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BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD AT KARACHI

DOUBLE BENCH-I

APPEAL NO. AT-50/2021

Assistant Commissioner (Unit-17),
Sindh Revenue Board, SRB,
02nd Floor, Shaheen Complex Building
M.R. Kiyani Road Karachi.....Appellant

Versus

M/s A.J. Worldwide Services Pakistan (Pvt.) Ltd.
(SNTN-2290208)
39-C/D, Block-06, PECHS near Jason Trade Centre,
Karachi.....Respondent

Date of filing of Appeal: 25.11.2021
Date of hearing: 13.04.2022
Date of Order 15.08.2022

Mr. Yousuf Bukhari, AC-SRB for the appellant

Mr. Muhammad Khurram, Finance Manager, 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.66/2021 dated 28.10.2021 passed by the Commissioner (Appeals) in Appeal NO. 111/2021 filed by the respondent against the Order-in-Original (hereinafter referred to as the OIO) No. 117/2021 dated 15.04.2021 passed by Mr. Muhammad Yousuf Bukhari, Assistant Commissioner, (Unit-17) SRB Karachi.

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02. The brief facts of the case as stated in the OIO were that the respondent was registered with Sindh Revenue Board (SRB) under service category of 'Courier Services' falling under Tariff Heading 9808.0000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred as the Act) chargeable to Sindh Sales Tax (SST) at standard rate of tax read with Sindh Sales Tax on Services Rules, 2011 (hereinafter referred as the Rules).

03. It was alleged in the OIO that the respondent was selected for audit u/s 28 of the Act for tax periods July-2017 to June-2018 (12 tax periods). The audit observations were duly communicated to the respondent during the course of audit proceedings by SRB Audit Wing. However, despite providing numerous opportunities for substantiating the matter, the respondent failed to provide justification to the observations / discrepancies. It also failed to provide required information despite availing various extension in time for compliance provided through SRB letters bearing number 3876, 4012 and 6447 dated 27.11.2019, 13.12.2019, 01.01.2021 and 18.02.2021 respectively.

04. The respondent was served with Show-Cause Notice (SCN) dated 30.07.2021, wherein the point-wise details of discrepancies were confronted to the respondent. However main issue is related to franchise services, and the allegation in the OIO was that upon scrutiny of Financial Statements (FS) for the year ended 30.06.2018, it was observed that the respondent had receivables from AJ Worldwide NYK and payables to AJ Worldwide UK. Therefore it was apparent that the respondent was operating as a Franchise and using the name of AJ Worldwide as intellectual property service. The franchise and intellectual property services were taxable service as per section 3(2) and 9(2) of the Act read with rule 36 of the Rules and the liability to pay the tax fell upon the person receiving or procuring such franchise and such intellectual property services.

05. In response to the SCN the representative of the respondent appeared before the Assessing Officer (AO) on 20.08.2020 and accepted and paid the liability in respect of allegation of suppression of sales. As

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regards Franchise Services the representative of the respondent contended that agency agreement was signed with AJ World Wide, New York. Thus he was asked to provide the photocopy of the agreement, which was not provided.

06. The representative of the respondent filed written reply dated 18.01.2021, which in fact was statement of expenses. The respondent was asked to provide supporting documents. The representative of the respondent filed another reply dated 04.02.2021 stating therein that the agency agreement dated 28.04.1998 pertained to the year 2018 and was valid till to date as there was no provision of expiry and renewal in the agreement. The respondent had also not submitted record regarding non-withholding of SST on the expenses mentioned in the reply dated 18.01.2021. It was further submitted vide email dated 02.03.2021 that the record could not be produced due to fire incident and instead a scanned copy of certificate dated 30.12.2020 issued by Fire Brigade Department was filed, certifying that the fire had broken in the office of the respondent on 02.06.2019.

07. The AO after considering all the facts of the case determined the SST at Rs.2,794,626/= (Rs.2,540,825/- on account of franchise services and Rs.253,801/- on account of failure to withhold SST) alongwith payment of default surcharge under section 44 of the Act. The AO also Imposed penalty of Rs.349,732/= under serial No. 2 & 3 of the Table under section 43 of the Act.

08. The respondent challenged the said OIO by way of filing appeal under section 57 of the Act before Commissioner (Appeals), SRB who allowed the appeal on the ground that the AC had failed to prove that appellant's services in question actually fell under the heading of "franchise" or "intellectual property services". The appeal was dismissed against other charges framed by the AO. The relevant portion of the OIA is reproduced for ready reference as under:-

"11. As regards the center-point of AC's case in this matter namely, the Appellant/ taxpayer's (foreign-based) principle M/s A.J Worldwide Co. OBC



International NYK provides to him 'franchise services' or 'Intellectual property Services' in Sindh (service respectively covered under tariff heading 9823.0000 and 9838.0000 of the Second Schedule to the Act ibid) is not proved; hence dismissed/ dropped. Careful perusal of the case-record, specifically the 'Agreement; between the Appellant M/s A.J Worldwide Services Pakistan (Pvt.) Ltd (SNTN-2290208) and the said principal, reveals that the same is simply an 'agency agreement' and it is, by no means a 'franchise service agreement' nor is an 'Intellectual Property Services agreement' for that matter. The nature of service provided by the said Appellant is clearly that of 'Courier services' (9808.0000). Admittedly, under the said 'Agency Agreement' M/s A.J Worldwide NYK sends International parcels (periodical magazine etc.) Pakistan in sender's packaging. Appellant clears such baggage from local customs, receives the material contained therein, and then distributes the same in Pakistan via the Pakistan Post, after affixing his own stamp on those parcels, so that in case of being un-delivered domestically, those could reach back the Appellant safely. Appellant charges his principal USD 15 per shipment for these services. It is evident that Appellant is not running any courier services of his in Pakistan and is simply engaged in further distribution of his foreign principal's shipment locally. As per Agreement, Appellant charges USD 15 per shipment to his principal that constitutes 'taxable value of services' in the instant matter. Clearly, these transactions do not indulge any element of 'franchise' services' nor of 'intellectual property services' as defined under the Act, 2011 respectively, vide the definition sections 2(46) & 2(54B) thereof. For ready and quick reference, these definitions are reproduced hereinafter in verbatim:



2(46) "Franchise" means an authority given by a franchiser, including an associate of the franchiser, under which the franchisee contractually or otherwise granted any right to produce, manufacture, distribute sell or trade or otherwise deal in or do any other business activity in respect of goods or to provide services or to undertake any process identified with franchiser, whether or not against a consideration or fee, including technical fee, management fee, or royalty or such fee or charges, irrespective of the fact whether or not trademark, service mar, trade name, logo, brand name or any such representation or symbol, as the case may be, is involved;

"2(54B) Intellectual Property Service" means any service provided or rendered to a person by any person by transferring temporarily or permitting the use or enjoyment of an intellectual property right;

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Since the AC has not been able to prove that Appellant's services in question actually fall under the heading of 'franchise' [or of 'intellectual property services'] the charge of short payment of Rs.2,540,825/- framed on this account, stands rejected and is set-aside".

Resultantly the Department filed an appeal before this Tribunal.

09. The learned AC-SRB Mr. Yousuf Bukhari submitted for appellant as under:

- i) The respondent is using the trademark, goodwill and brand name of a foreign entity A.J Worldwide Services Inc. (AJW) and its process of providing service were identified with AJW.
- ii) The Financial Statement of the respondent for the year 2017-18 shows that it had to pay certain amount to A.J. Worldwide in respect of franchise fees. The Financial Statement also reflected that the appellant has receivables from AJW.
- iii) The SST was calculated on turnover basis as provided under the proviso of sub-rule (2) of rule 36 of Rules, 2011 in absence of clear clause of payment in the agreement.
- iv) The Web Site of the respondent clearly showed that its business was part of international network of AJW.
- v) The learned Commissioner (Appeals), SRB has erroneously held that the AC had failed to prove that the respondent did not fall under the service category of franchise.
- vi) The agreement is not necessary for proving the relationship of franchiser and franchisee, and it is sufficient that the franchisee is using the name and trade mark of the franchiser.
- vii) The finding recorded by the Commissioner (Appeals) was against the facts of the case and relevant law and also against the decision of full bench of the Tribunal passed in the case of M/s DHL Pakistan (Pvt.) Limited.
- viii) That AJW appointed the respondent to provide services on reciprocal basis to various destinations as per Agency Agreement dated 28.04.1998.
- ix) The respondent is remitting the amount to its parent company AJW as per the audited accounts, thus it clearly falls within ambit of franchise services.



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10. The learned representative of the respondent Mr. Muhammad Khurram, Finance Manager submitted as under:-

- i) The respondent is using the name of AJW without making any payment to AJW for using its name.
- ii) The AJW had appointed the appellant as an agent to deliver shipments on reciprocal basis.
- iii) The amount taken by the AC as payable was actually receivable. Moreover the respondent had never remitted any amount to AJW, and such fact was evident from Bank statements provided to the AC.
- iv) The respondent is not franchise but providing re-mailing service to international company against fixed charges of USD 15/- per shipment and all other expenses relating to delivery were reimbursed by international company.
- v) The reciprocal activities were alien to Franchise Agreement. Since both the respondent and the International Company AJW worked for each other against consideration and adjusted their accounts accordingly.
- vi) The respondent has not send any shipment to US Company and only two shipments were sent to UK Company and the amount is reflected in the Accounts as payable.
- vii) The scope and nature of agreement could not be determined by heading or captions of the agreement but the same has to be determined by going through the entire contents of agreement.
- viii) The relationship between the respondent and AJW was not of franchisee and franchiser but as principal and agent. Reliance was placed upon the reported case of Supreme Court of Pakistan in Bolan Beverages (Pvt.) Limited Versus PEPSICO Inc. PLD 2004 SC 860.
- ix) The job of the appellant was to distribute the parcels received from AJW through DHL.
- x) The copy of the Agreement dated 28.04.1998 was provided to the AC which was misconstrued by the department.

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



12. The allegation against the respondent was that it had used the name of AJW for its business which fell within the ambit of franchise and due SST was not paid. The respondent denied such allegation and submitted that it had used the name without payment on reciprocal basis and no relationship of franchiser and franchisee existed between the respondent and AJW.

13. It is not disputed that the AJW was an international company incorporated as Courier Company and has appointed the respondent as its agent to provide delivery, handling and clearing services for it in Pakistan. The respondent was registered under the name of A. J. World Wide Services Pakistan (Private) Limited. It was not denied that the respondent was using the name of AJ World Wide (AJW) for carrying its courier service business.

14. The franchise service is defined under sub-section (46) of section 2 of the Act as under:-

"Franchise" means an authority given by a franchiser, including an associate of the franchiser, under which the franchisee is contractually or otherwise granted any right to produce, manufacture, distribute, sell or trade or otherwise deal in or do any other business activity in respect of goods or to provide service or to undertake any process identified with the franchiser, whether or not against a consideration or fee, including technical fee, management fee, or royalty or such other fee or charges, irrespective of the fact whether or not a trade mark, service mark, trade name or any such representation or symbol, as the case may be, is involved, whether or not a trade mark, service mark, trade name, logo, brand name or any such representation or symbol, as the case may be, is involved;] (Emphasis supplied)

15. The definition of franchise is very exhaustive and it covers various aspects of "franchise". The definition includes the associates of the franchiser. The said definition apart from other aspects of franchise provides that "or to undertake any process identified with the franchiser, (Emphasis supplied). It is clear from this definition that for deciding



whether or not the relationship of franchiser and franchisee exist between the respondent and AJW it is sufficient that the franchisee is providing services or is undertaking any process which was identified with franchiser. The appellant and AJW were in the business of courier service and the respondent is using the name of AJW. In this case the respondent was not only using the name of AJW but was also using the packing material provided by AJW. The activity is thus fully covered under the definition of franchise. In view of above discussions we hold that appellant is the recipient of franchise services from a non-resident person.

16. The respondent is a service recipient of franchise service from non-resident person and as per sub-section (2) of section 3 of the Act read with sub-section (2) of section 9 of the Act provides that where a 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. The respondent is a recipient of taxable services from a non-resident person and is therefore liable to pay SST.

17. The perusal of sub-rule (2) of rule 36 of the Rules also provided that in case where person providing or rendering the franchise service is a non-resident being based in a country other than Pakistan the liability to pay the tax shall be on the person receiving or procuring such franchise services .

18. The perusal of agreement between the respondent and AJW showed that no amount of franchise service was mentioned in the same. In absence of charges specified in the agreement proviso to clause (b) of sub-rule (2) of rule 36 of the Rules will come into play. This proviso provided that where the agreement between the service provider and the service recipient does not specify the amount of the consideration the value of the service shall be an amount equal to 10% of the turnover of the franchisee or the recipient for the tax periods for which the tax was payable.

19. The respondent in its financial statements has declared the sales exclusive of SST at Rs.254,082,488/= and in absence of charges mentioned in the agreement the value of service will be 10% of the turnover which



comes to Rs.25,408,248/- and SST at the reduced rate of 10% work out to Rs.2,540,825/=. The AO has therefore rightly calculated the value of service as well as SST.

20. We have carefully examined the findings recorded by Commissioner (Appeals) in the OIA and are unable to accept the same. Apparently the Commissioner (Appeals) while concluding that "As per Agreement, Appellant charges USD 15 per shipment to his principal that constitutes 'taxable value of services' in the instant matter. Clearly, these transactions do not indulge any element of 'franchise' services' nor of 'intellectual property services' as defined under the Act respectively, vide the definition sections 2(46) & 2(54B) thereof" has failed to consider the definition of franchise services provided in the Act in its true perspective. It is evident from the definition of franchise that mere undertaking of any process identified with the franchiser is sufficient to hold that the respondent is a franchisee of its principal AJW. The respondent is performing the process of delivering the parcels received from AJW on consideration of US\$ 15/- per shipment.

21. The representative of the respondent had relied upon the reported case of Supreme Court of Pakistan in Bolan Beverages (Pvt.) Limited Versus PEPSICO Inc. PLD 2004 SC 860. The said case relates to a dispute between a seller and purchaser regarding the agency and in the agreement it was specifically mentioned that purchaser would have no right or interest in the trademark or in the registration or any design, copyright, patent etc. The facts of this case are distinguishable and does not apply to the instant case.

In the said reported case in relation to franchise it was held as under:-



As franchise is not defined in our own Contract Act, we may have a reference to Black's Law Dictionary 6th Edition page 658, where franchise is defined as "a privilege granted or sold, such as to use a name or to sell products or service. The right given by a manufacturer or supplier to a retailer to use his product and name on terms and conditions mutually agreed upon." In its simplest terms, a franchise is a licence from owner of trademark or trade-name permitting another to sell a product or to serve under that name or mark. Precisely this definition is more akin to a licence rather than an agency. What exists between the present parties is more

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suitable to be determined in the light of the agreement itself and then the relevant laws on the subject”.

It is apparent from the above that a franchise is a licence from owner of trademark or trade-name permitting another to sell a product or to serve under that name or mark which the respondent is doing.

22. The AO had rightly determined the SST at Rs.2,540,825/= on franchise service which was erroneously setaside by Commissioner (Appeals). We therefore, allow this appeal and setaside the OIA and maintain the OIO to the extent of principle amount of SST of Rs.2,540,825/=.

23. The AO also imposed default surcharge under section 44 of the Act and penalty of Rs.349,732/- under serial No. 2 &3 of the Table under section 43 of Act. The same was imposed without establishing mensrea and malafide on the part of the respondent. We have considered it obligatory on the part of the department that before imposition of penalty and default surcharge it had to prove that the tax payer had acted deliberately in defiance of law or was guilty of contumacious dishonesty or had acted in conscious disregard of its legal obligation. In case of non-payment of tax it has to be seen whether the same was deliberate or not.

The purpose of imposing penalty was to create deterrence for the tax payers to avoid default in payment of due tax and not for enrichment of the department and to meet its target of collection of SST. The penalty imposed should not be harsh and exemplary. Furthermore the levy of penalty is a matter of discretion which must be exercised by the authorities judiciously on consideration of relevant circumstances and facts of the case. Penalty should not be imposed merely because it is lawful to do so. However for ready reference some of the relevant decisions are quoted as under:-

- a) In the reported case of DG Khan Cement Company Limited versus Federation of Pakistan, 2004 SCMR 456 relating to imposition of penalty/additional tax it was held as under:-

“Each and every case is to be decided on its own merits as to whether the evasion or non-payment of tax was willful or



malafide, decision on which would depend upon the question of recovery of additional tax. In the facts and circumstances of this case, we find that non-payment of the sales tax within tax period was neither willful nor it could be construed to be malafide evasion or payment of duty, therefore, the recovery of additional tax as penalty or otherwise was not justified in law”.(Emphasis supplied)

- b) In the reported judgment of Dy. Collector Central Excise and Sales Tax versus ICI Pak. Ltd. Lahore, 2006 SCMR 626 the Supreme Court of Pakistan has held as under:-

“...In an appropriate case of default in payment of sales tax, a manufacturer or producer of goods could be burdened with additional sales tax under section 34 of the Act as well as the penalty under section 33 of the Act. However, it does not necessarily follow that in every case such levy was automatic. It was further held that “...In case of failure of a registered person to pay the sales tax within time, he shall also be liable to pay additional tax and surcharge. The liability being not automatic would be determined by the appropriate authority to whether or not there was any reasonable ground for default in payment of Sales Tax which could be considered to be willful and deliberate”.(Emphasis supplied)



- c) In the reported judgment of Collector of Customs versus Nizam Impex), the Honorable DB of Sindh High Court while considering the imposition of default surcharge under section 34 of the Sales Tax Act, 1990 held as under:-

“9. It is well settled law that provisions of Section 34 are attracted when there is a deliberate failure to pay the sales tax. In the present reference the perusal of the show-cause notices, order-in-original and order in appeal reveal that there was no allegation against the present respondent in respect of deliberate or willful default, or to defraud the Government. We are, in agreement with the learned counsel for respondent that ample law is available on the point that

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imposition of penalty was illegal where the evasion of duty was not willful as held by the Hon'ble Supreme Court of Pakistan in the case of D.G. Khan and others. Further reliance is placed upon the case of Messrs Lone China (Pvt.) Ltd. v. Additional Secretary, Government of Pakistan decided by the Hon'ble Lahore High Court, reported as PTCL 1995 CL 415 wherein it has been held that if the party did not act mala fide with intention to evade the tax, the imposition of penalty of additional tax and surcharge was not justified. In another case Additional Collector Sales Tax Collect-orate of Sales Tax Multan v. Messrs Nestle Milk Pak Ltd., Kabirwala and another, 2005 PTD 1850, it has been held that in such circumstances the Tribunal has discretion to waive/remmit additional tax and penalties. (Emphasis supplied)

24. In view of above reported judgments we hold that the default surcharge and penalty were imposed without establishing mensrea, willful default and malafide on the part of the respondent, which were a necessary ingredient for penalizing the appellant thus the same are deleted.

25. In view of the above discussions the appeal is disposed of in terms of para 22 and 24 supra. The copy of the order may be provided to the learned representative of the parties.


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER

Karachi:

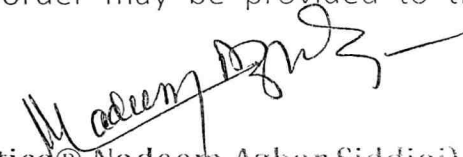
Dated: 15.08.2022

Copy Supplied for compliance:

- 1) The Assistant Commissioner, (Unit-17), 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.


(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order Issued on

19/08/2022

Order Dispatched on

19/08/2022