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BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD KARACHI

DB-1

APPEAL NO. AT-01/2016

Central Power Generation Co.....Appellant

Versus

Assistant Commissioner, SRB, Karachi.....Respondent

APPEAL NO. AT-02/2016

Assistant Commissioner, SRB, Karachi .....Appellant

Versus

Central Power Generation Co.,.....Respondent

Date of Filing of Appeal : 04.01.2016
Date of hearing: : 20.01.2020 and 24.02.2020
Date of Order: : 27.02.2020

Mr. Abubaker, Advocate and Mr. Qadeer Ahmad, ITP for the appellant.

Ms. Umi Rabbab, DR-AC and Mr. Muhammad Siddique, AC-Larkana for appellant.

ORDER

Justice ® Nadeem Azhar Siddiqi, Chairman: This appeal No. 01/2016 has been filed by the appellant/tax payer challenging the order-in-appeal (hereinafter referred to as OIA) No. 186/2015 dated 16.11.2015 passed by the Commissioner (Appeals) in Appeal No. 131/2015 filed by the appellant against the order-in-original (hereinafter referred to as OIO) No. 12/2015 dated 08.06.2015 passed by the Assistant Commissioner (Mr. Ghulam Murtuza Shar), SRB, Karachi.

01. The other appeal No. 02/2016 has been filed by the appellant/department challenging the same OIA passed by the Commissioner (Appeals) in the appeal filed by the appellant against the same OIO passed by the Assistant Commissioner (Mr. Ghulam Murtuza Shar), SRB, and Karachi.

02. The facts and the law points involved in both these appeals are similar therefore both these appeals are decided by passing a single order.

03. The facts as stated in OIO were that the appellant M/s Central Power Generation Company Limited (GENCO II TPS GUDDU KASHMORE) having National tax Number (NTN) 3049718-3 had received taxable services in Sindh relating to "Contractual Execution of Work or Furnishing Supplies, Construction and Contractor" covered under Tariff Heading 9809.0000, 9824.0000 and 9814.0000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) which were chargeable to Sindh Sales Tax (SST) at the rate of 16% reduced to 15% w.e.f. July, 2014.

04. It was also stated in the OIO that the appellant being a service recipient of taxable services, was required to withhold the amount of (SST) on Services received by it in compliance to Sindh Sales Tax Special Procedures (Withholding) Rules, 2011 (hereinafter referred to as the withholding rules, 2011) notified vide Notification No. S.R.B 3-4/I/2011 dated 24th August, 2011 and substituted by notification dated 01.07.2014. It was further stated that the appellant was required to deduct the amount of SST as mentioned in the invoices issued by the service providers. However, the appellant had not complied with the provisions of the Withholding Rules.

05. It was alleged that the appellant received the above mentioned taxable services for the sum of Rs.1,252,591,132/- during the tax periods from July-2013 to June-2014, involving SST of Rs.200,414,581/-. It was also alleged that the appellant was required to pay SST amounting to Rs:200,414,581/-; on account of receipt of aforesaid taxable services under clause (c) of sub-rule (2) of Rule 1 & 3 of withholding rules, 2011, read with section 3, 9 & 13 of the Act.

06. A Show-Cause Notice (SCN) dated 12.05.2015 was served upon the appellant calling upon it to explain as to why an amount of Rs.200,414,51/- of SST should not be assessed & recovered under section 23 & 47 (1A) of the Act along with penalty and default surcharge in terms of serial No.3, 6(d), 11 & 12 of Table under section 43 of the Act and default surcharge under section 44 of Act.

07. In reply to SCN the appellant has taken the plea that the appellant was a Limited Company and was not a withholding agent under Rule 1 (2) of Withholding Rules, 2011 and it was not liable to withhold tax for the tax periods involved. It was also stated that according to Sindh Sales Tax Special Procedure (Withholding) Rules, 2014 (hereinafter referred to as the Withholding Rules, 2014) notified on 01.07.2014 the appellant was declared as withholding agent vide rule 1 (2) (e) of Withholding Rules, 2014. The appellant acknowledged to have received the services of contractual execution of work or furnishing supplies and construction. It was stated that the appellant had made full payment of tax on services to all the service providers according to applicable law and in support of such claim it produced copies of contracts, bills issued by service providers and details of payment made by the appellant to service providers. In another reply the appellant with reference to sub-section (1) of section 3 of the Act and sub-section (1) of section 9 of the Act submitted that responsibility of payment of tax was on the service provider and not upon the service recipient.

08. Finally the Assessing Officer passed Assessment Order (AO) determining the SST amounting to Rs.200,414,851/= alongwith default surcharge and penalty of Rs.200,414,851/= under serial number 6 (sub-section not specified) of table of section 43 of the Act.

09. The appellant challenged the said AO by filing appeal before the Commissioner (Appeals) who reduced the tax liability to Rs.1,254,120/= and maintained the penalty under 6 (d) of table under section 43 of the Act (without considering the fact that clause (d) was not invoked in the OIO) to an equal amount of tax and default surcharge.

10. Both the parties have challenged the said OIA before this Tribunal. The appellant has challenged the determination of tax liability and the penalty. Whereas the department has challenged the OIA on account of reduction of the tax liability of the appellant.

11. The representative for the appellant has submitted as under:-

(i) The AO was passed against the appellant treating it as a withholding agent for the tax periods from July, 2013 to June, 2014 without considering the fact that for the relevant tax periods the Withholding Rules, 2011 were applicable and there was no provision in these Withholding Rules which compelled the appellant to withhold tax and to deposit the same with SRB. Moreover for the relevant tax periods there was no provision in the Act under which the assessment order could be passed against the service recipient since section 23 and 47 (1A) of the Act were not applicable.

(ii) The SCN was issued invoking section 23 and section 47 (1A) of the Act. It was submitted that under section 23 of the Act assessment order against service recipient could not be passed. Moreover section 47 (1A) of the Act was not applicable as no allegations as mentioned in the section itself were made against the appellant.

(iii) The recovery from a withholding agent could only be made under section 47 (1B) of the Act inserted by Sindh Finance Act, 2016 effective from July, 2016. Moreover, the same could not be retrospectively applied to tax periods July, 2013 to June, 2014.

12. Mr. Kaleemullah AC-DR on behalf of the department submitted that the Assessing Officer had fixed the liability of Rs.200,414,581/- along with penalty of Rs. 200,413,581/- and default surcharge. He submitted that in appeal the Commissioner (Appeals) erroneously reduced the tax amount to Rs.1,254,120/- along with penalty of same amount and default surcharge. He submitted that the department also filed appeal against the OIA bearing No. AT-02/2016. In the concluding para of the written submission of department it was stated that M/s Harbin Power had made payment of Rs.141,683,022/- to SRB out of the amount determined by the AO.

12. Mr. Qadeer Ahmed for appellant submitted his arguments as under:-

(i) The tax had wrongly been levied on appellant in its capacity as a withholding agent. He further submitted that on 28.11.2019 the learned AC appearing for SRB had submitted that the tax liability of Rs.200,414,851/- was reduced to Rs.1,254,120/- by Commissioner (Appeals). The department also submitted that M/s Harbin Power had made payment of Rs.141,683,022/- to SRB out of the tax determined by AC which clearly shows that erroneous assessment order was passed.

(ii) According to the Notification dated 15th July, 2013 the jurisdiction to pass order against withholding agents was vested in the Deputy Commissioner (Coordination) and at that time AC, Unit 21 was Incharge of withholding, whereas the SCN was issued by AC-Sukkur.

(iii) There was no provision in the Act for the tax periods 2013-2014 which empowered the officers of SRB to pass assessment order against the withholding agents (service recipients) since section 47 (1B) was inserted on 18.07.2016. This sub-section empowers the officers of SRB to determine the tax against the withholding agent. He relied upon unreported judgment of Supreme Court in the case of Commissioner Inland Revenue Lyallpur V/s Bilal Traders, Faislabad, CP No.3008/2019 dated 13.01.2020. He further stated that for the relevant tax periods the appellant could not act as withholding agent as it was not covered in the definition of withholding agent as envisaged under rule 1 (2) of Withholding Rules, 2011.

13. In reply Mr. Muhammad Siddique, AC submitted that the Notification with regard to assigning jurisdiction of withholding was not clear and it was nowhere mentioned that AC withholding who had his office at Karachi could also look after the withholding of Sukkur and Larkana. He submitted that AC, Sukkur and Larkana were authorized to deal with the cases of all types of services in their respective jurisdiction. He then submitted that SCN was rightly issued invoking Section 47 (1A) of the Act and the OIO was rightly passed as the appellant in collusion with its service providers had not discharged its liability of withholding due tax. He further submitted that the appellant was a Private Limited Company

and its 100% shares were held by Government of Pakistan thus the appellant fell within the ambit of Clause (c) and (d) of sub rule (2) of Rule 1 of Withholding Rules,2011.

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

14. The appellant for the tax periods from July, 2013 to June, 2014 was recipient of various services. As per the Memorandum and Articles of Association the appellant is a Public Limited Company. The authorized share capital of the appellant is Rs.50,000,000,000/= divided into 5,000,000,000/= ordinary shares of Rs.10/= each and the paid up share capital of the appellant is Rs.500,000/= divided into 50,000 ordinary shares of Rs.10/= each. As per form A (Annual return of the appellant) it is evident that out of 50,000 paid up shares only seven shares were held by individuals and rest 49,993 shares were held by the President of Pakistan. Thus it is established that the appellant a Public Sector Organization and is a state owned enterprise and is covered by clause (c) of sub-rule (2) of Rule 1 of Withholding Rules, 2011.

15. The instant case relates to the tax periods from July, 2013 to June, 2014 and for the said tax periods the Withholding Rules, 2011 were applicable and not Withholding Rules, 2014. Rule 2 of Withholding Rules, 2011 provides the description of service recipients who are specified as withholding agents. Clause (c) of sub-rule (2) of Rule 1 of the Withholding Rules, 2011 further provides public sector organizations, including public corporations, state owned enterprises and regulatory bodies and authorities. Undoubtedly the appellant is a public sector organization which is state owned and falls within the ambit of Withholding Agent.

16. Rule 3 of Withholding Rules, 2011 provides the responsibility of withholding agent. Sub-rule (1) of Rule 3 provides that the withholding agent receiving the taxable services shall deduct and withhold from the payment to be made to the service provider and deposit it with the Government of Sindh. Sub-rule (2) of Rule 3 provides that the

withholding agent shall deduct an amount equal to one fifth of the total sales tax shown in the sales tax invoices issued by a registered person (service provider) and make balance payment to service provider.

17. It is thus clear that the responsibility of appellant being withholding agent i.e. service recipient from resident person was to withhold 20% (one fifth) of SST and to deposit the same with SRB and pay the balance to service provider for depositing it with SRB. Sub-section (1) of section 9 of the Act fixes the liability to pay tax upon the registered person providing the services. The withholding Rules, 2011 were framed under section 13 of the Act and sub-section (1) thereof provides that notwithstanding anything contained in the Act, the Board may, by notification in the official gazette, prescribe special procedure for the payment of tax, valuation of taxable services, registration, record keeping, invoicing or billing requirements, returns and other related matters in respect of any service or class of service and subject to such limitations and conditions as may be specified in the notification. Although section 9 (1) of the Act had fixed the liability to pay the entire amount of tax, upon the registered service provider but the Withholding Rules shifted the burden of payment of tax upon the service recipient to the extent of 20% (one fifth) of the tax and the withholding agent/ service recipient from resident person is liable to act accordingly. It is only when the service recipient received services from non-resident person it is liable to pay the entire tax as provided under sub-section (2) of section 9 of the Act.

In view of the above discussions it is held that no order beyond 20% of the tax could be passed against the withholding agent/service recipient receiving services from resident person.

18. The SCN was issued by the department without proper care and apparently there was no material available before the officer of SRB who by issuing SCN had indulged in fishing and roving inquiry which was not permissible in view of the following decisions of the Superior Courts:-

(i) Assistant Director Intelligence & Investigation, Customs, Karachi versus B. R. Herman, PLD 1992 SC 485. In this case it was held that the

authority cannot make a roving inquiry or issue a notice by merely shooting in dark in the hope that it will be able to find out some material out of the same. of the following reported judgments.

(ii) Caretex versus Collector, Sales Tax, 2013 PTD 1536. In this case it was held that show-cause notice is not a casual correspondence or a tool or license to commence roving inquiry into the affairs of the tax payer based on assumption and speculations but is a fundamental document that carries definitive legal and factual position of the department against the tax payer.

19.The SCN is a fundamental document which has to comprehensively describe the case against the tax payer with reference to the material collected against it so that the tax payer may be able to prepare its defence. Thus the tax payer required to be confronted with the specific provision under which the tax is to be assessed and recovered. The confrontation of specific provision of law is not a technicality but goes to the roots of the SCN. Unless specific provision of law is mentioned in the SCN the tax payer cannot be able to take a proper defence. In the reported judgment of **WAK Limited versus Custom, Central Excise and Land Customs, 2018 PTD 253,** Lahore High Court has held that Show-cause notice is a serious business and not a casual correspondence and its purpose is to put the person on notice about the allegation for which the authorities intend to proceed against him.

20. The provision of section 23 of the Act (without mentioning sub-section) and section 47 (1A) of the Act were invoked in the SCN. Section 23 of the Act provide for assessment of tax. Sub-section (1) provides for assessment against registered person. Registered person as per definition available in sub-section (71) of section 2 of the Act is a person who is registered or is liable to be registered or any other person or class of persons notified by the Board. in terms of section 24 (1) of the Act the registration is required by the person who is resident and provide any services listed in the Second Schedule to the Act and fulfill other criteria or requirement fixed by the Board. From these provisions it is clear that the service recipient is not covered by the definition of registered person

and no assessment order can be passed against the service recipient under section 23 of the Act.

21. The other provision invoked in the SCN was sub-section (1A) of section 47 of the Act. Sub-section (1) of Section 47 of the Act deals with recovery of tax not levied or short levied by reason of some inadvertence, error or miscalculation. Sub-section (1A) of section 47 of the Act was inserted in the Act on 01.11.2011. This provision can only be invoked in specific situations mentioned in the section itself, where by reason of some collusion, abatement, deliberate attempt, misstatement, fraud, forgery, false or fake documents or if any tax or charge has not been paid or is, short paid, assessed or collected, the person liable to pay such tax shall be served with a notice requiring him to show cause for non-payment of such tax. Sub-section (2) of section 47 of the Act provides that the officer of SRB empowered in this behalf shall, after considering the objections of the person served with a notice has to determine the amount of tax or charge payable and such person shall pay the amount so determined. Perusal of The SCN revealed that the same was silent with regard to the specific situations mentioned in sub-section (1A) of section 47 of the Act. It is to be seen that SCN under sub-section (1) and section (1A) are meant for different situations and the department is bound to take specific grounds mentioned therein without which the SCN was not proper and suffered from vagueness. In the case of Caltex oil versus Collector Central Excise and Sales Tax, **2005 PTD 480** the Honorable Supreme Court has held as under:-

"7. Under section 36 of the Sales Tax Act, 1990, the case of non-levy of tax or short levied or erroneous refund is divided into two categories. The first category of case in which due to deliberate act, tax is not levied or short levied or erroneously refunded, are covered by subsection (1) of section 36 ibid whereas subsection (2) of this section covers the cases in which sales tax was not levied or short levied or erroneously refunded by reason of inadvertence, error or misconstruction. It is settled principle of law that completion of pre-requisite of show-cause notice and supply of the ground/reasons in clear and explicit words to ascertain that under which subsection of section 36 of Sales Tax Act, 1990, the case would fall, the demand notice may have no legal consequence and thus the failure of the authorities issuing show-cause

notice to disclose such grounds and reasons may render the notice invalid. In the instant case, it is not clear that under which subsection of section 36 ibid, the show-cause notice was issued and whether the non-payment of tax was due to the collusion of deliberate act of tax payer or it was the result of inadvertence error or misconstruction. The show-cause notice carrying the defect of vagueness, may not stand to the test of judicial scrutiny".

8. The analysis of the matter would bring us to the conclusion that the most important and fundamental question involved in the present case qua the legal status of the show-cause notice requiring determination was not as such attended either by the Tribunal or by the High Court. It is not ascertainable from the grounds and reasons given in the notice that the petitioner knowingly and deliberately withheld the payment of sales tax or it was the result of bona fide mistake and consequently, it could not be definitely said that case would fall under subsection (1) or subsection (2) of section 36 of Sales Tax Act, 1990. The department while treating it a case of deliberate evasion of tax proceeded in the matter whereas the stance of the petitioner was that non-payment of tax was due to the misconstruction of law and in these circumstances, the Tribunal was under heavy duty to ascertain the correct factual and legal position for proper decision of the matter which would also be a determining factor for the purpose of grant of benefit of section 65 of the Sales Tax Act, 1990".

22. The above case pertains to section 36 (now omitted) of Sales Tax Act, 1990 which dealt with recovery of tax not levied, or short levied or erroneously refunded. The language used in sub-section (1) & (2) of section 36 of the Sales Tax Act, 1990 and sub-section (1) & (1A) of section 47 of the Act are similar and at par with each other. The only difference is that sub-section (1) of section 36 of Sales Tax Act, 1990 is similar to sub-section (1A) of section 47 of the Act whereas sub-section (2) of section 36 of Sales Tax Act, 1990 is similar to sub-section (1) of section 47 of the Act. The above reported judgment is fully applicable to the facts of the instant case. In the instant case, it is not clear whether the non-payment of tax was due to the collusion of deliberate act of tax payer or it was the result of inadvertence error or misconstruction. The SCN carrying the defect of vagueness, may not stand to the test of judicial scrutiny".

23. The reported case of Assistant Collector V Khyber Electric Lamps, 2001 SCMR 838 relates to the contents of show-cause notice. It has been held that *"show-cause notice under subsection (2) and (3) of section 32 of the Customs Act are two distinct and separate type of notices on different ground and different period for service of notice. If such specific particulars are not stated in the notice, the notice would be vague and would not be in consonance with the requirement of subsection (2) and (3) of section 32 of the Customs Act, 1969"*. Since the provisions of section 47 of the Act and section 32 of the Customs Act, 1969 are similar and the instant judgment can be relied upon.

24. The Commissioner (Appeals) had rightly observed in the OIA that OIO does not provide the basis upon which the department has relied for determining the value of service shown at Rs.1,252,591,132/-. The Appellant had provided copies of contracts, bills issued by the service providers and details of payment to the respondent as per sub-para (e) of para 12 of OIO but the outcome of the documents provided by the appellant were not discussed in the OIO. There was also no discussion in the OIO as to that how the tax liability of Rs.200,414,851/- was accrued and established against the appellant who was a service recipient and withholding agent.

25. The Commissioner (Appeals) in para 1 of the OIA had framed five points for consideration but had not framed any point regarding the extent of the liability of payment of tax by the withholding agent/service recipient. The Commissioner (Appeals) had rightly held that the appellant received services from resident as well as non-resident persons and the service received from MEPCO are covered under sub-section (2) of section 3 of the Act and therefore sub-section (2) of section 9 of the Act which provides that where a service is taxable by virtue of sub-section (2) of section 3, the liability to pay the tax shall be on the person receiving the service. MEPCO is non-resident and the appellant is liable to withhold entire tax amount and to deposit the same with SRB. The Commissioner (Appeals) had rightly determined Rs.7,838,251/= as the value of services received by appellant from MEPCO involving SST of Rs.1,254,120/=.

26. As far as the penalty under 6 (d) of Table under section 43 of the Act is concerned both the forums below have imposed such penalty in violation of the judgments of the superior courts without establishing mensrea. The Commissioner (Appeals) while upholding the penalty under 6 (d) had failed to appreciate that in the OIO relevant clause of serial No. 6 of table under section 43 was not mentioned. Serial No. 6 has 4 clauses from (a) to (d) inserted to cater different situations. The main feature of the provision is that the same can be invoked if any person knowingly and fraudulently committed the acts and omissions mentioned in clause (a) to (d), only then such penalty subject to establishing of mensrea can be invoked. We have in our several orders relying upon the judgments of our superior courts have held that penalty cannot be imposed without establishing mensrea. The Commissioner (Appeals) as well as the AO besides being aware such orders were ignoring the same just to impose unjust penalties. The following judgments are quoted for reference.

(i) PLD 1967 SC I Pak, through Secretary M.O. Finance versus Hard Castle Waud (Pak).

(ii) 2004 SCMR 456 DG Khan Cement

27. The imposition of penalty is quasi criminal and presence of mensrea is mandatory and this view gains support from the reported judgment of Commissioner Income Tax versus Habib Bank Limited, 2007 PTD 901 (DB SHC) where it has been held that as under:-

"13. There can be no cavil to the arguments of the learned counsel for the respondent that the penal provisions under the Income Tax Act are quasi-criminal in nature and mandatory condition required for the levy of penalty under section 111 is the existence of mensrea and, therefore, it is necessary for the department to establish mensrea before levying penalty under section 111. There is plethora of judgments of the superior courts on India and Pakistan from the very inception of Income Tax Act, 1922, on this point".....

28. In the instant case also there is no independent determination at all in this regard and it was taken for granted by the Assessing Officer as well

as Commissioner (Appeals) that the liability to pay penalty was a necessary consequence or corollary of non-payment of sales tax.

29. The department has challenged the OIA on the ground that the Commissioner (Appeals) was not right in reducing the tax liability to Rs.1,254,120/= and waiving the penalty imposed by AO. We have held above that no assessment order cannot be passed against a service recipient who has received service from a resident person beyond 20 % of the tax amount. All other service providers except MEPCO of appellant are resident person and are liable to pay tax. Thus the Commissioner (Appeals) has rightly determined the value of service received by the appellant from MEPCO a non-resident person and has held that the appellant was liable to pay full amount of tax.

30. The Commissioner (Appeals) in para 18 of OIA has held that *"It shall be kept in mind that the respondent department has also proceeded against M/s Harbin Power separately, and so may proceed against the other service providers, who are resident of Sindh"*. The department has committed an illegality by proceeding against the service recipient for collection of entire amount of tax instead of 20%.

31. The Commissioner (Appeals) in para 4 of the OIA had mentioned that the value of services provided to the appellant by the service providers was on the basis of Reconciliation prepared by the Department. The value of services provided by MEPCO was determined at Rs.7,838,251/= involving SST of Rs.1,254,120/=. The argument of the AC that the Commissioner (Appeals) had established tax amount of Rs.7,838,251/= against the service received from MEPCO was not correct and was against the reconciliation mentioned in para 20 of OIA.

32. The Commissioner (Appeals) has not waived the penalty and default surcharge. The penalty and default surcharge has merely been reduced in conjunction with the reduction of amount of tax.

33. ~~In~~ Considering the above facts the tax determined by the Commissioner (Appeals) is upheld. The appeal, filed by tax payer is partly allowed to the extent of waiver of penalty under serial No. 6 (d) of the Table under section 43 of the Act.

34. In view of the above discussions the appeal filed by the department having no merits is dismissed.

35. The copy of this order may be provided to the learned representatives of the parties.

(Imtiaz Ahmed Barakzai)
Member Technical

(Justice® Nadeem Azhar Siddiqi)
Chairman

Karachi
Dated: 27.02.2020

Certified to be True Copy

REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Copy for compliance:

1. The appellant through authorized Representative.
2. The Assistant Commissioner (Unit-), SRB, Karachi.

Copy for information to:-

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

Order issued on 06/03/2020

Registrar

Order Dispatched on 06/03/2020

Registrar