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

APPEAL NO. AT-05/2022

M/s BDO Ebrahim & Co. Chartered Accountants
2nd Floor, Block-C, Lakson Square Building,
No. 1, Sarwar Shaheed Road, Karachi.....Appellant

Versus

The Assistant Commissioner (Unit-28),
Sindh Revenue Board,
2nd Floor, Shaheen Complex,
M. R. Kiyani Road, Karachi.....Respondent

Date of filing of Appeal: 03.02.2022
Date of hearing: 26.04.2022
Date of Order: 19.052022

Mr. Qasim Causar, FCA, Mr. Zulfiqar Causar, FCA and Mr.Ismail Shabbir, Senior Manager, Tax for appellant.
Mr. Hammad Ali, AC-SRB for the 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. 09/2022 dated 31.01.2022 passed by the Commissioner (Appeals) in Appeal No. 116/2021 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 232/2021 dated 07.07.2021 passed by the Mr. Liaqat Ali Bajeer, Assistant Commissioner, (Unit-28) SRB Karachi.

02. The facts as stated in the OIO were that the appellant having SNTN: S0829298-1 was registered with SRB on 16-12-2013, in the service category of "Accountants and Auditors", Tariff Heading 9815.3000 of the Second

Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) subject to payment of Sindh Sales Tax (SST) @8% ad valorem (in terms of 'reduced rate' Notification No. SRB-3-4/8/2013 dated 1st July 2013)

03. It was alleged that the SRB tax profile of the appellant indicated that it was filing Sindh Sales Tax Returns (SST Returns) regularly since its date of registration as per section 30 of the Actread with Rules 12, 13 & 14 of the Sindh Sales Tax on services Rules, 2011 (hereinafter referred to as the Rules).

04. The appellant was selected for audit under section 28 of the Act for the tax periods from July 2014 to June 2016 (24 tax periods). The Audit contravention report dated 26.06.2019 highlighted two issues. Both the issues are briefly reproduced as under:

i. **Failure to charge SST on franchise services received from Non-Resident person.**

It was alleged that the Franchise services and Intellectual Property Services as defined under section 2(46) and 2(54B) respectively of the Act were acquired and was taxable under section 8 of the Act. The procedure for payment of tax on Franchise Service is defined in rule 36 of the Rules.

During scrutiny of the records, it was observed that registered person received taxable services of 'Licensed Intellectual Property Service, Tariff Heading: 9823.0000 read with rule 36 of the Rules from M/s. BDO international (BDO) i.e. non-resident person, during the tax periods from July 2014 to June 2016. However the appellant failed to charge and e-deposit the SST on the said services with SRB which was in gross violation of the section 3, 5, 8, 9, 13, 17 and 30 of the Act. The franchise/license agreement provided by the registered person did not specify any amount of consideration paid, therefore in the absence of such information, the SST on franchises feeswas calculated at the rate of 10% of turnover of Rs.31,437,952/- involving payment of SST of Rs. Rs.3,143,795/-

and the same was recoverable under section 3(2) read with section 9(2) of the Act 2011 along with default surcharge under section 44 of the Act. Details are reproduced for ready reference as under:-

FY-2014-15			FY 2014-15			Total SST involved
Turnover	Value of Services (10% Turnover)	SST @ 10%	Turnover	Value of Services (10% of Turnover)	SST @ 10%	
(a)	(b) (a)* 10%	(c) = (b) * 10 %	(d)	(e) = (d) * 10 %	(f) = (e) * 10 %	(c) + (f)
152,129,679	15,212,968	1,521,297	162,249,838	16,224,284	1,622,498	3,143,795

ii. Withholding of Sindh Sales Tax.

Moreover in the same audit report it was revealed that audited financial statements for the financial year 2014-2015 and 2015-2016 transpired that the appellant received various services as mentioned in the below table; against which the appellant was liable to withhold SST @ 20% of the value of services received under sub rule 3 of rule of the Sindh Sales Tax Special Procedure (Withholding) Rules 2014. The appellant was required to provide the documentary evidence of payment/withholding of SST, but the same was not submitted with SRB. The SST applicable worked out at Rs.196,604/- on the total service value of Rs.1,736,876/- for the tax periods July 2014 to June 2015 and an amount of Rs.165,543/- on the total service value of Rs. 1,507,863/- for the tax periods July 2015 to June 2016 respectively. Details are reproduced for ready reference as under:-

July 2014 to June 2015					
S. No	Operating Expense	Total Amount	Sindh Portion	SST Rate	SST
1	Computer Expense	590,119	481,919	10%	48,192
2	Security Services	94,299	94,299	10%	9,430

3	Office Maintenance	826,041	702,330	10%	70,233
4	Consulting Charges	458,328	458,328	10%	68,749
Total		1,968,787	1,736,876	-	196,604
July 2015 to June 2016					
5	Computer Expense	646,062	598,392	10%	59,839
6	Security Services	55,453	55,453	10%	5,545
7	Office Maintenance	565,600	458,095	10%	48,510
8	Consulting Charges	368,923	368,923	10%	51,649
Total		1,636,038	1,507,863	-	165,543
Grand Total		**3,604,825**	**3,244,739**	-	**362,147**

The appellant failed to provide the documentary evidence of payment/withholding of SST received on the above mentioned services. It is evident from the non-provision of record that the appellant had received the aforementioned taxable services from unregistered persons and the appellant was required to Withhold 100 percent of SST on receipt of such taxable services.

05. The appellant was served with Show-Cause Notice (SCN) dated 28.06.2019 to show cause as why the principal amount of SST of Rs.3,505,942/- (Rs.3,143,795 + Rs.362,147) should not be taxed along with default surcharge under section 44 of the Act. The appellant was also called upon to explain as to why penalty under section 43 of the Act should not be imposed.

06. In response to the SCN Mr. Shoaib Munir Authorized Representative of the appellant appeared for hearing on 04.03.2021 and submitted that charges framed in SCN in relating to issue no. 1, as elaborated above were not applicable as the appellant was only using the name of BDO to serve its clients based in Pakistan. In order to substantiate his contention the appellant agreed to submit copy of agreement with M/s BDO International which was not submitted till the OIO was passed. However for the other

issue of withholding of SST, the representative of the appellant submitted that the appellant would deposit the disputed amount of SST once the main issue of franchise/license was resolved.

07. The appellant challenged the said OIO by way of filing of appeal under section 57 of the Act before Commissioner (Appeals), SRB who dismissed the appeal and fully maintained the OIO.

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

08. The learned representative of the appellant submitted as under:-

i. There is no relationship of franchiser and franchisee between the BDO and appellant. The appellant is the Member of BDO International Limited, A UK Company limited by guarantee, and forms part of the international BDO network of independent member firms.

ii. The agreement between the appellant and BDO was erroneously construed as a Franchise Agreement.

iii. The license was granted by BDO to the appellant without payment of Royalty and referred to clause 2.1 of the Agreement. However since no royalty was paid the charging of SST on the basis of sales of appellant was erroneous.

iv. The appellant is a member firm of BDO and was allowed to use the name of BDO on certain conditions but not against payment of franchisee fee or any other charges.

v. The appellant was paying cost contribution to BDO on no profit or no loss basis for using technical manuals, cost of salaries of HR and quality control personal.

vi. The appellant was remitting above charges since last several years with the permission of State Bank of Pakistan.

vii. The reliance by Commissioner (Appeals) on the decision of the Tribunal in the case of DHL Pakistan was misplaced.

viii. The calculation of SST in terms of rule 36 of the Rules was against section 5 of the Act, which provided the procedure for determining the market value of the service.

ix. The matter relating to chargeability of SST on franchise services was under discussion between the top ten Chartered Accountant Companies affiliated internationally and Chairman, SRB and it would take some time to conclude such discussions.

x. The appellant was singled out from the entire industry by conducting the audit of the appellant and issuance of SCN to it.

xi. In the SCN and OIO the relevant provisions of the Act were not mentioned making the SCN illegal.

xii. That several types of penalties were imposed without establishing mensrea and malafide on the part of the appellant.

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

i. The appellant was registered with SRB on 16.12.2013 as a provider of Accountants and Auditor Services, Tariff heading 9815.3000.

ii. The case against the appellant was established on the basis of audit conducted under section 28 of the Act.

iii. The appellant failed to provide the agreement with BDO which clearly reflected the malafide of the appellant. The agreement was provided to Commissioner (Appeals) for the first time.

iv. The appellant was using the name of an international firm and the same is covered under the definition of franchise provided under sub-section (46) of section 2 of the Act read with Tariff Heading 9815.3000.

v. The SST was calculated in terms of rule 36 of the Rules which provided that in case the amount or consideration is not known the value of service shall be an amount equal to 10% of the turnover of the franchisee.

vi. In presence of rule 36 of the Rules section 5 was not applicable and the SST was rightly determined on the basis of turnover of the appellant.

vii. The appellant was regularly paying the franchise charges for using the name of an international firm which is evident from the invoices produced before the Tribunal.

viii. The appellant had acquired franchise services from a non-resident person and the responsibility was on the appellant to pay SST on franchise services.

ix. Non-mentioning of relevant provisions of the Act would not affect the merits of the SCN and OIO.

x. The issuance of SCN to the appellant did not amount to singling out the appellant since the SCN would be issued to other chartered accountants and auditors in due course of time.

xi. The discussion, if any between the chartered accountants and Management of SRB has no effect on the merit of this case.

xii. The mensrea and malafide of the appellant was apparent from the contents of the SCN and several types of penalties were rightly imposed.

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

11. The appellant is a chartered accountant and registered with SRB from 16.12.2013 under service category of "Accountants and Auditors", Tariff Heading 9815.3000 of the Second Schedule to the Act. The allegation against the appellant was that it had acquired franchise services, Tariff Heading 9823.0000 of the Second Schedule to the Act from a non-resident person against consideration but had failed to pay the due SST for the tax periods July-2014 to June-2016 (24 tax periods). The contention of the appellant was that BDO International allowed the appellant to use the Licensed Intellectual Property free of any charges vide Agreement dated 01.01.2010. The relevant clause is reproduced as under:-

> *"The Licensor is licensed by Stichting BDO to grant the licensee the right to use, on the Licenses Intellectual Property (as defined below) in various jurisdictions".*

12. The Licensed Intellectual Property was defined in the definition clause 1.1. of the Agreement and read as under:-

"Licensed Intellectual Property means the BDO name and any Intellectual Property Rights subsisting in or relating to the BDO Technical Manuals and the BDO Software, which the Licensor has the right to disclose and/or License to the Licensee".

13. It is not disputed that the appellant is using the name of a foreign based company, Technical Manuals and Software under Member Finance License dated 01.01.2010 in connection with its business activities.

14. The appellant alleged that the Licensee was granted royalty-free license and referred to clause 2.1 of the Agreement which is read as under:-

"In consideration of the undertakings given by the Licensee contained in the Agreement and subject to clauses 6.1 and 6.3, the Licensor hereby grants the Licensee a non-exclusive, non-transferable, royalty-free License to use the Licensed Intellectual Property and copy the BDO Technical Manuals and the BDO Software".

15. It is apparent from the above clause that the License to use Intellectual Property was granted free of cost. In this case the assessment was passed on the presumption that the quantum of royalty was not known. The Act provides two provisions to cater with this situation viz., Section 5 of the Act provides for the value of taxable service, and section 6 provides for open market price.

16. The AO in absence of the royalty specified in the Agreement has determined the value of service in accordance with the proviso to clause (b) of sub-rule (2) of rule 36 of the Rules, which reads as under:-

"Provided that in cases where there is no formal agreement between the service provider and the service recipient or in case where the agreement between the service provider and the service recipient does not specify the amount of the considerations like franchise fee, network fee, or intellectual property transfer/usage/enjoyment fee, etc., the value of the service shall be

an amount equal to 10% of the turnover of the franchisee or the recipient of the intellectual property services for the tax periods for which the tax is payable".

The explanation attached to the above proviso read as under:-

"In case where franchise services are provided or rendered by a franchiser to franchisee and the agreement does not provide specifically for franchise and the consideration is paid as a consideration other than franchise fee, royalty, technical fee or fee for transfer/usage/enjoyment of intellectual property, the value of service shall be an amount equal to 10% of the turnover of the franchisee or the recipient of the intellectual property services, as may be, for the tax periods for which the tax is payable".

17. The representative of the appellant argued that where the value of franchise service was not known the same had to be fixed in accordance with section 5 and 6 of the Act. However the Board could not fix the value of franchise service by issuing notification or framing of rules in presence of section 5 & 6 of the Act.

18. Section 5 of the Act dealt with the value of service. It only provides the mechanism for determining the value of service. It does not deal with the situation where the value of service is not known. Section 6 dealt with the open market price. Sub-section (2) of section 6 of the Act provides that if the open market price of a service cannot be determined under subsection (1), it may be determined using any method approved by the Board for calculating an objective approximation of the price the service would fetch in an open market transaction freely made between persons who are not associates. The Board had framed and issued Rules under section 72, read with sections 5, 6, 9, 13, 26, 54A, and 75 of the Act. The proviso to clause (b) of sub-rule (2) of rule 36 of the Rules was framed by the Board under the delegated power and the same is applicable to all cases where the actual value of taxable service is not known.

19. It is apparent from the perusal of the above proviso that the same would be applicable when the value of service was not known. In the instant case the Agreement is clear that the Licensed Intellectual Property was allowed to be used by the appellant royalty-free. It has come on record that the appellant had made quarterly payments to the BDO International (Franchiser) under the invoices issued by the BDO International. The Invoices are silent with regard to the purpose for which invoices were issued and payments were made. The invoices contained that "contribution on account 2014 quarter". It appears that the appellant has not produced the invoices before the forums below and the same have been produced for the first time before us. Thus the forums below have not committed any mistake in invoking provisio to clause (b) of sub-rule (2) of rule 36 of the Rules.

20. The proviso to clause (b) of sub-rule (2) of rule 36 of the Rules could be invoked where there is no formal agreement between the services provider and the service recipient or where the value of service was not known. In the instant case the appellant admitted that it was making quarterly payment on account of reimbursement of expenses relating to administrative expenses incurred by BOD International on its behalf. However, the invoices are silent with regard to the purpose for which the amounts were remitted. Thus it could not be conclusively said that this is the case where the value of service is not known. Sub- sub-section (46) of section 2 of the Act read 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)

The definition of franchise as reproduced supra is very exhaustive and has covered various aspects of "franchise". The said definition apart from other aspects of franchise provides that "*or to undertake any process identified with the franchiser,* (Emphasis supplied).

21. That the first question "Whether or not the relationship of franchiser and franchisee existed between the appellant and BDO International?" is clarified from the definition of Franchise as reproduced in para 20 supra. "It was sufficient that the franchisee was providing services or was undertaking any process which was identified with franchiser. In this case the appellant is using the name of the BDO International and its Technical Manuals and Software in providing services or undertaking a process similar to BDO International and its activities are 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.

22. The second question is "Whether the assessment order in this case could be passed invoking proviso to clause (b) of sub-rule (2) of rule 36 of the Rules". This is not the case where value of service is not known. The appellant is making quarterly payment under the garb of reimbursement of expenses. The definition of franchise provided that "*whether or not against a consideration or fee, including technical fee, management fee, or royalty or such other fee or charges" (emphasis supplied).*The definition is very clear and provides that the consideration paid against franchise by any name is taxable. We therefore hold that in this case proviso to clause (b) of sub-rule (2) of rule 36 of the Rulescould not be invoked as the appellant was making quarterly payment to BDO International.

23. The third question is "What should be the value of the taxable services of franchise received by the appellant?" The appellant placed few

invoices on record from which it was not possible to determine the value of taxable services received by the appellant. In our view this is a fit case to be remanded to the AO for determining the value of taxable services.

24. It is pertinent to mention that in the instant case SCN was only issued to the appellant leaving the entire industry. Thus singling out the appellant for the reasons best known to SRB. The AC though submitted that the SCN was issued to other four chartered accountants. However he accepted the fact that the SCNs were issued to other four chartered accountants after our calling the details of issuance of SCN to other similar cases.

25. The appellant pleaded discrimination. It is true that by ignoring the entire industry and issuing the SCN to the appellant alone smacks of discrimination with the appellant. However, we are afraid in tax matters equitable principals could not be invoked to provide relief to a tax payer as in taxing statute one has to look merely at what is clearly said; there is no room for any intendment; there is no equity about a tax and there is no presumption as to a tax. By now 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.

26. Before parting with this order we want to point out that relevant provision of law under which the assessment was to be made and SST was to be recovered was not mentioned in the SCN. This is a glaring mistake and renders the SCN invalid. Similarly no relevant provision of law was also mentioned in the OIO.

27. The other allegation against the appellant was that it had received various services from unregistered persons and it had failed to withhold and deposit the SST. The appellant has not seriously contested this issue and submitted before the AO that it would pay the SST once the issue of franchise was resolved. The appellant admittedly is a resident person and is required to act as withholding agent under clause (g) of sub-rule (2) of rule

1 of the Withholding Rules and required to withhold the SST under provisio to sub-rule (3) of rule 3 of the Withholding Rules and was thus liable to deposit the same with SRB as admitted by it. We therefore, direct the appellant to deposit the SST of Rs.362,141/- with the SRB alongwith default surcharge under section 44 of the Act within thirty days from the date of receipt of this order, failing which it would also be required to pay penalty as prescribed at Serial No.3 of the Table under section 43 of the Act.

28. The AO imposed penalties under Serial No. 3, 6 (d) (without mentioning sub-clause of Serial No.6 in the SCN), 11 and 12 of the Table under section 43 of the Act without establishing mensrea and malafide on the part of the appellant. Furthermore, multiple penalties were imposed without just cause and we therefore delete all such penalties except those as provided under Serial No.3 of the Table under section 43 of the Act.

29. In view of the above discussions the appeal is partly allowed and OIO and OIA are setaside to the extent of charging SST on franchise services and the case is remanded to the AO for fresh decision on franchise services. However before proceeding further the AO would issue proper corrigendum to the appellant intimating the relevant provision of law under which it sought to pass the assessment order and recover the amount. The appellant is directed to provide all relevant documents to the AO for determining the correct value of franchise services received by the appellant. Needless to say that the appellant will be provided proper right of hearing and such order should be passed keeping in view the provisions contained under sub-section (3) and (4) of section 23 of the Act.

30. The appeal is disposed of in terms of para 27 to 29 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

Karachi:
Dated: 19.05.2022

Copy Supplied for compliance:

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

Copy for information to:-

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

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REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on 23/05/2022

Registrar

Order Dispatched on 23/05/2022

Registrar