

## IN THE HIGH COURT OF SINDH AT KARACHI

**Present:**  
**Mr. Justice Muhammad Shafi Siddiqui**  
**Mr. Justice Mahmood A. Khan**

Special Sales Tax Reference Application No.02 of 2017

IMS Health Pakistan (Private) Limited  
 Versus  
 Commissioner-II

**ALONG WITH**

CP Nos.D-1869 of 2019 & D-4061 of 2021

IQVIA Solution Pakistan (Pvt.) Ltd.  
 Versus  
 Sindh and Others

Date of Hearing:	11.11.2021
Petitioner/Applicant:	Through Mr. Hyder Ali Khan along with M/s Sami-ur-Rehman Khan and Hamza Waheed Advocates.
Respondent/Province of Sindh:	Through Mr. Saifullah, Assistant Advocate General.
Respondent Sindh Revenue Board:	Through Mr. Shamshad Ahmed Advocate along with Syed Zain-ul-Abdin Shah, Deputy Commissioner SRB.

### **J U D G M E N T**

**Muhammad Shafi Siddiqui, J.**- Through this common judgment we intend to dispose of Special Sales Tax Reference Application and the two connected petitions as the same involve common questions and for the sake of convenience the Reference Application is being treated as leading matter and the answers to the questions proposed therein will decide the fate of the petitions as well.

2) Applicant has invoked the Reference jurisdiction of this Court by proposing following three questions of law:-

- A) Whether the learned Appellate Tribunal erred in holding that the appellant (applicant) is engaged in the provision of “Business support services” under the Tariff Heading 9805.9200 of the Second Schedule of the Act?
- B) Whether the learned Appellate Tribunal was justified in taxing the entire value of the appellant’s (applicant’s) invoices even though only one component of such invoice related to fee for provision of services?
- C) Whether the learned Appellate Tribunal gravely erred in deciding that the appellant (applicant) would be liable to pay default surcharge and penalty if the principal amount was not paid expeditiously despite having held that the key element of *mens rea* was missing and that there was a contest between the parties in respect of classification of services?

3. Impugned in this Reference is an order of Appellate Tribunal Sindh Revenue Board dated 07.11.2016, which approved department’s version as well as of the first appellate Court by applying Tariff Heading 9805.9200 to the Second Schedule of Sindh Sales Tax on Services Act, 2011.

4. Brief facts leading to the present controversy under Reference are that a show-cause notice was issued by an officer of Sindh Revenue Board (SRB) to the applicant on 25.04.2016 for the tax period July 2013 to December 2014. Applicant responded to the said show-cause notice by replying in detail on 10.05.2016 which ended up in passing Order-in-Original dated 01.06.2016 under section 44 and 47 of Sindh Sales Tax on Services Act, 2011 in terms whereof the applicant was liable to pay the assessed amount with penalty. The remedy of appeal was then exhausted before the Commissioner Appeals under section 57 of Sindh Sales Tax on Services Act, 2011 which appeal was decided on 12.08.2016 against the applicant. Second statutory appeal was then filed under section 61 of Sindh Sales Tax on Services Act, 2011 before the Tribunal which too passed order under section 62 of the *ibid* Act on 07.11.2016 against the applicant. Consequently and ultimately this Reference was

filed impugning the order of the Tribunal under reference jurisdiction of this Court.

5. The crux of the dispute, which is specifically in relation to tax period July 2013 to December 2014, is whether or not the applicant is liable to pay sales tax on services under the referred Tariff Heading 9805.9200 (Business Support Service) as provided in the Second Schedule to the Act as against the more appropriate and specific entry (as alleged) in the first schedule to the Act being Tariff Heading 9824.0000 (Data processing and provision of information).

6. We have heard the learned counsel and perused material available on record.

7. Subsection 79 of Section 2 of Sindh Sales Tax on Services Act, 2011 defines what service or services means. It means anything which is not goods and shall include but not limited to the services listed in the First Schedule of this Act whereas taxable services are defined in Second Schedule of section 3 and 8 of the *ibid* Act. The first Schedule provides under section 2(72) of the *ibid* Act is more general and information specified services and more importantly described what services could be whereas second Schedule to the *ibid* Act is list of services whereon tax is levied.

8. Principal argument of applicant is that when more specific and exclusive entry in the shape 9824.0000 as Data Processing and Provision of Information Services is available the recourse to a Tariff Heading (9805.9200) to the Second Schedule is not warranted. We are unable to reconcile such contention of Mr. Hyder Ali Khan as the Tariff Heading 9824.0000 emerges out of First Schedule deals with the subject of data processing and provision of information, services of engineering, handling and storage of goods, which entry on account of prefix is an alien to the subject of services being rendered by the applicant. The

applicant is providing and rendering services more appropriately in terms of Tariff Heading 98.05, which is available in Second Schedule as 9805.9200 as being taxable service. Tariff Heading 98.05 is as under:-

*“98.05 Services provided or rendered by persons authorized to transact business on behalf of others.”*

9. For the purposes of aforesaid conclusion the admitted facts are that the applicant was incorporated in Pakistan on 22.07.2002 and is engaged in collection and coding of data relating to the pharmaceutical industry and its transmission to overseas IMS offices and coordination between IMS-AG Switzerland and its customers in Pakistan. The activities of such services is governed and undertaken by the applicant through an agreement attached with the pleadings and relied upon before lower fora. The applicant company claims to be wholly owned subsidiary of IMS-AG Switzerland. The agreement, which is not disputed, provides that principal (IMS-AG) is engaged in collection of data, statistics and information of all kinds for preparing publications and selling market research reports and the primary object, in connection therewith of the applicant, was not only to collect data, rather marketing research reports and its publication. Such exercise was undertaken under the agreement which relationship is more appropriately governed by Tariff Heading 98.05 with its suffix as 9200 i.e. 9805.9200 to the two Schedules and in doing so the activity undertaken to support such business transactions and activities has been provided in the Second Schedule as taxable activity of service under Tariff Heading 9805.9200. Thus, we would not upset the findings as far as applicability of Tariff Heading is concerned.

10. The important issue however is that if activities are covered under Tariff Heading 9805.9200 (Business Support Services) to the Second Schedule, the revenue component that constitute value of service provided or rendered has to be clear and other component,

which does not constitute value of service should be disintegrated under Sindh Sales Tax on Services Act, 2011.

11. The department as well as statutory appellate forums held that reimbursed expenses involved to its services is liable to Sindh Sales Tax on the basis of above stated Tariff. This perhaps is to be seen within the scheme of the Sindh Sales Tax on Services Act, 2011 as the Act provides the taxability of adjusted value services provided or rendered rather than any other amount for which invoice issued and expenses were incurred which are admittedly reimbursed by the principal recipient.

12. Section 5 and 8 of Sindh Sales Tax on Services Act, 2011 deals with the value of taxable services. For the sake of convenience, the same are reproduced as under:-

***“5. Value of a Taxable Service.--(1) The value of a taxable service is:--***

*(a) the consideration in money including all Federal and Provincial duties and taxes, if any, which the person providing a service receives from the recipient of the service but excluding the amount of sales tax under this Act: Provided that—*

*(i) in case the consideration for a service is in kind or is partly in kind and partly in money, the value of the service shall mean the open market price of the service as determined under section 6 excluding the amount of sales tax under this Act;*

*(ii) in case the person provides the service and the recipient of the service are associated persons and the service is supplied for no consideration or for a consideration which is lower than the price at which the person provides the service to other persons who are not associated persons, the value of the service shall mean the price at which the service is provided to such other persons who are not associated persons excluding the amount of sales tax;*

*(iii) in case a person provides a service for no consideration or for a consideration is lower than the price at which such a service is provided by other persons, the value of the service shall mean the open market price for such a service;*

*(b) in case of trade discounts, the discounted price excluding the amount of sales tax under this Act, provided the tax invoice shows the discounted price and the related tax and the discount allowed is in conformity with customary business practice;*

*(c) in case there is reason to believe that the value of a service has not been correctly declared in the invoice or for any special nature of transaction it is difficult to ascertain the value of a service, the open market price, as determined under section 6;*

*(d) notwithstanding any of the above, where the Board deems it necessary it may, by notification in the official Gazette, fix the value of any Service or class of services and for that purpose fix different values for different classes or description of the same or similar types of services;*

*Provided that where the value at which the service is provided is higher than the value fixed by the Board, the value of the service shall, unless otherwise directed by the Board, be the value at which the service is provided.*

**8. Scope of tax.--***(1) Subject to the provisions of this Act, there shall be charged, levied and collected a tax known as sales tax on the value of a taxable service at the rate specified in the Schedule in which the taxable service is listed.*

*(2) The Board, with the approval of Government, may, subject to such conditions and restrictions as it may impose, by notification in the official Gazette, declare that in respect of any taxable service provided by a registered person or a class of registered persons, the tax shall be charged, levied and collected at such higher or lower rate or rates as may be specified in the said notification for any given tax period.”*

13. It is the consideration in money including federal and provincial duties and taxes which constitute value of taxable services which the person provides against the consideration but it excludes the amount of sales tax under the *ibid* Act. The Tribunal was of the view that the invoices generated on the amount includes the expenses/expenditures plus 10-% service charges and is to be taken as one revenue component for services rendered. The Tribunal is also of the view that in certain cases there is specific rule in Sindh Sales Tax on Services Act, 2011 providing for valuation of a particular service and providing a certain minimum threshold and also any exemption and exception. However, Tribunal considered that since no rule is available for the category of

“Business Support Services” full value of generated invoices shall be taken as the value of services rendered or provided in terms of provisions of Section 5 *ibid*.

14. We do not agree with the observation as Section 5 itself is clear that it is for the value of the service which is taxable; the reimbursed part of the invoice may or may not be of the goods which have been separately subjected to tax and the provincial Act itself would then not come into play for the entire invoice and the rule that is being discussed perhaps would deal with the exceptions not the one in hand.

15. The department has absolutely not disputed about the value of the service rendered. It is their view that even the reimbursed part of invoice is liable to be taxed and hence the value of service has not been disputed. Proviso to Section 5(1)(a) also supports the disintegration of Invoice component i.e. service value and other value which is reimbursable.

16. In the case of Sami Pharmaceuticals<sup>1</sup> the Bench is of the view that it is only the quantum and value of service which is taxable and not the amount being reimbursed by service recipient.

17. Primarily value of service charges for the purposes of Act 2011 is governed by the value of service agreed upon between the provider and the recipient as the market itself is so competitive that nothing could defeat the actual amount being declared to be taxed. However, in case such understanding of value of service is doubtful as it does not disclose correct value of service, it was open for the department to have considered the open market price of such service as required to be determined under section 6 of Sindh Sales Tax on Services Act, 2011 which is not the case here. Two provisos to Section 5 deals the situation of value of service. In a situation where the consideration of value of

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<sup>1</sup> 2021 PTD 731 (Sami Pharmaceuticals (Pvt.) Ltd. v. Sindh)

service is in kind or is partly in kind and partly in money, value of service shall mean open market price<sup>2</sup> excluding the amount of sales tax under Act 2011. Similarly in case where service is provided by provider to a recipient who is an associated person and the value is not the actual value of service, then the value of service which is being provided by a provider to a non-associated person shall be counted and in case no consideration is claimed or value is lower than it is being provided by other persons, the value of service shall be of open market. In principle the department has not disputed the value of services rather the department is of the view that reimbursed amount or the amount of maintenance/expenses incurred should be made part of the value of the service.

18. A dispute came for consideration before Delhi High Court in the case of Intercontinental Consultants & Technorats (P.) Ltd.<sup>3</sup> in relation to Section 66 and 67 Chapter V of Finance Act, 1994 which perhaps is *pari materia* to the relevant provisions of Sindh Sales Tax on Services Act, 2011 such as Section 5 and 6, which provide clear mandate of the value of taxable service by charging service tax to be in consonance with Section 66 which levies tax only on taxable service and nothing else. There was however an inbuilt mechanism to ensure that only the taxable service shall be evaluated under the relevant provisions of the said Finance Act, 1994 such as Section 67. Delhi High Court thus concluded that in determining the value of the service nothing more and nothing less than the consideration paid as *quid pro quo* for which service can be brought to charge, as Rule 5(1) of Service Tax Rules, 2006 ran contrary to the substantive Statute which was declared *ultra vires* by the Delhi High Court.

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<sup>2</sup> Section 6 of Sindh Sales Tax on Services Act, 2011.

<sup>3</sup> Intercontinental Consultants & Technorats (P.) Ltd. v. Union of India



19. The above matter went up to Supreme Court of India<sup>4</sup> which found no merit and the appeals were dismissed thus maintained the findings of the Delhi High Court.

20. In the case of Human Resources<sup>5</sup> the same principle was maintained. The gross amount was thus defined to be read in consonance with the subject of taxable service. Thus, it cannot be read in isolation of the “actual subject” which in the context of “valuation of service” is the gross amount, inclusive of federal and provincial duties and taxes which could only be taken into consideration after excluding the sales tax, which is to be applied on such gross value of taxable service.

21. Section 8 also limits the applicability to the extent of its charge, levy and collection which is restricted to the value of taxable service. This however deals with the specified rate in the schedule where taxable services listed. Thus, the collective reading of Section 3, 5 and 8 would take us to an irresistible conclusion that it is only the value of service rendered and provided that could be subjected to Sindh Sales Tax on Services Act, 2011 and not any other components therein as this would invade the jurisdiction of other statutes as the invoice could contain a component of an amount likely to be reimbursed which amount either has already been subjected to a treatment on the basis of other applicable laws, or otherwise.

22. In relation to the last point that deals with the default surcharge and penalty, the applicant’s case is that since the element of mens rea was missing, as held by the Tribunal, the applicant should not have been burdened with the default surcharge and penalty in case amount was not paid within 30 days from the receipt of the order of the Tribunal.

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<sup>4</sup> AIR 2018 SC 3754 (Union of India v. Intercontinental Consultants & Technocrats (P.) Ltd.

<sup>5</sup> 2021 PTD 933 (Human Resource Solutions (Pv.) Ltd. v. Federation of Pakistan)

Learned counsel for the applicant has relied upon the case of ICI<sup>6</sup> wherein the Hon'ble Supreme Court held that failure of a person to register with the authority and pay sales tax within the time is to be scrutinized on the basis of facts and circumstances as such liability being not automatic would better be determined by appropriate authority as to whether there was any reasonable ground that default in payment of sales tax which could be considered as willful and deliberate. Only on a decision of willful and deliberate non-payment would enter into a regime of recovery of additional tax such as penalty and surcharge. The proceedings throughout were contested on lawful grounds and there is no element of willful and deliberate negligence. Even the Tribunal considered the entire amount of invoice which includes reimbursed amount as well for the purposes of sales tax payable hence the applicant was justified by contesting it within the frame of law and hence there is no element of willful evasion of such taxes. Same rule is considered in the case of Habib Bank Ltd.<sup>7</sup>

23. In view of above facts and circumstances, we are of the view that department has misapplied the provisions of Section 5 of Sindh Sales Tax on Services Act, 2011 by including reimbursed and other components of the invoice in charging tax on the value of services rendered by the applicant. However, the department has validly considered the case of the applicant to have fallen under Tariff Heading 9805 with its sub-heading/suffix 9200 in the Second Schedule of Sindh Sales Tax on Services Act, 2011 and hence the rate specified in the third column of the Second Schedule at the relevant time is recoverable on the value of the services rendered, which is disclosed in the invoices and is not disputed throughout by the department. The questions (A) and (B) are thus answered in negative. However, since the tax is to be recovered on

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<sup>6</sup> 2006 SCMR 626 (Deputy Collector Central Excise v. ICI Pakistan)

<sup>7</sup> 2007 PTD 901 (Commissioner of Income Tax v. Habib Bank Ltd.)

the basis value of the service, the amount be deposited in 30 days' time and only on failure thereof the penalty and surcharge shall then be liable to be paid and recovered. Question (C) is thus answered accordingly.

24. In result of answers to the above, the petitions are also disposed of accordingly.

25. A copy of this decision may be sent under the seal of this Court and the signature of the Registrar to learned Appellate Tribunal Sindh Revenue Board, as required by section 63(5) of Sindh Sales Tax on Service Act, 2011.

Dated: 29.11.2021

**Judge**

**Judge**