

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD

APPEAL NO. AT-30/2016

M/s Ahsan Engineering works Appellant

Versus

1/ Commissioner, (Appeals), SRB, Karachi
2/ Assistant Commissioner (Unit-), SRB, Sukkur Respondents

Mr. Mr. Asif Khalique Shar Advocate For Respondent

Mr. Saindad Jjoy AC-SRB, Sukkur For the Respondent

Date of hearing 29.08.2018

Date of Order 31.08.2018

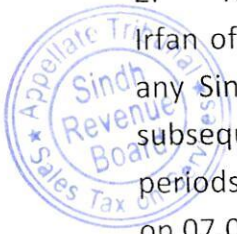
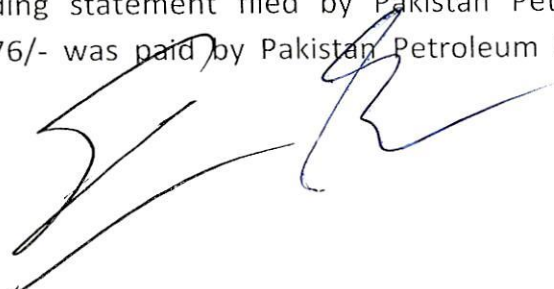
ORDER

Aagha Kafeel Bark: This appeal has been filed against order of commissioner (Appeals) dated 01.03.2016 who dismissed the appeal of the appellant after the appellant failed to appear before him despite several notices of hearing issued by the Commissioner (Appeals); the Commissioner (Appeals) has recorded that the appeal was fixed for hearing 22 times and many a times the appellant himself sought adjournment for various reasons. Earlier the AC- II SRB passed an exparte order on 15.10.2014 as the registered person failed to submit details/ documents required by the AC to be filed before him, nor he furnished any reply to the show cause notice dated 10.09.2014.

The facts of the case are as under:

2. The appellant M/s Ahsan Engineering works, a proprietorship of Mr. Muhammad Irfan of Kandhkot had been in the business of construction since long but failed to file any Sindh Sales Tax return for the periods from July, 2011 to December, 2012, and subsequently filed NULL returns (meaning there being no economic activity) for the periods from Janury, 2013 to December, 2014. Interestingly, it was voluntarily registered on 07.03.2013 under tariff coded 9824.0000 rendering construction services.

3. Meanwhile the AC-II SRB Mr. Abdul Rauf Collected an information from Income Tax Withholding statement filed by Pakistan Petroleum Ltd, which revealed that Rs.138,027,276/- was paid by Pakistan Petroleum Limited to M/s Ahsan Engineering



works during the tax year 2012 and 2013 (Financial years ending 30.06.2012 and 30.06.2013). This involved Sindh Sales Tax of 22,084,364 @ 16% which was neither withheld by Pakistan Petroleum Ltd nor paid by Ahsan Engineering works.

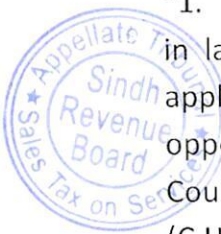
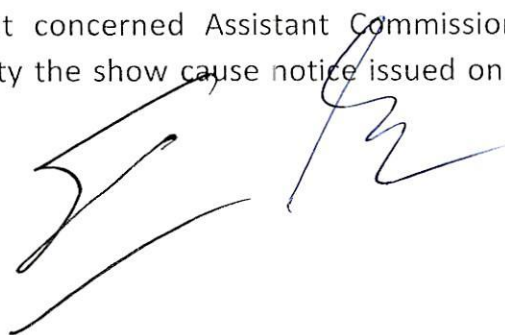
4. Hence the AC-II issued a notice under section 52 on 04.08.2014 requiring him to file certain documents including copies of contract with Pakistan Petroleum Ltd, work orders, Bank Statements and also Audited Account etc. This notice was not complied. Thus a show cause notice was issued on 10.09.2014 by the AC-Unit 11 requiring the appellant to show cause as to why assessment under Section 23/47 (1A) may not be finalized on the basis of available data. This notice also remained un-complied. Hearing was fixed by the AC Unit-11 for 3-4 times in September and October, 2014 but as the appellant failed to appear or make any response to the show cause notice the officer concerned, Mr. Abdul Rauf AC Unit-11 passed on ex parte order on the merits of the case and created Sindh Sales Tax on Services of demand of 22,084,364/-, as confronted in the show cause notice, with penalties of 1,104,218/- under section 43 (3) and 100,000/- under section 43 (15).

5. Appeal was filed before Commissioner (Appeals) on 31.10.2014 who fixed it for hearing 22 times from 10.12.2014 to 01.03.2016, over a period of 1 year and 4 months, and as the appellant constantly buy kept on taking adjournments on one or the other pretext the Commissioner (Appeals) finally observed that." the appellant has lost interest in pursuing the appeal," and dismissed it vide his order dated 01.03.2016. Hence this appeal before us.

6. Grounds of appeal filed with the Memo of appeal are as under:

"1. That the order-in-appeal No. 17 of 2016 dated 01.03.2016 is not sustained in law and is liable to be set aside because the learned respondent has not applied his judicial mind and decided the matter haste without giving full opportunity of hearing to the appellant. It has been held by the Honorable High Court of Sindh at Karachi in C.P.No.849 of 1998 respect in (1999) 79 TAX 605 (C.H.Kar) which is in reference to the judgment of the Honorable Supreme Court of Pakistan reported in 1994 SCMR 2322 wherein it has been held that "Audi alterem partem i.e. no one shall be condemned unheard is a universally established principle of law. This rule applicable to both judicial and non-judicial proceedings."

"2 That concerned Assistant Commissioner passed order without proper opportunity the show cause notice issued on 10.09.2014 hearing date was fixed



on 18.09.2014 and order passed on 15.10.2014 so the appellant not provide record and reply.

"3. That the impugned Order militates against the principles of fairness and equity envisaged under article 10A of Constitution and Section 24A of the General Clauses Act, 1897. Therefore, the impugned order is liable to be set aside.

"4. That the appellant registered in SRB on 07.03.2013 and files monthly return regular. Furthermore it is now well settled principle of law that tax cannot be lived on the basis of presumption or assumption but with the clear intendment of the legislature.

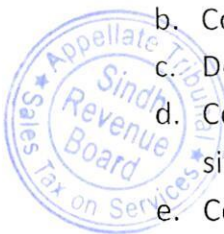
"5. That the Appellant business of construction. In this business a construction contract is completed with the combination of goods and services. Contract costs under the international Accounting standard (IAS-II) included.

Contract cost shall comprise:

- a. Cost that relate directly to the specific contract.
- b. Costs that are attributable to contract activity in general and can be allocated to the contract.
- c. Such other costs as are specifically chargeable to the customer under the terms of the contract.

Costs that relate directly to a specific contract include:

- a. Site Labor costs, including site supervision.
- b. Costs of materials used in construction.
- c. Depreciation of plant and equipment used in contract.
- d. Costs of moving plant, and equipment and materials to and from the contract site.
- e. Costs of hiring plant and equipment.
- f. Costs of design and technical assistance that is directly related to the contract.
- g. The estimated costs of rectification and guarantee work, including expected warranty costs.
1. The major cost included in a construction contract is a material cost (direct/indirect) the material which used appellant in construction of contracts purchase locally from different arrears and from different suppliers which are mostly unorganized sector.



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“Direct material cost included:

Cement, Sand Water, Bricks, Crush Stones, Wooden, Khako, pipes, Steel Road and Steel Wires etc.

2. That it most respectfully and most and humbly submitted that the Appellant seeks the indulgence of this Tribunal to raise further grounds at the time of the hearing of this Appeals

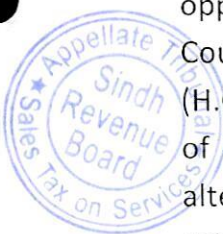
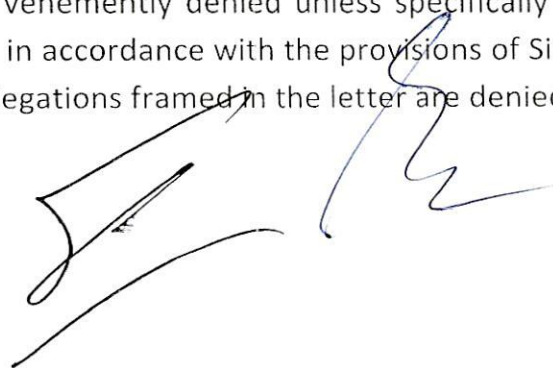
7. **“Additional Grounds of Appeal”**

“1. Justice commonly recognized by the courts of Pakistan are that:-

- (I) Every person whose rights are affected must have that the adjudicating authority erred in law and condemned the appellant unheard. No hearing opportunity was provide to appellant. It is a universal law that no one can be condemned unheard. It is also against the natural justice. The four principles of natural reasonable notice of the case he has to meet;
- (II) The must have reasonable opportunity of being heard in this defiance;
- (III) The hearing must act impartial tribunal; and
- (IV) The authority must act in good faith and not arbitrarily but reasonably. (PLD1958 Pesh 157,PLD 1965 Pesh 162 & Air 1957 all 297)

“2. That the impugned order in original No. 538 of 2014 dated 15.10.2014 is not sustained in law and is liable to be set aside because the learned respondent has not applied his judicial mind and decided the matter haste without giving full opportunity of hearing to the appellant. It has been held by the Honorable High Court of Sindh at Karachi in C.P.No.849 of 1998 reported (1999) 79 TAX 605 (H.C.Kar) which is in reference to the judgment of the Honorable Supreme Court of Pakistan reported in 1994 SCMR 2322 wherein it has been held that “Audi alterm partem i.e. no one shall be condemned unheard is a universally established principle of law. This rule applicable to both judicial and non-judicial proceedings.”

The allegations framed in the impugned order under in this regard it is submitted that we are vehemently denied unless specifically admitted herein. Conducting our business in accordance with the provisions of Sindh Sales Tax on Services Act, 2011. The allegations framed in the letter are denied vehemently.



"3. That respondent two decided case only within one month, no any reasonable opportunity to appellant, no any one person present and he diced the case.

"4. That respondent 1- issued Order-in-Appeal time bare, because the appellant filed appeal against Order-in-Original No. 538 of 2014 dated 15.10.2014 on 31.10.2014 and he issued the decide the case on 01.03.2016 after above 486 days.

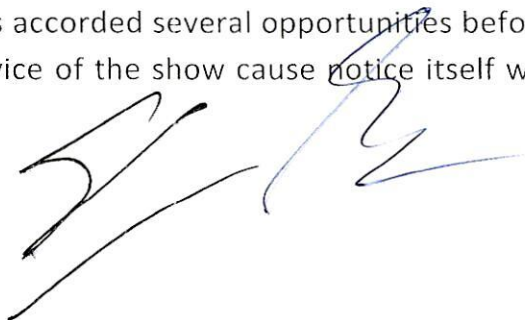
"5. As per Section 59 sub section (5) Sindh Sales Tax on Services Act, 2011 (Decision of appeal).

"An order passed by the Commissioner (Appeals) Sindh Revenue Board under sub section (1) shall be passed no letter that one hundred and twenty days from the date of filing of appeal or within such extended period, not exceeding sixty days, as the Commissioner (Appeals) Sindh Revenue Board may, for reason to be recording in writing fix."

7. Mr. Asif Khaliq Shar Advocate argued the case for the appellant while Mr. Sain Dad AC Sukkur appeared for the SRB and supported the orders of the officers below mainly on the issue of exparte order. The issues raised in the grounds of appeal are taken up by as included under:

Ground No.1 it is alleged that adequate opportunity was not provided by the Commissioner (Appeals) and that notices issued by his office were not properly served on the appellant. However, it is noted that the hearing of appeal by the Commissioner (Appeals) was fixed for 22 times and he has recorded all the dates with his statement that the A.R of the appellant himself sought adjournment many a times for his own reasons. This itself proves that notices were duly served on the appellant / his A.R and more than enough opportunities were accorded to him to pursue his appeal. The Commissioner (Appeals) finally dismissed the appeal with his observation that "it is believed and understood that the appellant is not serious in the proceedings of the hearings and has lost his interest in the appeal."

Ground No. 2 The learned A.R stated that the appellant was not occorded enough opportunity even at the stage of assessment under section 23 by the AC Unit-11 SRB. Mr. Saindad AC SRB, on the other hand, argued that as evident from the order-in-original the appellant has accorded several oppotunities before and after issue of show cause notice, beside service of the show cause notice itself which has not been denied by the A.R at any stage.



Ground No. 3 It is alleged that the impugned order violates Article 10 A of the constitution. However, the learned A.R. could not explain as how constitution of Pakistan has been violated. The AC SRB stated that both the orders of the officers below have been framed within the boundaries of relevant laws and no violation of any law has been caused.

Ground No.4 It is claimed that the appellant has been filing monthly returns regularly since its registration on 07.03.2013. The learned A.R stated that the appellant could not file returns before that date for technical reasons, as user ID and password was not available for e filing of returns. The learned AC-SRB however produced tax payer's tax profile maintained in SRB computerized system and showed that the said person had not filed any return from July, 2011 to December, 2012 and then filed NULL returns from January, 2013 to December, 2015. Then from January, 2016 onwards he filed taxable returns for January-May, 2016 and for July & May, 2016 to October, 2017. This belies the statement of the learned counsel. It is also contended that "law cannot be levied on the basis of presumption or assumption but with the clear indentment of legislature." The learned AC SRB submitted that the department had definite information about payments from Pakistan Petroleum Limited to the appellant for construction services during the period relevant to financial years ending 30.06.2012 and 30.06.2013, and that it moved against the said taxpayer under the clear provisions of law as it had suppressed correct transactions and all the receipts of Rs.138,027,276 from Pakistan Petroleum during the period when it had either not filed any Sindh Sales Tax returns or just filed NULL returns showing No economic activity.

Ground No. 5 The learned A.R stated that a contract of construction is a combination of supply of various construction material as well as services. He argued that value of goods be separated and should not be subjected to Sindh Sales Tax, also because the contractor has already suffered Federal Sales Tax on it. The learned AC-SRB argued that firstly no such bifurcation was ever made at any stage by the appellant. Secondly, he argued that in construction business it is a composite contract in which value of goods and services are taxed at one place. He also referred to Rule 42B (2) of the Rules 2011 which provides that value of taxable services for the levy of tax shall be the gross amount charged for the services provided or rendered. He argued that there is no room for the exclusion of value of raw material used in the construction business, as the learned A.R has demanded. Besides, he said any tax paid to FBR on purchase of raw material used in construction can he claimed as input adjustment against Sindh Sales Tax payable on gross value of contract.

8. Additional Grounds

The A.R of the appellant had during the hearing of appeal before the Tribunal on 21.09.2017 filed Additional grounds dated 12.09.2017. It is noted that these are merely elaboration of grounds of appeal filed with the Memo of appeal and already discussed above.

a) Additional ground no. 2 & 3

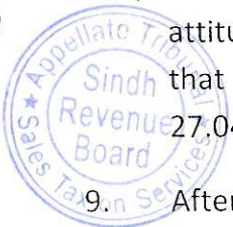
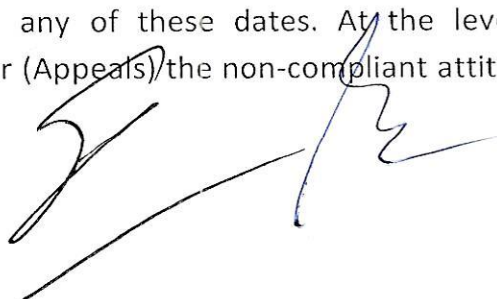
In additional grounds no. 2 and 3 it is alleged that the AC SRB decided the matter in haste and enough opportunity was not provided by him as it was decided within one month. The learned A.R stated that as provided in section 23 the AC SRB could pass the order in 180 days but he passed it in 35 days. The AC-SRB stated that the officer SRB fulfilled all legal requirements, issuing notice under section 52 followed by a show cause notice and giving him 3-4 hearings to represent his case and finalized it in due course of time instead of keeping it pending for 180 days, and to pass it on the last day.

b) Ground No. 4 & 5 About the order passed by Commissioner (Appeals) the learned A.R argued that it was time barred being passed in 486 days. The AC SRB pointed out that delay was caused by un-necessary adjournments taken by the learned A.R himself. As recorded by the Commissioner (Appeals) the appeal was fixed for 22 times and every time it was adjourned on application from the AR for his own reasons. While the AR has referred to sub-section (5) of Section 59, he has deliberately not mentioned sub-section (6) of Section 59 which allows the adjournments to be excluded from the time taken by the Commissioner (Appeals) in disposal of appeal under section 59.

c) At this stage it was pointed out by Mr. Saindad AC-SRB that the non-compliant attitude of the appellant continued even before the Tribunal and it is on record that this Bench had earlier dismissed this appeal for non-prosecution on 27.04.2017 and it was restored only on the application of the leaned A.R.

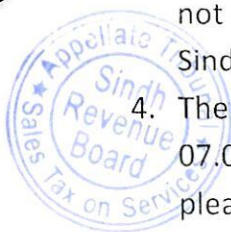
9. After perusal of the record and hearing of the arguments from both sides our findings are as under:

1. Both the officers below have passed orders after according enough opportunities; in the case of order by Commissioner (Appeals) more than enough opportunities of being heard were accorded in this case. The AC issued a notice under section 52 on 04.08.2014 requiring certain documents, which was not complied with. After this a show cause notice was issued on 10.09.2014. None appeared on any of these dates. At the level of hearing of appeal before Commissioner (Appeals) the non-compliant attitude remained unchanged, rather



hardened and as recorded by the Commissioner (Appeals) and not controverted by the learned A.R the appeal was fixed for 22 times but the appellant and his A.R attended before him only to seek adjournments on different excuses, finally prompting the Commissioner (Appeals) to dismiss appeal on 01.03.2016 after patiently waiting for 486 days for the appellant / his A.R to argue his appeal which was filed on 31.10.2014

2. The learned A.R could not defend the appellant from the main allegation of filing NIL returns of the period from July, 2011 to December, 2012 and NULL (no economic activity) returns for the periods from January, 2013 to July, 2014. This was despite the fact that it was engaged in economic activity since long. The argument of the learned A.R that he did not file taxable returns because he was not registered is also incorrect and unfound as the appellant was voluntarily registered on 07.03.2013 as per his registration profile but he still continued to file NULL returns till December 2015, as reflected from his tax payers profile; copy of his complete tax profile has been filed by the learned AC before this Bench. He filed first taxable return for tax period January, 2016. On the other hand as per information from Pakistan Petroleum Limited the Income Tax Withholding statements payments were made by Pakistan Petroleum to the appellant during the tax years 2012 and 2013, relevant to financial years ending 30.06.2012 and 30.06.2013. These facts also demand penal action against the tax payer for filing inaccurate, incorrect and false Sindh Sales Tax returns.
3. The A.R has argued that Pakistan Petroleum being withholding agent was duty bound to withhold Sindh Sales Tax and to deposit it. But he forgot that under the provisions of Sindh Sales Tax Act, 2011 it is the basic responsibility of the service provider (here the appellant) to pay Sindh Sales Tax. The learned A.R also could not produce any evidence to show if the appellant issued proper invoices, with Sindh Sales Tax added in value of services, to Pakistan Petroleum Limited.
4. The learned A.R has also taken the plea that since it was not registered (Till 07.03.2013) it could not file returns, not having allotted the ID and Code. But this plea is not correct; firstly because it committed a primary offence of not getting registered till 07.03.2013, despite rendering taxable services since 2011. Secondly for not paying Sindh Sales Tax it is taking shelter behind the offence of not getting registered since July 2011, stating that since he was not registered he was not under legal obligation to pay Sindh Sales Tax. Here we hold that person may be handicapped in filing returns on technical grounds, but he can not take excuse of this handicap to avoid other main duty that as of paying Sindh Sales Tax. We have



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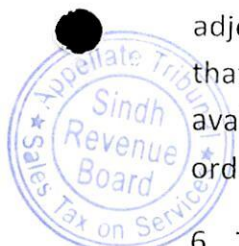

held this view in many of our earlier decisions; one such judgment was passed on 04.07.2018 in AT-32/2018 in the case of MAB Services (Pvt.) LTd.

The tax profile on record proves that even after registration on 07.03.2013 the appellant did not file taxable return till January 2016, although huge payments were received during this period from Pakistan Petroleum Limited which were all the taxable receipts of Rs.138,027,276/-

5. The learned A.R also took twofold plea about the time frame for passing assessment order and subsequently disposal of appeal by Commissioner (Appeals). In his very strange plea about the time consumed in passing the assessment order on 15.10.2014 the learned A.R argued that while show cause notice was issued on 10.09.2014 the passing of assessment order under section 23 on 35th days was a hurried act on the part of the assessing officer, although, as the learned A.R argued he had 180 days at his disposal to pass the order. This is the most ridiculous argument put forth against an efficient officer who passed order after providing enough opportunities, issuing notice under section 52 followed by show cause notice and fixing hearing for at least 3 times. The A.R also objected about passing of appellate order on 01.03.2016 by Commissioner (Appeals) after 486 days of filing of appeal on 31.10.2014. He claimed that under the provisions of sub-section (5) of section 59 it is time barred. The learned A.R however, failed to appreciate that under sub-section (6) of section 59 all the days of adjournments sought by the appellant are excluded. In this case, as recorded by the Commissioner (Appeals) in his order whole delay was caused by the adjournments sought by the appellant although the appeal was fixed 22 times. Again it is noted that the appellant / his A.R had tried to take advantage of this inordinate delay caused by their own deliberate adjournments, by putting it in the account of the Commissioner (Appeals) stating that the Commissioner (Appeals) passed a time barred order. After examining the available record we hold that under the provisions of section 59 (6) the impugned order is well in time.

6. The learned A.R has also raised the point that there should not be any presumption in tax matters. He is correct in his statement, but it does not apply to this case as everything is quantified, documented and verifiable in this case particularly the value of contract Rs.138,027,276/- dates of payment and nature of services rendered. Hence this argument is also rejected.

7. The learned A.R also argued that in the business of construction the contract comprises of sale of goods and providing services. He demanded that these should be bifurcated and only element of services should be subjected to Sindh Sales Tax. In



this respect his attention is invited to Rule 42 B of the Rules which provides special procedure for payment of tax on construction services. Sub-rule (2) of Rule 42 B provides for the calculation of value of construction services as under.

Rule 42 B (2) the value of taxable services for the purposes of levy of tax shall be the gross amount charged for the services provided or rendered”.

This clearly shows that there is no way to break up the value of construction services into good & services and exclusion of goods from it. In fact it is a composite business in which neither the goods & services are bifurcated, nor is value of goods is excluded, from Sindh Sales Tax. Hence this ground of appeal is also rejected.

10. To conclude our findings we hold and agree with the assessing officer that by not getting registered (Till 07.03.2013) for 20 months since July 2011, and not filing true or correct taxable returns of Sindh Sales Tax for the receipts of Rs.138,027,276/- they have deliberately not paid tax of Rs.22,084,354/-.
11. Accordingly, we confirm the order of the officers below in creating Sindh Sales Tax demand of 22,084,354/- (as there is no evidence of any payment of tax out of it till date) along with penalty of Rs.1,104,268/- under section 43 (3) for non-payment of tax and also Rs.100,000/- under section 43 (15) for non-compliance of notice under section 52 for submission of record etc.
12. Appeal is accordingly dismissed as above.



(Muhammdad Ashfaq Balouch)
JUDICIAL MEMBER



(Agha Kafeel Barik)
TECHNICAL MEMBER

Karachi.

Dated: 31.08.2018

Certified to be True Copy

Copies supplied 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. The Deputy Commissioner (Legal), SRB, Karachi.

5. Office Copy.

✓ 6. Guard File.



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