

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD AT KARACHI

DOUBLE BENCH-I

APPEAL NO. AT-57/2021

Assistant Commissioner SRB, (Unit-20),
02nd Floor, Shaheen Complex Building,
M.R. Kiyani Road Karachi.....Appellant

Versus

M/s Contact Plus (Pvt.) Ltd,
(SNTN: S1422413-5)
D-47, Miran Muhammad Shah Road,
Muhammad Ali Housing Society,
Karachi.....Respondent

Date of filing of Appeal: 30.12.2021

Date of hearing: 23.06.2022

Date of Order: 19.07.2022

Mr. Shoaib Iqbal Rajkoti DC, (Unit-20)-SRB, for appellant.

Non present for the respondent despite knowledge date of hearing.



ORDER

Justice[®] Nadeem Azhar Siddiqi: This appeal has been filed by the Assistant Commissioner (Unit-20), SRB Karachi challenging the Order-in-Appeal (hereinafter referred to as the OIA) No. 72/2021 dated 26.11.2021 passed by the Commissioner (Appeals) in Appeal No. 160/2020 filed by the respondent against the Order-in-Original (hereinafter referred to as the OIO) No. 233/2020 dated 29.10.2020 passed by Mr. Allah Rakhio Jogi, Assistant Commissioner, (Unit-20) SRB Karachi.

02. The brief facts of the case as stated in the OIO were that the respondent was registered with Sindh Revenue Board under the service category of "Advertisement on Cable T.V. Network, Advertising on Poles Advertising on Billboards and Other Advertisements like those on web/internet etc." classified under Tariff Heading 9802.5000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act), which was subject to levy of Sindh Sales Tax (SST) and the

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respondent was required to charge, collect and pay SST on all its taxable services in terms of sections 8 and 9 of the Act.

03. It was alleged in the OIO that during the scrutiny of available tax record during the tax periods January, 2015 to September, 2019 the respondent had declared that it had provided taxable services of Rs.1,092,542,580/-involving SST of Rs.145,864,703/- and SST amount of Rs.127,601,609/-was reportedly withheld by the service recipient i.e. M/s Procter & Gamble Pakistan (Private) Limited (P&G) and the remaining amount of Rs.18,263,094/- was accordingly paid by the service provider to Sindh Revenue Board (SRB).

04. It was also alleged that contrary to the above facts and record including monthly sales tax declaration such as SST Form-3 by P&G and tax deduction certificate provided therein has revealed that it had received taxable services from respondent to the extent of Rs.1,202,709,365/- involving of SST of Rs.162,131,198/- and SST amount of Rs.32,689,776/- was withheld by the service recipient as per the provision of Sindh Sales Tax Special Procedure (Withholding) Rules, 2014 (hereinafter referred to as the Rules, 2014) while remaining SST amount of Rs.129,441,442/- was paid to the respondent during the tax period January-2015 to September-2019. The evidence of such payment of Rs.129,441,442/- was received from P&G vide their letter bearing No. AT-2111 dated November 29, 2019 including the Purchase Summary, Certificate of Deduction / Withholding of the SST which has duly been made part of the instant OIO.

05. In view of the above factual position, there was short payment and short declaration of value of services, sales tax involved and sales tax withheld. The respondent was required to pay short declared / short paid SST of Rs.111,178,348/- (129,441,443-18,263,094) to SRB for the tax period mentioned above. The details are as under:-

Sindh Sales Tax Short Paid by M/s Contact Plus (Private) Limited				
Declaration of M/s Procter & Gamble Pakistan (Private) Limited in SRB Returns (As per Withholding Certificate issued in terms of Withholding Rules, 2014)	1,202,709,365	162,131,198	32,689,776	129,441,422
As per Declarations of M/s Contact Plus (Private) Limited in SRB Returns	1,092,542,580	145,864,703	127,601,609	(18,263,094)
Sindh Sales Tax Short Paid				111,178,328

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06. The respondent was served with Show-Cause Notice (SCN) dated 21.02.2020 to explain as why the tax liabilities of Rs.111,178,348/- may not be assessed in terms of the provisions of section 23 of the Act alongwith default surcharge under section 44 of the Act. The respondent was also called upon to explain as to why penalties under Serial No. 2 and 3 of the Table under section 43 of the Act should be imposed for violation of the provisions of section 3, 8, 9, 17 and 30 of Act and rules made thereunder.

07. The representative of the respondent appeared before the Assessing Officer (AO) on 15.09.2020 and submitted that his client was ready to pay the short paid SST amount as confronted in SCN and for that reason it first needed to reconcile all the data with their own record on factual grounds and requested for extension of one week upto 22.09.2020, which was allowed. On due date i.e.22.09.2022 the representative of the respondent stated that it was ready to pay the short paid SST within a period of ten days, and such Diary Sheets were accordingly signed by the representative of the respondent.

08. The AO passed OIO directing the respondent to deposit the SST of Rs.111,178,348/- as assessed under section 23 of the Act 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.570,000/= under Serial No.2 of the Table under section 43 of the Act and Rs.5,558,917/= under Serial No.3 of the Table under section 43 of the Act.


09. 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 on the ground that P&G the service recipient of the appellant was required to withhold 100% instead of 20% of SST. The relevant portion of the OIA is reproduced for ready reference as under:-

"...20. Keeping in view the multiple fatal errors of facts and law committed by the respondent AC in the impugned SCN, as summarized at para-20(Para 19) supra, there is no doubt left in my mind that the entire case framed by the respondent AC in this matter, is utterly baseless and unsustainable in the eyes of law. For AC's education, his attention is drawn towards a reported judgment of the Hon'ble Lahore High Court, [Reported No.1968 P.Cr. L.J 127]



wherein the esteemed Court was pleased to lay-down the following principles of drafting of 'quasi-judicial show-cause notices', for these notices to be valid in law:

"A proper show cause notice stating therein brief of the case, the offence committed and the evidence on the presumption of which the offence is based should be issued to the person concerned before taking any action against such person. When a show cause notice is given, the object is that the person on whom it is served gets an opportunity to explain his position for which action is proposed to be taken. When an enquiry into an alleged offence, punishable by a sentence or penalty is made, the accused should know that there is a charge against him and should exactly know what the charge is; and he should be given fair opportunity of explaining his position before any adjudication against him is made. This holds goods of all such enquiries, whether they are conducted departmentally or under a special statute, or in a court of law, and whether conducted with the formalities of a settled procedure or not".



"21. Measured against the yardstick set by the Honorable Court as above, the impugned SCN dated 21.02.2020 is set aside and quashed as suffering from multiple fatal and incurable defects. The impugned OIO based on such unsustainable SCN also collapses with it and stands quashed and set-aside as well, without any cost to the Appellant. Appeal stands disposed of accordingly."

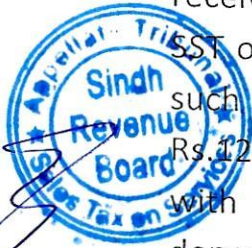
"22. While disposing of this Appeal in the above noted terms, concerned quarters of the respondent department, are hereby directed to take -up, without any delay, necessary steps under law, to enforce recovery of the short-paid revenue in this matter, against the service recipient/ withholding agent, namely M/s Procter & Gamble Pakistan (Pvt.) Limited in line with the afore-quoted provisions of the Act, 2011 & those of the Withholding Rules, 2014 [after adjusting the tax amounts already paid in this matter, if any, subject to verification]"

Resultantly the instant appeal was filed before this Tribunal.



10. The learned AC-SRB submitted as under:-

- i) The respondent had received the SST from P&G but failed to deposit the same with SRB and such fact was ignored by Commissioner (Appeals).
- ii) The Commissioner (Appeals) totally ignored the joint Reconciliation prepared by the parties and presented before him.
- iii) The representative of the respondent instead of filing Reply to SCN had shown its inclination to pay SST and such fact was recorded in the Diary/Note Sheets by the AO (signed by the representative of the respondent) which were erroneously ignored by the Commissioner (Appeals).
- iv) The inclination of the respondent to pay the SST dues amounts to acceptance of liability and could not be ignored.
- v) The service recipient P&G issued withholding certificates as well as filed returns showing the value of taxable services received from the respondent for Rs.1,202,709,365/- involving SST of Rs.162,131,198/-. However the service recipient out of such amount withheld Rs.32,689,776/- and paid Rs.129,441,442/- to the respondent for depositing the same with SRB, but only an amount of Rs.18,263,094/- was deposited with SRB, leaving balance of 111,178,384/- which was determined as SST payable by respondent.
- vi) The Commissioner (Appeals) erroneously set aside the OIO on a technical ground that SCN was not proper without appreciating that the evidence was available on record from which it was established that the withheld amount was transferred by P&G to the respondent. Moreover the respondent was liable to deposit/pay the same to SRB under section 16 of the Act.
- vii) The respondent had signed an Undertaking dated 11.03.2021 stating therein that P&G had received several advertising services from it during the Tax periods from January-2015 to date for which P&G have apparently withheld 20% instead of 100% under sub-rule (5) of rule 3 of Withholding Rules, 2014.



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In the same undertaking the respondent agreed with P&G that it had provided non-advertising service to P&G thus it had correctly withheld 20% of the Sales Tax under the Withholding Rules, 2014 and it had indemnified the P&G for the withholding of SST and would pay or reimburse such taxes and penalties and interest thereon.

- viii) The Commissioner (Appeals) had erroneously ignored the admission of the respondent in the undertaking, which amounted to acceptance of SST liability.
- ix) The Commissioner (Appeals) quashed the SCN and OIO on a very technical ground ignoring the reported case of Zamindara Paper Mills (2008 PTD 1894) and AL Khair Gadoon Limited (2020 PTD 18).
- x) The respondent was liable to pay penalties and default surcharge for not depositing/paying the SST as prescribed.

11. The respondent in its Reply dated 26.04.2022 submitted as under:-

- i) The case was made out on the basis of arbitrary and misleading submissions by the service recipient (P&G).
ii) The service recipient was required to withhold 100% of the SST on the services falling under Tariff Heading 9805.5000 of the Second Schedule to the Act. Moreover it had to deposit the same with SRB in view of rule 3(5) of the Withholding Rules, 2014.
- iii) The defaulted amount was required to be recovered from the service recipient, P&G which was the withholding agent.
- iv) The appellant was not confronted with any detail of the invoices or annexure during the adjudication proceedings. Moreover no reconciliation exercise was carried out at appeal stage.
- v) The Reconciliation Report dated 05.04.2021 was prepared by the AC in line with the amount confronted in the SCN, and the same was submitted to the Commissioner (Appeals).
- vi) The service recipient had only provided withholding certificate for the tax periods from July-2015 to June-2016. Whereas the



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total tax periods involved were from January-2015 to September-2019.

- vii) The letter dated 29.11.2019 was scrutinized by the Commissioner (Appeals) and after detailed discussion the same was declared as frivolous.
- viii) The Commissioner (Appeals) set aside the SCN and OIO after exhaustive discussion and declared both of them short of high standard.

12. We have heard the learned AC-SRB and perused the reply dated 26.04.2022 filed by the respondent and the record made available before us including the Reconciliation report dated 21.02.2022 submitted by the AC.

13. The learned advocate for the appellant after availing several opportunities had filed Reply to the appeal on 26.04.2022. Thereafter he obtained adjournment on 16.05.2022 on the ground that respondent was in process of collecting documentary / material and details. The respondent again sought adjournment on 30.05.2022 and the case was adjourned to 08.06.2022. The advocate for the appellant again sought adjournment on the ground that the respondent was in process of preparing and gathering information. The adjournment was granted on the ground that in case the respondent failed to submit details as ordered earlier the appeal would be heard and decided on the basis of available record and the case was adjourned to 25.06.2022. On due date the case was taken up and the AC-SRB was present but no one was present on behalf of the respondent.

14. We had heard the AC-SRB on 25.06.2022, and reserved the case for order. After reserving the case for order the advocate for respondent sent an adjournment application through WhatsApp which was received at 1.40 pm on the mobile phone of the staff member of the Tribunal on the ground that the respondent was still in the process of preparing and gathering information / data. This clearly reflected gross negligence on the part of the respondent and its advocate.

15. The allegation against the respondent was that it had collected/ received the SST of Rs.111,178,348/= from its service recipient P&G but



failed to deposit the same with SRB. The respondent had not filed any written reply in response to the SCN. Instead it had shown its inclination to pay the SST to SRB after reconciliation. However no such material on details were provided to AO to reconcile the matter.

16. The perusal of grounds of appeal filed before the Commissioner (Appeals) revealed that technical grounds were taken. However in none of the grounds the respondent had claimed that the SST was not passed on to it, or in other words it had not denied that P&G had withheld and transferred the SST to it.

17. In the reply dated 26.04.2022 filed before us the respondent again failed to deny the receipt of SST from P&G. The Undertaking signed by the respondent and its inclination to pay the SST before the AO is sufficient proof to establish that a huge amount of Rs.111,178,348/= was passed on to the respondent by its service recipient (P&G) and the same was not deposited with SRB. Moreover sufficient material was available on record to prove that the service recipient (P&G) had passed on the SST to the respondent which had not deposited the same with SRB. The respondent had failed to produce the invoices and the details of payment in support of its contention that advertising services were provided to the services recipient who withheld the entire amount of SST despite being provided with numerous opportunities. Apparently this ground was taken as an afterthought to usurp the huge amount of SST passed on to it by P&G.

18. The allegations leveled against the respondent were clear from the content of SCN and no prejudice was caused to the respondent in preparing its defence. Moreover it was apparent from the contents of SCN that the allegation against the respondent was that it had provided taxable services to P&G and short declared the value of services as well as withholding of SST. The respondent had failed to put up any defence before the AO and as an afterthought it took technical grounds before Commissioner Appeals without denying the fact of receiving SST from P&G.

19. The two judgment cited by the AC directly relate to the issuance of SCN. However in the reported case of M/s AL Khair Gadoon Ltd. versus The Appellate Tribunal & others, 2020 PTD 18 (FB—SC) it was held as under:-



“11.What is crucial to note is that, in deciding the legal validity of the show cause notice, it is important to first see whether the recipient/assessee of the said notice has been put to any prejudice in preparing and putting up its defence to the allegations made therein. And whether the issuer of the notice had the authority to issue the same, provided the notice had all the necessary facts leading to the alleged acts or omission of the recipient constituting the stated contravention of provisions of law, and thus, to be meaningfully responded by the assessee.

20. We have examined the SCN on the touch stone of the above judgment and it appears that the AO had the authority to issue SCN as the same was neither disputed by the respondent nor the facts were denied. Moreover the allegations leveled against the respondent in the SCN were clear and unambiguous and the same contained all the necessary facts leading to the alleged acts or omission of the recipient of SCN constituting the alleged contravention of provisions of law.

21. In the reported case of Collector of Sales Tax and Central Excise, Lahore v. **Zamindara Paper and Board Mills** and others 2008 SCMR 615 it was held as under:-



4....It is to be noted that instead of taking into consideration technicalities, the court looks into the matter with different angles namely as to whether substantial compliance has been made or if any of the sub rule has been omitted then what prejudice is likely to cause to the party to whom the show cause notice is given”.

22. Considering the above facts there is sufficient proof that the SST was passed on to the appellant who had failed to deposit the same. Moreover the OIO could not be quashed merely for the reason of some defect in issuance of SCN and passing of OIO. However since the respondent had not denied the fact of receiving the SST from its service recipient it was required to deposit the same with SRB even if the SST was erroneously received by it under section 16 of the Act. It is pertinent to point out that

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section 16 of the Act provides for collection of excess SST, which reads as under:-

"16. Collection of excess sales tax: (1) Any person who has collected or collects any tax or charge, whether under misapprehension of any provision of this Act or otherwise, which was not payable as tax or charge or which is in excess of the tax or charge actually payable and the incidence of which has been passed on to the person to whom the service is provided, shall pay the amount of tax or charge so collected to the government.

(2) Any amount payable to the Government under sub-section (1) shall be deemed to be an arrear of tax or charge payable under this Act and shall be recoverable accordingly".

23. The Commissioner (Appeals) has erred in quashing the SCN and OIO on technical ground. Instead he should have decided the appeal on merits after exercising of powers available to him under sub-section (5) of section 58 of the Act read with sub-section (2) of section 59 of the Act. The sub-section (5) of section 58 of the Act gives the power to the Commissioner (Appeals) to call for such particulars as he may require in respect of the matter or cause further inquiry to be made by the officer of the SRB. The sub-section (2) of section 59 of the Act gives power to the Commissioner (Appeals) to make further inquiry as may be necessary provided that he shall not remand the case for denovo consideration.


24. The OIA was based on the presumption that the respondent had provided advertising services and the service recipient was liable to withhold 100% SST and to pay the same to SRB. Apparently the Commissioner (Appeals) had failed to exercise powers vested in him and also failed to inquire and consider the implication of the passing of the SST by P&G to the respondent. The OIA was based on technicalities instead of considering merit of the appeal thus the same could not be sustained.


25. In view of the above discussions the appeal is allowed and the OIA is set aside. The respondent is directed to pay the SST of Rs.111,178,348/= received from its service recipient P&G as it had failed to deposit the same with SRB. Needful be done within thirty days from the receipt of copy of this order alongwith default surcharge under section 44 of the Act.



26. That if the SST dues are paid within 30 days as directed in para 25 supra the respondent would not be liable to pay penalties of Rs.570,000/= and Rs.5,558,917/= respectively imposed under Serial No. 2 & 3 of the Table under section 43 of the Act. Such penalties would than stand waived.

27. The appeal is accordingly disposed of as at para 25 and 26 above. The copy of this order may be provided to the learned representative of the parties.


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER


(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN
Certified to be True Copy

Karachi:

Dated:19.07.2022

Copy Supplied for compliance:

- 1) The Assistant Commissioner, (Unit-20), 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.


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order Issued on 19/07/2022

Order Dispatched on 19/07/2022

Registrar

Registrar