

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD

1. APPEAL NO. AT-06/2017

M/s Media Five Holdings Appellant

Versus

1. Commissioner (Appeals), SRB, Karachi
2. Assistant Commissioner (Unit-11) SRB, Karachi Respondents

2. APPEAL NO. AT-16/2017

Assistant Commissioner (Unit-11), SRB, Karachi Appellant

Versus

M/s Media Five Holdings Respondent

Mr. Qazi Anwar Kamal, Advocate For the Registered Person

Ms. Rafia Urooj, Assistant Commissioner, SRB, and
Ms. Shumaila Yaar Muhammad, AC-SRB, Karachi For the Department

Date of hearing 12.03.2018

Date of Order 26.03.2018

ORDER

Razia Sultana Taher: The cross appeals have been filed against the common order in appeal No. 276/2016 dated 31st December, 2016 passed by the Commissioner (Appeals) in appeal No. 222/2016 who upheld the order in original to the extent of penalty against Offence No.2 and the said order further reads as "whereas the same is set aside to the extent of penalty against Offence No.13. However, if the appellant revises the returns by making them true and correct as against business support services within 15 days of receipt of this Order the penalty of Offence No.2 shall also not be required to be paid."

2. The department SRB has also challenged the impugned order on ground that Commissioner (Appeals) set aside the penalty imposed by the AC / Department under Section 43(13) of the SStoS Act, 2011 for repeating the Offence No.2 of the table under section 43 of the SStoS Act, 2011.

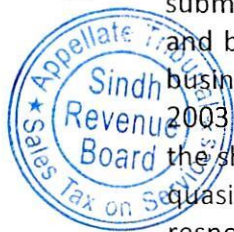


3. The concerned Assistant Commissioner in the order in original No.778 of 2016 dated 06-September, 2016 observed and concluded that the appellant are registered with Sindh Revenue Board under the service category of Business Support Services falling under tariff heading 9805.9200 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as SSToS Act, 2011). The said services are liable to Sindh Sales Tax and the appellant being a registered person was required to e-file true and correct Sindh Sales Tax return in Form SST-03 as prescribed under Section 30 of the SSToS Act, 2011 read with Rules 13 and 14 of Sindh Sales Tax on Services Rules, 2011(hereinafter referred to as SSToS Rules, 2011). The appellant failed to make the payment of Sindh Sales tax for the tax periods July 2013 to March 2016 nor e-filed the Sindh Sales Tax returns. The said offence is punishable under Serial No.2 and 13 of the table in Section 43 of the SSToS Act, 2011. The appellant's representative cited Section 2(19) of the SSToS Act, 2011 and referred to information available / displayed on website www.karachideals.com highlighting the business activity of the appellant.

The Assistant Commissioner in the order in original No.778 of 2016 dated 5th September, 2016 held that the information provided by the appellant and perusal of the legal provisions confirmed that the appellant are providing support services to different businesses falling under tariff heading 9805.9200. The order further stated that for not filing true and correct returns for the tax periods from July 2013 to October 2015 a penalty of Rs.25,02,432/- was imposed. As returns for the period from November 2015 to March 2016 were filed, no penalty was imposed but ordered to revise the return after depositing sales tax amount. Furthermore, for repeating the offence of non-filing / not filing the true and correct returns imposed penalty of Rs.5,004,864/- under Sr. No.13 of Section 43 of the SSToS Act, 2011.

4. The order of the Assessing Officer was challenged by way of filing of appeal before the Commissioner (Appeals) SRB who upheld the order in original to the extent as detailed in paragraph I of this order.

5. During the course of hearing the appellant's advocate submitted that respondent had levied penalty without bringing any material evidence and support to show that the appellant was engaged in the activity of 'business support levy'. It was argued that the appellant is exclusively engaged in the business of online trading and the same does not come within the jurisdiction of Sindh Revenue Board. In order to augment his contention, the learned advocate submitted income tax returns of the appellant, submitting that it is a trite law that initial onus and burden of proof rests upon the respondent to prove that the appellant is engaged in the business activity of 'business support levy'. The advocate relied on 'Supreme Court decision PLD 2003 SC page 56, 2007 PTD Tribunal 468. Here the basic objection goes to the root of the case, the show cause notice is defective itself. The penalty proceeding under the SSToS Act, 2011 is a quasi judicial proceeding and quasi criminal proceeding. At the time of issuance of SCN the respondent should have confronted the quantum and amount of penalty. It is mandatory requirement of law and placed reliance on judgment of Lahore High Court 2016 PTD 483, relevant observation is at page 509. The learned advocate argued that proving of 'mens rea', is also a mandatory requirement of law and non fulfillment of this requirement has rendered the whole proceeding illegal and cited



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- a) PLD 1967 SC page I
- b) 2004 PTD 1179 SC page 1180-81

The learned advocate argued that respondent imposed penalties to generate revenue which is disapproved by the Superior Courts. To lend support to the contention cited 2010 PTD 1199 - relevant observation is at 1202 – Income Tax Appellate Tribunal and added that appellant had deleted category of 'business support levy' from his profile as it was only added on the specific request of respondent. That appellant has filed rectification application with respondent under section 151 CPC against order in original No.692 dated 04.01.2016. The said application was filed with Ms. Umi Rubab AC-Unit-20 and which is still pending (now with DC Mr. Abdul Rauf).

On the next point added that the impugned order in original No.778/2016 was passed merely on the basis of assumptions, hence the respondent be directed to investigate the matter and bring concrete evidence and material on record and if it is found that the appellant is engaged in the service of business support service then penalty and default surcharge may be collected alongwith due tax.

6. In counter arguments, the learned advocate reiterated almost the same arguments that against order in original No.692 of 2015 dated 04.01.2016, the appellant was represented by an accountant, the respondent department did not impose penalty and held that the appellant is engaged in the activity of 'business support levy'. The order was not challenged by the appellant because no penalty was imposed and the accountant could not comprehend the consequences / repercussions of the Order as he was Non-technical. Now rectification application has been filed.

The learned advocate argued on the imposition and amount of penalty. The amount of penalty was not disclosed in the Show Cause Notice, to which the respondent had replied that there was no need to disclose the amount of penalty in the SCN thus the amount of penalty was not confronted in the SCN. The advocate further argued that disclosure and confrontation of the amount of penalty is mandatory under the law and on account of non fulfillment of mandatory requirement, the SCN stood as defective and illegal and without jurisdiction, resultantly the order in original on such SCN is void abinitio. In support placed relied upon AIR 1962 Madras 366 relevant portion at 368 & 369, second case law 2012 PTD Tribunal 1123 relevant page 116.

The advocate on the 3rd issue stated that the respondent during the course of hearing had observed that the appellant filed 'Nil' returns in the category of business support service and for that reason penalty was levied by the AC concerned. In response continued that the appellant did not file return in the category of business support service himself, the same was filed on the verbal instruction of Assistant Commissioner and further added that the appellant was never engaged in the category of 'business support service' and in this connection the appellant made submission in hearing before the AC of the impugned order in original. The appellant's Return of income for the tax period 2014 (July 2013 to June 2014 and June 2015) bank statement, annual return. The return of income submitted with FBR showed that appellant was exclusively engaged in 'trading'. No evidence was shown in order in original to substantiate the allegation that the appellant was engaged in 'business support services'. The



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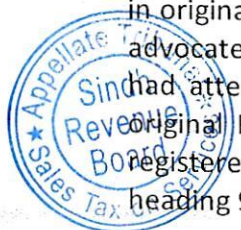
SCN, submitted that the offences committed and sections contravened and the penalty for the aforesaid contraventions or violations was communicated to the appellant through the SCN. The departmental representative added that the appellant relied on paragraph 10 of the decision of an Indian judgment AIR 1962 Madras 336 and submitted that appellant has failed to fully understand the contents of the said decision wherein, it is clearly mentioned that mere insertion of section or rule contravened in the SCN would not be sufficient. In addition the SCN must also mention the penalty for the contravention of the provisions of the Act. Nowhere in the said judgment the words quantum or amount of penalty have been mentioned. Thus the said SCN is legal and within jurisdiction. In response to third issue, the appellant had submitted that they had e-filed the returns on the verbal instructions of then AC for the tax period July 2013 to June 2015, the appellant has been unable to substantiate the said contention. The respondent went on to argue that filing returns for the aforesaid tax periods when the services of Commission Agent were not liable to tax and not challenging the order in original 692 of 2015 dated 04.01.2016, makes it clear that the appellant had accepted the registration as 'business support service'. Moreover, the service category of business support services is still reflected in their profile.

9. We have heard the learned representatives of both sides and perused the record of the case made available to us. The learned advocate took the stance that the respondent imposed penalties against the appellant for non filing / not filing true and correct returns but failed to provide material evidence to show that the appellant was providing 'business support services' falling under tariff heading 9805.9200 of the Second Schedule to the SSToS Act, 2011.

The advocate also challenged the show cause notice that the same was defective as it failed to confront the quantum and amount of penalty and hence the order in original based on defective show cause notice was in itself void abinitio. Furthermore, added that the department has not been able to prove 'mens rea' against the appellant and the penalties have been imposed to generate revenue.

Perusal of the record shows that the appellant enrolled with SRB on 01.12.2015 as Commission Agent under tariff heading 9819.1300 of the Second Schedule to the SSToS Act, 2011. The said profile also show the other activities as 'Business Support Services'. The record reveals that Assistant Commissioner had issued show cause notice and thereafter issued order in original No.692/2015 dated 04.01.2016, wherein it was held that after having gone through the requisite documents "that M/s Karachi deals are engaged in providing 'Business Support Services' to various business including restaurants, saloons, retails stores etc.". The said order in original No.692/2015 was not challenged at any forum and had attained finality. The learned advocate had in his arguments submitted that a non-technical representative of the appellant had attended the hearing and had failed to comprehend the repercussions of the order in original No.692/2015 with this in the back ground, it is seen that the appellant voluntarily registered with SRB and also showed other activities as 'business support services' under tariff heading 9805.9200 of the Second Schedule to the SSToS Act, 2011.

The order in original No.778/2016 dated 20th September, 2016 pertains to non filing of sales tax returns. Every registered person is liable to submit Sindh Sales Tax returns in the manner



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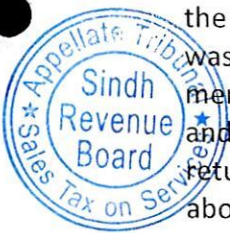
prescribed under Section 30 of the SSToS Act, 2011 and failure to comply with the mandatory provisions is an offence which is punishable. The tax payer profile reflects that the appellant filed 'Null' returns from July 2013 to October 2015, which further confirms that the appellant had no reservation to being placed in the category of 'business support services'. It is not out of context to add here, that other Business Activities still reflect 'Business Support Services' in the profile.

10. The Commissioner (Appeals) in paragraph 6 of order in appeal No.222/2016 dated 31st December, 2016 has in detail explained / discussed the issue in a convincing manner and resolved as under:

"6. I have visited the website of the appellant available at www.karachideals.com. It appears to me that the Appellant has displayed many products i.e. the electronics, jewelry, accessories, clothing, kids, hair care, perfume, home accessories, watches, health care and novelty items etc., which are available for sale through online purchasing / shopping. I have also read the definition of "business support services" contained at section 2(19) of the Act, 2011. Obviously, there has to a mechanism for payment and delivery after the online purchase. I have also read the definition of the "commission agent" contained at section 2(22A) of the Act, 2011. When studying the activity of the appellant with definition of the commission agent the things missing are that the services of the appellant are in relation to business or commerce, including evaluation of prospective buyers, telemarketing, accounting and processing of transactions, fulfillment services, information and tracking of delivery schedules, managing distribution, operation assistance for marketing, formulation of customer services and pricing policies. What I have conceived from the above is that the activity of the appellant is not the activity of mere sale and purchase on behalf of the principals and keeping record of invoices and sale thereto and thus it cannot be in line with the definition of commission agent. In my humble view there is a lot more extensive than the activity of a commission agent which the appellant is doing. This all will explicitly show that the activity of the appellant squarely falls in the category of business support services in an ordinary sense when read with the definition. In view of the above I have no cavil in my mind that the appellant was liable to pay the tax and file the true and correct returns regarding "business support services" from the date the tax was levied. The appellant failed to file returns in-time, despite of the facts above mentioned, made clear to the appellant by means of the order in original No.692/2015 and the order in original (impugned herein). Moreover, to my humble opinion the returns are also not true and correct as the same have been filed as NUL. In view of the above circumstances the element of *mens rea / malafides* patently floats on surface."

The aforesaid findings of the Commissioner (Appeals) are in conformity with the material on record and in consonance with the law. Moreover its competitors like Eatoye, Lootlo.pk, M/s RSC foodpanda are also registered under the service category of 'Business Support Services'.

11. The appellant has challenged the SCN that on the ground that amount of penalties have not been mentioned. Perusal of show cause notice shows that the provisions of SSToS Act, 2011



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and Rules contravened have been quoted under which penalties were to be imposed. The appellant had been provided full opportunities to defend itself and no prejudice has been caused by merely not mentioning the amount of penalty which was provided in the sections.

Furthermore, the penalties under section 43(2) and 43(3) as mentioned in the show cause notice are subject to calculation of days of default and the same could not be determined or estimated accurately, at the same time of issuance of show cause notice as to how long the period of default will be at tax payer's end.

The appellant relied on para 10 of the decision of an Indian judgment AIR 1962 MADRAS 336. It appears that the appellant has failed to fully understand the contents of the said decision, wherein it is clearly mentioned that mere insertion of section or rule contravened in the show cause notice would not be sufficient. In addition the show cause notice must also mention the penalty for the contravention of the provisions of the Act. Nowhere in the referred paragraphs the words quantum of penalty or the amount of penalty been mentioned.

12. The case laws cited have distinguishable facts and hence not relevant to the instant appeal case.

13. The Commissioner (Appeals) for valid reasons set aside the order in original to the extent of penalty imposed under Offence No.13 of the table under Section 43 of the SSToS Act, 2011. Furthermore, the appellant have presented no satisfactory / substantive argument.

14. In view of the discussions in the preceding paragraphs, we do not find any infirmity in the order of the Commissioner (Appeals) and therefore the same is confirmed and both the appeals, departmental as well as of the registered person are hereby dismissed.



(Muhammad Ashfaq Balouch)
JUDICIAL MEMBER



(Razia Sultana Taher)
TECHNICAL MEMBER

Karachi

Dated:26.03.2018

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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burden lies on the Assessing Officer to prove the case which has not been so done hence order in original is illegal. In support cited case law 2012 PTD (Trib.) 1775 relevant page 1776. No detail is at all given in order in original to show that appellant is engaged in business support service and the said service has been deleted.

7. The respondent Assistant Commissioner submitted that appellant voluntarily added other business activity i.e. Business Support Services under tariff heading 9805.9200. The order in original was passed on 04.01.2016, no appeal was filed against the said order in respect of business support services which draws the conclusion that they had no objection to the order of the Assistant Commissioner and had accepted that they are providing or rendering taxable services of business support and every registered person is required to file SST returns under Section 30 within due date. As regard the second point, the SCN was issued, penalty amount has not been shown in the SCN, the relevant clauses and sections are mentioned and the amount of penalty is given in the order in original. The third point, the contention of the appellant that the registration in business support service was taken in good faith and AC failed to establish mens rea. The respondent submitted that if the appellant did not 'carry business support service' the concept of good faith has no weightage to the instant case. No objection was raised by the appellant which is in itself acceptance to the order in original. The respondent added that the appellant's version that Respondent used penalty proceedings to generate revenue is not fair. The appellant was penalized for violation of Section 30 of the SSToS Act, 2011 and not for generating revenue. Now coming to the reply to the point on facts, the appellant's contention that Business Support Services have been deleted from their profile. The respondent submitted registration profile of appellant dated 07.06.2017 showing their other business as 'business support services' under tariff heading 9805.9200. The same is not deleted nor SRB has received any information to the said effect. The respondent added that the appellant has filed rectification application against order in original No.692/2015 dated 04.01.2016. The rectification application was filed on 27.03.2017. Section 76 of the SSToS Act, 2011 pertains to correction of clerical errors, there is no provision or section under SSToS Act, 2011, the appellant had an option to file appeal and rectification application was not the remedy. In reply to the third fact, the statement of Appellant's advocate that Order was passed on basis of assumption. The registration of the appellant in business support services makes him liable to discharge the liabilities stipulated in SSToS Act, 2011 and rules made thereunder. Therefore, there is no question of assumption, here returns were not filed within due date.

8. The respondent further explained that in response to order in original No.692 of 2015 dated 04.01.2016, the appellant was required to add 'business support services' tariff heading 9805.9200 of the 2nd Schedule to SSToS Act, 2011 as their 'other business activity' in the registration profile as maintained with SRB. Resultantly, the same was added and the said order was not challenged. Now proceeding to take the submission that a non technical person was representing / defending the case holds no water in light of a latin maxim which says 'Ignorantia juris non excusat', ignorance of law is no excuse. Furthermore, as regards the request for rectification of order could not be entertained by the Assistant Commissioner as there exists no such provisions, section 76 of the SSToS Act, 2011 provides for correction of clerical error. To the point that the quantum of amount of penalty was not mentioned in the



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