Counsel file

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

APPEAL NO. AT-39/2021

Assistant Commissioner SRB, (Unit-28)
Sindh Revenue Board,
02nd Floor, Shaheen Complex Building
M.R. Kiyani Road Karachi.....Appellant

Versus

M/s Torque Corp. (Pvt.) Ltd.
Ltd, (SNTN: 4006633-3)
F-17, Business Executive Centre,
Block 8, Clifton Karachi.....Respondent

Date of filing of Appeal: 19.07.2021
Date of hearing: 13.01.2022
Date of Order: 17.05.2022

Appellate Tribunal Sindh Revenue Board Sales Tax on Services

Mr. Usama Javed Siddiqi AC, (Unit-28)-SRB, for appellant.

Mr. Rizwan Manai, Advocate & Mr. Lutfullah, (FCA) for respondent.

ORDER

Justice ® Nadeem Azhar Siddiqi: This appeal has been filed by the Assistant Commissioner (Unit-04), SRB Karachi challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.42/2021 dated 24.05.2021 passed by the Commissioner (Appeals) in Appeal NO. 133/2018 filed by the respondent against the Order-in-Original (hereinafter referred to as the OIO) No. 554/2018 dated 25.05.2018 passed by Ms. Nida Noor Assistant Commissioner, (Unit-28) SRB Karachi.

02. The facts as stated in the OIO were that the respondent got voluntary registered with SRB on 22.11.2017 under the principal activity of "Management Consultants", Tariff Heading 9815.4000 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) under section 8 of the Act with effect from 01.07.2013.

03. It was further stated in the OIO that the respondent being a registered person was required to pay the due amount of SST on the value of taxable services provided or rendered through place of business located in Sindh on every 15th day of the month following the tax period to which it related and to file true and correct sales tax return within 3 days from the due date of the payment of SST.

04. It was alleged in the OIO that perusal of the copy of audited financial statement for the year ended June 30, 2015 and June 30, 2016, revealed that the respondent earned revenue, amounting to Rs.17,404,549/- for the year 2014-15 and Rs.13,530,967/- for the year 2015-16. The respondent vide letter dated 14.03.2018, was required to submit true and correct SST Returns for the tax periods July 2014 to March, 2018 along with payment of due SST on value of taxable services of Rs.17,404,549/- for the year 2014-15 and Rs.13,530,967/- for year 2015-16.

05. The respondent filed reply dated 22.03.2018, through its representatives which was found unsatisfactory, hence, Show Cause Notice (SCN) dated 30th March, 2018, was served upon it to explain as to why SST of Rs.4,505,018/- [(Rs.17,404,549 x 14%) + (Rs.13,530,967 x 14%)] for the tax periods July, 2014 to June, 2016, together with amount of default surcharge under section 44 of the Act may not be assessed and recovered under section 23 of the Act read with section 47 (1A) (a) of the Act. The respondent was also required to explain as to why penalties under Serial No. 2 and 3 of the Table under section 43 of the Act may not be imposed for the contravention of sections 8, 9, 17 and 3 of the Act read with rules made thereunder.

06. The respondent filed written reply dated 23.04.2018 to the SCN before the Assessing Officer (AO) through its representative. It was stated therein that the respondent was engaged in imparting education and providing motivational and leadership training through its trainers. The training services were listed in the First Schedule to the Act hence were not taxable. It was also stated that the respondent inadvertently got registration under Tariff Heading 9815.4000 of the Second Schedule to the Act without any intention to provide such services. The respondent further submitted the copy of Memorandum of Association alongwith documents, proposal submitted to UBL, email conversation with the client and copy of invoices on sample basis before the AO. However the respondent did not produce the copy of contract entered into with the recipient of service. On the direction of AO to produce the copy of the contract the respondent submitted that no written agreement was signed with the client and all arrangements were made verbally/orally.

07. The AO assessed the SST at Rs.4,469,796/- in respect of taxable services provided or rendered in Sindh under section 23 read with section 47(1A) (a) of the Act together with default surcharge (to be calculated at time of payment of SST) under section 44 of the Act. The AO also imposed penalty of Rs.223,490/- (i.e. 5% of Rs.4,469,796) under Serial No. 3 of the Table under section 43 of the Act and Rs.240,000 (i.e. 10,000/- per month) under Serial No. 2 of the Table under section 43 of the Act.

08. The respondent challenged the said OIO by way of filing of appeal under section 57 of the Act before Commissioner (Appeals), SRB who allowed the appeal and totally setaside the OIO as held in para 16 and 17 of the OIA in which it is reproduced as under:-

> "16. It is particularly noted that the AC though, having charged the Appellant of under-declaration of taxable services / under-payment of due tax in the stated terms, has failed to bring out any meaningful or cogent documentary evidences to prove his point. Instead, his approach seems to be pedantic and irrational, as already discussed above. On the contrary, the

evidences brought by the AR, seem to support Appellant's view point that the under-reference tax-periods, he was actually engaged in rendering 'training/educational services' and not the 'management consultancy services'. It is an admitted fact that 'training services' became taxable vide the Sindh Finance Act, 2019 (effective 01.07.2019) while the under-reference tax-periods are FY 2014-2015 & 2015-2016 when these services were not subject to the levy of SST".

"17. In view of the foregoing, this appeal succeeds and the impugned OIO is set-aside in toto, with no cost to the Appellant. The appeal stands disposed of accordingly".

Resultantly the instant appeal was filed by the appellant / department before this Tribunal.

09. The learned AC-SRB on behalf of appellant submitted as under:-

i. The service Management Consultant, Tariff Heading 9815.4000 was brought to tax net w.e.f. 01.07.2013.

ii. The respondent despite providing services from the date of inception got delayed registration on 22.11.2017.

iii. The clients of the respondent declared the services acquired from it in their monthly tax returns.

iv. The respondent after obtaining registration from SRB neither paid SST nor filed monthly SST Returns.

v. The plea of the respondent that it had provided education and training services was false and without any basis nor were supported by any documentary evidence.

vi. The Commissioner (Appeals) in ignorance of the definition of management consultant provided in the Act erroneously concluded that the appellant had provided training services.

vii. The Commissioner (Appeals) failed to consider the fact that the respondent was involved in providing management

consultancy service from July-2014 but had neither paid any SST nor had filed any SST returns.

viii. The Commissioner (Appeals) failed to consider that the respondent was registered with FBR since July-2012 under the principal activity of "professional, scientific and technical activities/Management consultancy activities.

ix. That the respondent had charged, collected SST from some of its client but had not deposited the same with SRB, and an amount of Rs.1,764,925/- was payable by the respondent under section 16 of the Act.

x. The default surcharge and penalties were rightly imposed upon the respondent for not paying the SST and for not filing the SST returns which were erroneously setaside by Commissioner (Appeals).

10. The learned representative of the respondent submitted as under:-

i. The registration under Tariff Heading 9815.4000 of the Second Schedule to the Act was obtained under the commercial compulsion of the clients to procure business.

ii. The appellant got registration on 22.11.2017 under Tariff Heading 9815.4000 of the Second Schedule to the Act, Management Consultant and since then it was paying due SST.

iii. The respondent did not pay SST prior to registration for the reason that no taxable services were provided and further that the respondent was not liable to charge, collect and pay the SST before the date of registration.

iv. The SST could not be charged on the basis of registration alone but was to be charged on the nature of services actually provided.

v. The AC misinterpreted the Memorandum of Association and the Financial Statement although it was clear that services provided by the respondent was training and education and not of consultancy.

vi. The Training service was brought to tax net w.e.f. July-2019 and thereafter the respondent was regularly discharging its statutory obligations.

vii. The AC never confronted the respondent with regard to returns filed by the clients of the respondent declaring services acquired from the respondent and this plea could not be raised at Tribunal stage.

viii. The AC had not confronted the respondent with section 16 of the Act and the same could not be invoked at Tribunal stage.

ix. The default surcharge and penalty were erroneously imposed without establishing mensrea and malafide on the part of the respondent and the same was rightly setaside by the Commissioner (appeals).

11. The learned AC in rebuttal submitted that as per definition of registered person provided under sub-section (71) of section 2 of the Act a person providing taxable services is liable to be registered and was also liable to charge, collect and pay SST.

12. We have heard the parties and gone through the written submissions filed by their learned representatives, and perused the record made available before us.

13. The dispute between the parties was whether the respondent had provided services of management consultant, Tariff Heading 9815.4000 of the Second Schedule to the Act or it had provided services of training and education. Since the later activities were not part of Second Schedule to the Act during the relevant tax periods and was thus not taxable.

14. The service of management consultant was brought to tax net w.e.f. July-2013. The tax periods involved in this appeal were from July-2014 to June-2016 (24 tax periods).The respondent got voluntarily registration on 22.11.2017 under Tariff Heading 9815.4000 of the Second Schedule to the Act. However as per the Tax Profile of the respondent it had neither paid SST nor filed SST returns from July-2013 to October-2017 (periods prior to

registration). The respondent had also not paid SST nor filed SST returns from November-2017 to June-2019 (period after registration). The respondent started paying SST w.e.f. July-2019 two years after its date of registration.

15. The AO while passing OIO had concluded that the appellant had provided the service of management consultant. However for drawing this conclusion he had heavily relied upon the clauses of Memorandum of Association of the respondent and the Notes to the Financial Statements for the years 2014-2015 and 2015-2016. The perusal of the objective clauses of Memorandum of Association revealed that the respondent company was established to perform various types of business activities. The clause 1 and 2 of the Memorandum of Association which are most relevant are reproduced as under:-

> *"1. To carry on the business of rendering management training, consultancy services, event management and organized development projects to government, donors, international institutions, individuals, firms companies, trust, non-governmental organization, association in the area of project management, institutional development, capacity building and other ancillary services".*
>
> *"2. To acquire advanced technology of electronics products and provide both project and bureau services associated with this technology. Project services include feasibility studies, consultation, project implementation, market development, import services, maintenance, and computer software customization, optimization and system integration".*

16. It is evident from the above that the respondent company was established to provide training services, consultancy services, event management and other services relating to the computer software customization, optimization and system integration. It was not necessary for the respondent to perform all activities mentioned in the Memorandum of Association. The Memorandum of Association is like a constitution of the respondent and it contains various type of activities and its clauses define

or describe the business activities that the respondent could undertake at present or in future, without getting the Memorandum modified or altered.

17. The AO also relied upon the Notes to the Financial Statements for the two years i.e. 2014-215 and 2015-2016. The Note 1.1 of both the years was identical and is reproduced for ready reference as under:-

> *"1.1. The principal activity of the company is conducting conferences, workshops, and other events to promote, assist, and encourage the cause of education, especially the effectiveness of management and to provide opportunities for exchanging knowledge and intelligence".*

18. The SST could not be charged on the basis of clauses of Memorandum of Association and Notes to the Financial Statements. However SST could only be charged if the services provided or rendered by the respondent fell within the ambit of Tariff Headings which form part of Second Schedule to the Act. The AO fell in error in only considering the clauses of Memorandum of Association and the Notes to Financial Statements without deciding the actual scope and nature of services provided or rendered by the respondent. In the reported case of M/s G.M. PFAFF A.G. versus Sartaj Engineering Co. Ltd. and 3 others PLD 1971 SC 564 it was held at page No. 569 as under:-

> "...The Memorandum only catalogues the objects for which a Company is formed and it is not unusual for a Memorandum of a Company to incorporate within it almost all conceivable objects in order that the vires of its action in launching upon a particular business or enterprise cannot be challenged by any shareholder. But we must not confuse this with the Articles of Association of a Company which deal with the powers of the Company. A Memorandum is a covenant between the Company and its members that the Company shall not engage in any business which is not mentioned in the Memorandum".

19. It is evident from the above reported decision that the AO's reliance mainly on 'Memorandum of Association' is out of place. Moreover the AO has only concentrated on "consultancy service" ignoring the other objects i.e. "management training". He has also included the technical assistance relating to conceptualization, devising, development, modification, rectification or upgradation of any working system, which was otherwise not part of the definition of management consultant. The AO on the pretext of interpretation could not read anything in the definition which was not there and could not enlarge the scope of definition. The AO could also not pick and choose the objects mentioned in the Memorandum and has to consider the Memorandum in its entirety and he should have enquired into the actual nature of services provided or rendered by the respondent. In the reported case of PLD 1985 SC 109 Habib Ins. v. Commissioner Income Tax it was held that "in revenue cases one must look at the substance of a thing and not at the manner in which the account is stated".

20. It could not be ruled out for want of proper documentation i.e. agreements/contracts with the clients and the invoices issued by the respondent to the clients that the respondent may have performed other activities mentioned in the Memorandum which may or may not be taxable. Moreover from the Notes to the Financial Statements it was not clear that the respondent had performed the consultancy services. This difficulty in deciding the actual nature of service arose due to non-provision of copies of agreements and contracts by the respondent. The respondent only provided the invoices on sample basis from which it was difficult to ascertain its actual nature of service. Furthermore, the respondent declared itself in the documents submitted with UBL as Management Consultant and also got voluntarily registration under Tariff Heading 9815.4000 (Management Consultant) and thereafter never tried to correct that mistake.

21. The Commissioner (Appeals) allowed the appeal of the respondent on the plea that the AO failed to bring out any meaningful or cogent documentary evidences to prove his point. However the Commissioner

(Appeals) has failed to consider that the respondent had not provided all documents to the AC to determine the actual nature of service. The suppression of documents on the part of respondent had created doubts about the actual nature of services provided or rendered by it. Article 129 (g) of the Qanun-e-Shahadat Order, 1984 provides that "evidence which could be and is not produced would, if produced, be unfavorable to the person who withholds it". Apparently the respondent had withheld the copies of contracts/agreements and invoices and the presumption would be that if those documents were produced the same would be unfavorable to the respondent.

22. It is pertinent to mention that it is an established principle of fiscal statutes that if a person sought to be taxed comes within the ambit of the law then the he must be taxed no matter how great the hardship appears to be. Conversely, if the State is seeking to recover the tax then it has to bring the subject within the ambit of the law otherwise no fiscal burden can be imposed. It is also a settled principle of taxation that burden of tax could not be passed on to the tax payer on presumption and whims of the taxing officer. The interpretation of taxing laws ought to be made in the light of what has been expressed in the statute. To recover a tax, it is the duty of the State to establish that the subject falls within the ambit of law. In the reported case of Muhammad Younus versus Central Board of Revenue PLD 1964 SC 113 it was held at page No. 119 as under:-

> "...It is patent that before a person can be made liable to the payment of a tax or a levy he must be shown clearly to fall within the category so made liable under the letter of the law".

23. The AC attempted to argue that the respondent had charged / collected SST from some of its clients but had not paid the same to SRB and an amount of Rs.1,764,925/- was payable by the respondent under section 16 of the Act. We have perused the Statement dated 24.08.2021 wherein the respondent from September-13 to April-19 provided or rendered service of Rs. 8,413,435/- involving SST of Rs.1,764,925/-. However it is not clear from this statement whether the service recipient had passed on the

SST to the respondent or not. The respondent was registered with SRB on 22.11.2017, and the tax periods from September-2013 to August-2017 were before the date of registration and the tax periods from December-2017 to April-2019 were after the date of registration. The tax periods involved in the instant case were from July-2014 to June-2106 (24 tax periods).

24. That if the respondent received SST from the recipient of service during the above tax periods from July-2014 to June-2016 it was bound to deposit the same with SRB under section 16 of the Act irrespective of the fact whether it was registered or not and whether the taxable services were provided or not. The difficulty was that neither section 16 was invoked in the SCN nor it was alleged that despite receiving SST from the service recipient the same was not deposited with SRB. In absence of ground in the SCN no order of payment of SST could be passed at this stage on the strength of reported case of Collector of Customs v. Rahim Din, SCMR 1987 which holds that:

> "....The order based on a ground, not mentioned in show-cause Notice was palpably illegal and void on the fact of it. The purpose of serving a notice on a taxpayer is to notify him of the case against him. When such a document contains incomplete information it can seriously prejudice the taxpayer's defence.

25. In view of the above discussions we are of the opinion that this case requires further inquiry and probe by the AO, consequently the appeal is allowed and both OIO and OIA are setaside. The case is remanded to the AO to pass fresh OIO (within the time allowed by law) after providing full opportunity of hearing to the respondent. However the appellant is directed to provide all relevant documents including the contracts / agreements with the clients and all invoices issued to the AO to determine the actual nature and value of service provided or rendered by the respondent. The AO should also call information and documents from the clients of the respondent to determine the actual nature and value of services provided or rendered to them by the respondent. However the

department/AC is at liberty to issue fresh SCN to the respondent as far as the recovery under section 16 of the Act is concerned.

26. The appeal is disposed of in terms of para 25 supra. 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

REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Karachi:
Dated: 17.05.2022
Copy Supplied for compliance:

1) The Assistant Commissioner, (Unit-28), SRB, for compliance
2) The Respondent through Authorized Representative.

Copy for information to:-

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

Order issued on 19/05/2022

Registrar

Order Dispatched on 19/05/2022

Registrar