

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD, AT KARACHI

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APPEAL NO. AT-07/2022

M/s Nalco Pakistan (Pvt.) Ltd.
D-15/1, Block # 3, KDA Scheme No. 5,
Clifton Road, KarachiAppellant

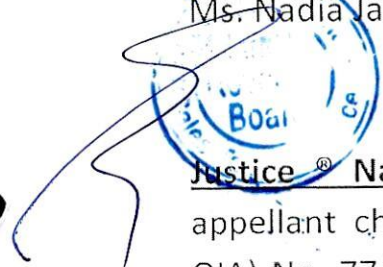
Versus

The Assistant Commissioner (Unit-21),
Singh Revenue Board,
02nd Floor, Shaheen Complex,
M.R Kiyani Road, Karachi.....Respondent

Date of filing of Appeal: 16.02.2022
Date of hearing: 19.04.2022
Date of Order: 13.06.2022

Mr. Moiz Mithaiwala, ITP for appellant.
Ms. Nadia Jalil, AC-(Unit-21), SRB for 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. 77/2021 dated 17.12.2021 passed by the Commissioner (Appeals) in Appeal No. 59/2021 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 212/2021 dated 31.05.2021 passed by Ms. Ambreen Fatima, Assistant Commissioner, (Unit-21) SRB Karachi.

02. It was stated in the OIO that the appellant having SNTN-S2322811-3, was registered with Sindh Revenue Board (SRB) under the service category of "Franchise Services" falling under Tariff Heading 9823.0000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) which was subject to Sindh Sales Tax (SST) with

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effect from 01.07.2011. It was further stated that it was evident from record that the appellant had acquired the taxable services of 'management consultants' classified under Tariff Heading 9815.4000 of the Second Schedule to the Act, from non-resident service provider. Therefore, the appellant in addition to its liability under Tariff Heading 9823.0000 of the Second Schedule to the Act was also required to deposit the amount of SST on receipt of management consultant services in terms of the provision of section 3(2) and 9(2) of the Act.

03. It was alleged in the OIO that the record showed that the appellant had signed an agreement titled as 'Laboratory Assistant and other Allied Services Agreement' with M/s Ecolab Europe GmbH (EEG). According to the agreement, EEG had developed knowledge and expertise relating to providing service to enable appellant to make better use of its local resources and to provide centralized location to administer actions between the appellant and other affiliated companies of EEG. Accordingly, the appellant under the aforementioned agreement had acquired the counsel, advice and assistance services from EEG in the areas of commercial & technological development advice, laboratory support and handling hazardous material.

04. It was further alleged in the OIO that In consideration, the appellant under Article IV of the agreement was required to make payment to EEG for each calendar quarter, besides such payments were subject to withholding tax, and the appellant was further required to withhold the amount of tax on behalf of EEG. The council, advice and assistance services acquired by appellant from EEG under the aforementioned agreement fell within the ambit of the definition of 'management consultants' provided under section 2(57) of the Act and had been classified under Tariff Heading 9815.4000 of the Second Schedule to the Act and these services were chargeable to SST at the standard rate with effect from 01.07.2013.

05. It was further alleged in the OIO that from Note 14 of the annual audited, accounts of the appellant for the year ended November-2018 it

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had transpired that the appellant had incurred expenses of Rs.78,848,488/- during the Financial Year 2017 for procuring the afore-referred services from EEG and the appellant was required to deposit the SST of Rs.10,250,303/- (being 13% of Rs.78,848,488/-) in terms of the provisions of section 3(2) and 9(2) of the Act. However, perusal of the Sindh Sales Tax Returns (SST Returns) filed by the appellant during the tax periods from December-2016 to November- 2017 it was revealed that the appellant had failed to deposit the due amount of SST with SRB.

06. The appellant was served with a Show-Cause Notice (SCN) dated 08.04.2021 under Section 23 of the Act calling upon it to explain as to why SST amounting to Rs.10,250,303/- may not be assessed and recovered from it under section 23 and 47 of the Act along-with default surcharge under section 44 of the Act. The appellant was also called upon to explain as to why penalty as provided under serial No. 3 and 12 of the Table under section 43 of the Act should not be imposed on it for violation of the provisions of section 3, 8, 9 and 17 of the Act read with the rules made thereunder.

07. The representative of the appellant submitted written response dated 04.05.2021 to the SCN and submitted that since the amount of services were not reimbursed to the EEG therefore, the appellant was not required to make payment of SST as confronted in the SCN.

08. The Assessing Officer (AO) passed OIO under section 23 and 47 of the Act determining the SST of 10,250,303/= along with payment of default surcharge under section 44 of Act (to be calculated at the time of payment). The AO also imposed penalties of Rs.512,515/= 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 dismissed the appeal .The relevant portion of the OIA is reproduced for ready reference as under:-

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"...29. Since the Appellant had created the provision of expense of Rs.78,848,488/- against 'Management Consultant' services (falling under Tariff Heading 9815.4000) which he had availed from a non-resident person, he was required to pay due SSTs thereon, under section 3(2) read with section 9(2) of the Act, 2011 [read with the commensurate provisions of 'MALA' itself] in line with the section 17(2) ibid on the date that entry was created. Obviously, Appellant has failed to discharge his lawful duty in this regard. In view of such scenario, the instant Appeal fails while the impugned OIO is upheld in toto without any modification".

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

10. The learned representative of the appellant submitted as under:-
- i. The department had already recovered an amount of Rs.10,252,303/- along-with penalty of Rs.512,515/- from the appellant.
 - ii. The department has issued recovery notice dated 09.02.2022 for recovery of Rs.5,541,228/- on account of default surcharge which was on higher side.
 - iii. The recovery of SST dues without determination of the same from an independent forum was against the principles of natural justice and the decisions of Superior Courts.
 - iv. The OIA was announced on 17.12.2021 and was dispatched to the appellant on 20.12.2021 and was received by the appellant on 21.12.2021. However, before the supply of OIA the bank accounts of the appellant maintained at Citi Bank Limited and MCB Limited were attached on 20.12.2021 and the amounts mentioned above were withdrawn leaving the demand raised on account of default surcharge of Rs.5,541,228/-.
 - v. The core business of the appellant was import of chemicals from EEG and sale of the same in local market. It was paying sales tax on goods under the provisions of the Sales Tax Act, 1990 to FBR.
 - vi. The expenses of Rs.78,848,488/- were booked in the Financial Statement for the year 2016-2017 and since the payment was not remitted to EEG the entry was reversed in the Financial

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Year 2017-2018. Thus due to reversal of entry under the heading 'liability considered no longer payable', no amount was payable by the appellant.

- vii. No payment was remitted to EEG due to refusal of State Bank of Pakistan to ratify the Agreement.
- viii. The agreement with EEG stands cancelled and was no longer applicable.
- ix. The AC Unit 21 who had issued SCN and passed OIO had no jurisdiction to deal with the case. Since the jurisdiction was with the AC Unit 28 as per the Notification dated 03.07.2020.
- x. The service was wrongly treated as Management Consultant Service instead of Franchise service. Moreover the appellant was paying SST separately under the two agreements but was using Tariff Heading of Franchise Services for this purpose.

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

- i. The appellant entered into two separate agreements covering Franchise and Management Consultant Services.
- ii. The dispute is only in respect of Agreement of Management Consultant and not in respect of Franchise Agreement since the appellant was discharging its obligation under Franchise Agreement.
- iii. The appellant got registration on 21.03.2012 under Tariff Heading 9823.0000, of the Second Schedule to the Act under Franchise Services.
- iv. The appellant was recipient of service of management consultant from non-resident person and was liable to pay SST under sub-section (2) of section (3) of the Act read with sub-section (2) of section 9 of the Act.
- v. The payment of SST was not dependent on payment of service charges and reference to clause (i) of sub section (2) of Section 17 of the Act was given.
- vi. The appellant had not raised the point of reversal of entry at the two forums and it could not raise the same at this stage. Moreover even if the entry was reversed the same would not affect the payment of SST as the service was already acquired.

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- vii. The payment of SST was not dependent on the permission of State Bank of Pakistan but was dependent on the acquiring of such service, which was already acquired.
- viii. The AC-Unit-21 was fully competent to issue SCN and to pass OIO. Reference was made to para-2 of Notification dated 03.07.2020.
- ix. The appellant in its Financial Statement had separately booked the Franchise Services and Management Consultant Services and therefore it was accordingly required to pay SST separately-
- x. The payments were made for acquiring Franchise Services. Moreover the SST for acquiring Management Services was not paid separately thus the same was not mentioned in the SST Returns.
- xi. The appellant had concealed the acquiring of Management Consultant services and had committed tax fraud. Thus filing of true and correct SST Returns was the responsibility of the appellant.

12. We have heard the learned representative of the parties and perused the record made available before us.

13. The dispute is in respect of payment of SST on acquiring of management consultant services from a non-resident person. The appellant has not disputed that it had acquired the services under an agreement with EEG. The contention of the appellant was that since the service charges were not remitted to the service provider no SST was payable. It was also not disputed that services were duly acquired and booked in the financials. The appellant has however contended that since the State Bank of Pakistan had refused to allow remittance thus the entry was accordingly reversed hence no SST was payable.

14. That after hearing the parties the following issues require consideration.

- i. "Whether the officer of SRB who had issued the SCN and subsequently passed the OIO had jurisdiction?"

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- ii. "Whether the appellant was liable to pay SST on account of non-remittance of service charges to the non-resident service provider?"

15. We will take issue Number (i). first "Whether the officer of SRB who had issued the SCN and subsequently passed the OIO had jurisdiction?" The discussions on this issue are as under:-

- i. The appellant had challenged the jurisdiction of the officer of SRB by submitting that the officer having jurisdiction to deal with the cases of franchise had issued SCN and passed OIO instead of the officer having jurisdiction to deal with the cases of management service and both the acts were without jurisdiction. He relied upon the SRB Notification dated 03.07.2020. The AC in reply submitted that the appellant was registered under the service category of Franchise and the AC dealing with the cases of franchise had the jurisdiction to deal with the case and also relied upon para 2 of the SRB Notification dated 03.07.2020.
- ii. That the AC-21 was authorized to deal with the cases of franchise and AC-28 was authorized to deal with the cases of management consultant. Para 2 of the said Notification provided that where a service provider was engaged in the economic activity of providing or rendering more than one taxable service, as specified in the column (3) of the table against Units No. 1 to 32 (except Unit No. 24 and 24A), as specified in Column (2), he shall be placed in the jurisdiction of the Unit, specified in Column (2) relating to the service which was its principal activity as per its registration particular.
- iii. The appellant was registered under the service category of franchise services which was its principal economic activity. Thus we hold that the SCN was rightly issued and OIO was competently passed by the AC-21 having jurisdiction to deal with the cases of franchise.



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16. Now we will take issue Number (ii). "Whether the appellant was liable to pay SST on account of non-remittance of service charges to the non-resident service provider?" The discussion on this issue are as under:-

- i. The appellant under an agreement had acquired management consultant service from EEG a non-resident person and the said service charges were duly booked in the financials for the year ended November-2018. The appellant had incurred expense of Rs.78,848,488/- for procuring the afore-referred services from EEG.
- ii. The appellant submitted that since the payment was not remitted to the non-resident service provider, thus the entry was reversed and it was not liable to pay SST. The contention of the AC was that the payment of SST was not dependent on payment but the same was dependent on acquiring services and in the instant case the service were acquired and charges were mentioned in the financials. Therefore the SST became payable and he referred to clause (i) of sub-section (1) of section 17 of the Act. Section 17 deals with the time, manner and mode of payment which reads as under:-

17. Time, manner and mode of payment: 1[(1) The tax in respect of a taxable service provided or rendered during a tax period shall be paid by a person by the due date prescribed for payment of tax.]

(2) For the purposes of sub-section (1), a taxable service shall be considered to have been provided in the tax period during which:

(i) it was provided to the recipient;

(ii) an invoice for the value of the taxable service was sent to the recipient; or

(iii) consideration for the same was received; whichever is earlier.

(3) Notwithstanding anything contained in sub-section (1), the Board may, by a notification in the official Gazette, direct that the tax in respect of all or such classes of taxable services, as may be specified in the aforesaid notification,

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shall be charged, collected and paid in any other way, mode, manner or time as may be specified therein.

(4) The tax due on taxable services shall be paid by any of the following modes, namely:- (a) through deposit in a bank designated by the Board; or (b) through such other mode and manner as may be specified by the Board.

- iii. That for the purpose of the instant appeal the relevant clause is (i) of sub-section (2) of section 17 of the Act. This provision is very clear and has provided three modes during which the SST become payable. Out of the such three modes, the first is when a taxable service was considered to have been provided in the tax period during which it was provided to the recipient. The service was provided in the financial year ending November, 2018. The SST became payable since the date such services were acquired irrespective of the fact whether the charges were remitted or not. The reversal entry does not mean that services were not acquired. The appellant as per the agreement was required to pay the management consultancy fee on quarterly basis. Moreover the appellant despite charging the same did not disclose the Management Consultancy in its SST Returns and has therefore concealed the same from SRB. Once the appellant has acquired the services it is immaterial whether the charges were remitted to non-resident service provider or not.

In view of the above discussions it is held that the appellant was liable to pay the SST of Rs.10,250,303/= to SRB due to acquiring of management consultant service from a non-resident service provider.

17. It has come on record that the SRB had recovered the SST of Rs.10,250,303/= and penalty of Rs.512,515/= from the appellant. Moreover only the default surcharge of RS.5,541,228/= was payable for which the demand notice was issued to the appellant. The manner in which the recovery was made from the appellant even before supply of copy of OIA was highly objectionable and was a result of deception on the part of the officers of SRB and was not expected from such reputable institution.

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18. The appellant has complained that its bank accounts were attached and payment was withdrawn on 20.12.2021 even before supply of OIO which was dispatched and received by the appellant on 21.12.2021. On query from the Tribunal the AC submitted that she had received the copy of OIA on 21.12.2021. However she had received prior information from AC-Appeals on 17.12.2021 that no stay was operating and thus the attachment letters were issued, and the pay orders were received on 20.12.2021.

19. It is apparent from the above narration of the AC that the copy of OIA was deliberately not provided to the appellant to give an advantage to the department to recover the demand without providing opportunity to the appellant to approach the Tribunal for obtaining stay of recovery of demand. This type of tactics bring bad name to the department and tarnishes its image and the officer who had indulged in such malpractices should be taken to task.

20. Keeping in view the manner in which the recovery was made by the AC we vide our order dated 27.02.2022 had requested the Chairman, SRB to hold enquiry and take action against the delinquent officer. Moreover this Tribunal has not yet been intimated about the action taken which may be expedited and such intimation should be sent to the Tribunal accordingly.

21. The default surcharge and penalty were imposed without establishing mensrea and malafide on the part of the appellant. The OIO is silent in this regard. The imposition of default surcharge is penal in nature and establishing of mensrea is must as held in various pronouncements of the superior courts. Furthermore the default surcharge could only be imposed where there is a willful evasion of tax. However if the matter was contentious it could not be said that the default was willful. In the reported case of Hard Castle Waud, PLD 1967 SC Pak 01 Hamood ur Rehman J had held that "even in the case of statutory offence the presumption is that mens rea is an essential ingredient". In another reported case of Deputy Collector Central Excise and Sales Tax versus ICI Pak Lahore 2006 PTD 1132

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(Supreme Court) it was held that Imposition of default surcharge was not automatic therefore it was to be determined by the appropriate authority as 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.

22. In another reported judgment it was held as under:-

“Jurisprudence that has evolved over the years is that penalty can only be imposed where there is willful evasion of duties and taxes. In the Pakistan, through the Secretary, Ministry of Finance, Rawalpindi etc. v. Hardcastle Waud (Pakistan) Ltd., Karachi (PLD 1967 SC 1), while dilating on Item 3-B of Section 167 of the Sea Customs Act, 1878, the Honorable Supreme Court held that it was incorrect to say that the said Item created an offence of absolute liability and was an exception to the general rule that mens rea was an essential element in the commission of a criminal offence. It ruled that even in the case of a statutory offence the presumption is that mens rea is an essential ingredient unless the statute creating the offence by express terms or by necessary implication rules it out. In Ms D.G. Khan Cement Company Ltd., etc. v. The Federation of Pakistan, etc. (PTCL 2004 CL 224), the Apex Court held that in order to impose additional tax it should be seen whether the evasion or non-payment of tax was willful or malafide. Therefore, every case should be decided on its own merits. Every default on the part of the registered person would not ipso facto make him liable for penalty or additional tax/default surcharge. The Revenue must establish that it was dishonest, willfull or malafide.

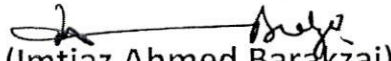
23. In view of the above reported cases and considering the principles laid down by Superior Courts it cannot be said that the instant case was of tax evasion. Moreover no determination of willful default and evasion of SST coupled with mensrea was undertaken or established. Therefore it is held that the appellant was not liable to payment of default surcharge and penalty.

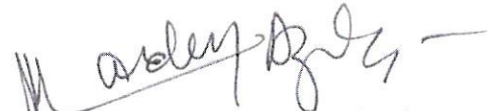
24. In view of the above discussions the OIO and OIA are maintained to the extent of payment of SST. The appeal is partly allowed to the extent of levy of default surcharge and penalty.

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25. In view of the circumstances of the case and the manner in which the SST and penalty were recovered from the appellant it is ordered that the penalty of Rs. 512,515/= may be refunded to the appellant within thirty days from the date of receipt of this order. However if the penalty is not paid within the stipulated time the appellant is allowed to adjust the same from its future liability.

26. The appeal is disposed of in terms of para 24 and 25 supra. The copy of the order may be provided to the learned representatives of the parties.


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER


(Justice[®] Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi:

Dated:13.06.2022

Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
- 2) The Chairman, Sindh Revenue Board, Karachi.
- 3) The Assistant Commissioner, (Unit-21), SRB, for compliance

Copy for information to:-

- 4) The Commissioner (Appeals), SRB, Karachi.
- 5) Office Copy.
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APPELLATE TRIBUNAL
SINQH REVENUE BOARD

Order issued on

14/06/2022

Order Dispatched on

14/06/2022

Registrar
