL under an agreement with the permission of the State Bank for joint venture was providing Port of Sales (POS) Terminal to merchants in the entire Pakistan. The merchant/retailer had provided services to its customers in the shape of acceptance of Credit/Debit card and such amount was claimed from BAHL which charged approximately 2%



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as service charge and paid tax on such 2% to the various revenue authorities under whose jurisdiction the said machine was used. All payments were dealt with by the bank.

vii) The job of the appellant was to provide IT related service including installation of machines, maintenance and repair of technical faults in the machines.

12. The learned AC-SRB on behalf of the department submitted as under:-

i) The OIO was rightly passed and erroneously set aside by Commissioner (Appeals) without considering the facts of the case.

ii) The OIA was passed within statutory period since the appeal was filed before Commissioner (Appeals) on 11.11.2010. The appellant had sought adjournments of 83 days which were excluded while computing the time consumed in finalization of appeal and referred to para 6 of the OIA.

iii) The audit ordered by the Commissioner (Appeals) did not fall under denovo trial and the same was duly conducted. Moreover this ground was not agitated by the appellant

iv) Against the demand of Rs.207,776,651/- BAHL has deposited Rs.78,515,526/- with SRB, leaving a balance of Rs.129,261,125/=.

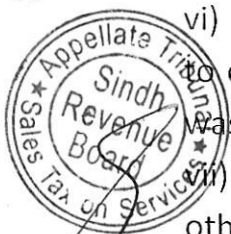
v) The BAHL erroneously and malafidely deposited SST in other jurisdiction as all the processing of settlement was undertaken from Head Office of BAHL which is situated at Karachi.

vi) The appellant had only one office situated at Karachi and all services to other jurisdiction were originated and provided from Sindh thus all SST was to be deposited with SRB.

vii) The appellant was not registered with other revenue authorities of other provinces and was liable to pay the entire amount of SST to SRB.

viii) The BAHL had not deposited SST on behalf of the appellant and had deposited SST on account of banking services provided by it to merchants, customers and retailers.

ix) The appellant was registered on its own under Tariff Heading 9815.6000, Software and IT System Development Consultant and had provided IT related service including installation of machines, maintenance



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and repair of the technical faults. Thus it was liable to pay SST on the services provided by it.

13. The Advocate for the appellant in rebuttal submitted that the appellant and BAHL were working under an agreement of joint venture and could not be assessed separately as the appellant received its commission from that received by BAHL.

14. We have heard the learned representatives of the parties and perused the record made available before us and the written submissions by the AC-SRB.

15. The dispute is whether the SST liability of the appellant was discharged by BAHL. After hearing the parties the following points requires consideration:

- i) Whether the OIA was time barred having passed beyond the statutory time limit as provided under law?
- ii) Whether the order for conducting Audit passed by Commissioner (Appeals) amounted to remanding the case for denovo trial?
- iii) Whether the SST deposited by BAHL was on behalf of the appellant?

16. The first point is "Whether the OIA was time barred having passed beyond the statutory time limit as provided under law?" The discussions on this point are as under:-

The appeal before Commissioner (Appeals) was filed on 11.11.2010 and was decided on 29.04.2021. Total 169 days were consumed in finalizing such appeal out of which 83 days were excluded on account of adjournments sought by the appellant leaving with the balance of 86 days. The Commissioner (Appeals) in para 6 of his OIA has given the calculation of time consumed by the AC which has been further confirmed in para B of Parawise Comments. Moreover such position was not disputed by the appellant.

ii) In view of the above factual position we hold that the OIA was passed within time.



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17. The second point is "Whether the order for conduction Audit passed by Commissioner (Appeals) amounted to remanding the case for denovo trial?". The discussions on this point are as under:-

i) The contention of the learned advocate for the appellant was that the Commissioner (Appeals) was not vested with the power to direct audit while disposing of the appeal since the same amounted to denovo trial. Whereas the contention of the AC was that the direction to conduct audit by Commissioner (Appeals) did not amount to fresh trial.

ii) The Commissioner (Appeals) under sub-section (5) of section 58 of the Act is vested with the following powers:-

*"(5) The Commissioner (Appeals) SRB, may before disposing of an appeal, call for such particulars as the Commissioner (Appeals) may require respecting the matters arising in the appeal or cause further inquiry to be made by the officer of the SRB".*

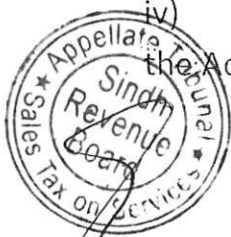
iii) It is clear from the perusal of the above provision that the Commissioner (Appeals) before disposing of the appeal may call such particulars as he may require relating to the matter in appeal or may cause further enquiry through officer of SRB. The power could only be exercised during the pendency of appeal before Commissioner (Appeals) and not while disposing of the appeal. Thus the Commissioner (Appeals) should finally decide the appeal and should not leave the matter to be decided by the officer of the SRB after disposal of the appeal.

iv) The other relevant provision is sub-section (1) and (2) of section 59 of the Act, which are reproduced as under:-

*"(1) In disposing of an appeal lodged under section 57, the Commissioner (Appeals) SRB may pass such order as he thinks fit, confirming varying, altering, setting aside or annulling the decision or order appealed against.*

*(2) In deciding an appeal, the Commissioner (Appeals) SRB may make such further inquiry as may be necessary provided that he shall not remand the case for denovo consideration.*

v) It appears from the requirement of sub-section (2) of section 59 of the Act that the Commissioner (Appeals) may make such further inquiry himself during pendency of the appeal provided he shall not remand the



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case for denovo consideration. In this section the word "shall" was used with word "not" which made the provision mandatory and specifically prohibited Commissioner (Appeals) from exceeding such mandate. In the book Understanding Statutes, Edition 2008 by S. M. Zafar at page 275 it was mentioned as under:-

*"Negative words give a statute an imperative effect. Negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statute imperative".*

vi) It is now well established principal of law that when law has prohibited from doing something it cannot be done at all even under exercise of lawful jurisdiction. Since the law specifically prohibited Commissioner (Appeals) from remanding the case for denovo consideration thus such powers were not available with him. In the reported case of Ummatullah Versus Province of Sindh, PLD 2010 K 236 it was held as under:-

*"It is a settled principle of law that what cannot be done directly cannot be done or allowed to be done indirectly. It is also trite principle of law; what is not possessed can neither be conferred nor delegated."*

vii) Now the question is whether the direction to conduct audit while disposing of appeal under section 29 of the Act amounted to remand for denovo trial. The appeal was disposed of with the direction to conduct audit and the Commissioner (Appeals) in para 24 of the OIA used the words "Accordingly, for the time being, I drop all the allegations of short payment/nonpayment etc. as framed against the instant appellant in the SCN/OIO". This clearly reflected that the appeal was not finally decided and the final decision rested on the outcome of the audit and direction to conduct audit after disposal of the appeal amounted to denovo trial as after audit report if some SST was found due the fresh adjudication could be started, and the same was not permissible. The term "denovo trial" is defined in the Black's Law Dictionary, Tenth Edition at Page 1737 as under:-

*"a new trial on the entire case-that is, on both questions of fact and issues of law-conducted as if there had been no trial in the first instance".*



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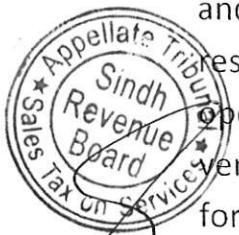
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viii) In view of the above discussions we hold that the Commissioner (Appeals) was not vested with the power to remand the case for denovo consideration and could not allow audit to be conducted by the officer of SRB after disposal of appeal by him.

18. The third point is "Whether B AHL had deposited the SST on behalf of the appellant?" The discussions on this point are as under:-

i) It is not disputed that B AHL had deposited Rs.207,776,651/- out of which Rs.78,515,526/- was deposited with SRB and the balance of Rs.129,261,125/= was deposited with revenue authorities of other provinces. The Agreement entered into between the appellant and B AHL provided for the obligations of the parties. The obligations of the appellant were provided under clause 4 of the Agreement. The main obligation of the appellant was marketing, advertising and promotional campaigns to support acquisition of new merchants. The appellant was also responsible for deployment and installation of the Terminals and all related electronic terminal hardware, software and applications at participating Merchant's locations. The appellant was also responsible for providing proper instructions to participating merchants. The obligations of B AHL were provided under clause 4.2 of the Agreement. The main obligation of B AHL was timely payment processing, clearing and settlement between Participating Merchants, issuing Banks, Cards Association, Settlement Banks and appellant. One of the obligation of B AHL was that it shall be responsible for all back office operations, including but not limited to, opening and maintaining Settlement Accounts of Participating Merchants, verification and evaluation of Settlement Account opening application forms and Know Your Customer due diligence. The joint obligations of appellant and B AHL was provided under clause 4.3 of the Agreement. The main obligation was for the establishment of the infrastructure (hardware, software and application) required to operate a merchant acquiring business and maintaining checks and balances to ensure maximum uptime of relevant system and servers.



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ii) It is evident from the perusal of the obligations that under the agreement both the appellant and BAHL were required to perform differently. The BAHL as a bank was to perform its function which was in relation to providing banking related services and the appellant had to deploy and installation of the Terminals and all related electronic terminal hardware, software and applications which were in the nature of providing services of software and IT based system development consultant or any other services different from banking services.

iii) The services provided by BAHL and appellant are different in nature and could not be clubbed with each other. Apparently BAHL had paid SST in relation to banking services provided by it to the merchants who had used its services and appellant was to pay SST for the services provided to it by BAHL.

iv) This aspect of the case was not considered by the forums below and for that reason there was no discussion and findings in this point.

v) The AO unnecessarily issued SCN to the appellant alleging that the appellant had charged SST of Rs.207,776,651/= but had not deposited the same with SRB. After audit it was clear that the SST was not charged by the appellant but it was charged by BAHL and whatever amount was charged by BAHL the same was deposited with SRB. The AO had also committed a glaring legal mistake by not mentioning the relevant sub-sections of section 23 and 47 of the Act. Both these provisions and its sub-sections were inserted in the Act to cater for different situations and it was necessary for AO to mention proper sub-section so that tax payer could take appropriate defence.

vi) The contention of the AC that the service was originated from the office of the appellant and BAHL being situated at Karachi was required to deposit the entire amount with SRB, could not be decided by us for the reason that the same was not part of SCN. Moreover BAHL is not a party before us thus no order could be passed against it in its absence.

vii) In the light of above discussions we hold that the amount of SST was deposited by BAHL against the services provided by it.




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19. In view of the above discussions the appeal is allowed and both the OIO and OIA are set aside. The case is remanded to the AC to examine the nature of services provided by the appellant and BAHL and if it is found that they provide different taxable services proper SCN may be issued to them. The department is also at liberty to examine whether the amount deposited by BAHL with other jurisdictions were in respect of SST and if sufficient material is available in this regard the department is at liberty to initiate appropriate proceedings. The appeal is disposed of accordingly.

20. The copy of the order may be provided to the learned representatives of the parties.



(Justice<sup>®</sup> Nadeem Azhar Siddiqi)  
CHAIRMAN



(Intiaz Ahmed Barakzai)  
TECHNICAL MEMBER

Karachi:

Dated: 22.09.2021

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.
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REGISTRAR  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD

Order issued on 08/10/2021  
Registrar

Order Dispatched on 08/10/2021  
Registrar