

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

SB-I

APPEAL NO. AT-01/2018

Assistant Commissioner, SRB Unit No. 21.....Appellant

**Versus**

M/s Electro Polymers (Pvt.) Ltd.....Respondent

Mr. Turab Ali, AC, and Mr. Rehmatullah Internee Officer for SRB

Mr. Kumail Badami FCA and Mr. Mustafa Zakir for Respondent

Date of hearing 07.03.2018

Date of Order 16.03.2018

**ORDER**

**Justice<sup>®</sup> Nadeem Azhar Siddiqi:** This appeal has been filed by the appellant challenging the Order-in-Appeal No.1302017 dated 13.12.2017 passed by the Commissioner (Appeals) in Appeal NO. 52/2017 filed by the respondent against the order in original No. 86/2017 dated 13.04.2017 passed by the Assistant Commissioner (Ms. Anum Shaikh) SRB, Karachi.

01. The facts of the case as mentioned in the Order-in-Original are that the respondent is registered with SRB under the category of Franchise Services. Tariff heading 9823.0000 of the 2<sup>nd</sup> schedule of the Sindh Sales Tax on Service Act, 2011 (herein after referred as the Act) chargeable to Sindh sales tax at the rate of 10%. It was further stated that the respondent has a franchise agreement namely Technical Assistance Agreement with M/s Thai Stanley Electric Public Co., Thailand.

02. It was alleged in the Order-in-Original that scrutiny of the Annual Audited Accounts for the year ended June, 2012, June, 2013 and June, 2014 of the



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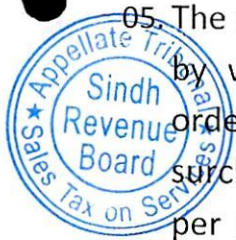
respondent revealed that the It had paid an amount of Rs.5,580,832/=, Rs.3,618,351/= and Rs.3,552,291/= on account of royalty for the tax periods July, 2011 to June, 2014. The said amount is chargeable to sales tax @ 10% which comes to Rs.1,275,147/=, which amount the respondent has failed to deposit with SRB. It was also alleged that respondent also failed to file monthly tax returns for the tax periods July, 2011 to June, 2014.

03. That a show-cause notice dated 21.11.2016 was served upon the respondent to explain as to why short paid amount of sales tax amounting to Rs.1,275,147/= on account of franchise services should not be assessed and recovered along with penalty and default surcharge. The respondent through letters dated 29.11.2016, 07.02.2017 and 06.03.2017 submitted its point of view. The respondent vide letter dated 14.03.2017 informed the Assessing Officer that Nil returns for tax years 2011, 2012, 2013 and 2014 were filed and payment has been inserted in the return for the month of November, 2016. The respondent also informed the Assessing Officer that tax amounting to Rs.1,275,147/= was deposited.

04. The Assessing Officer has passed Order-in-Original and imposed default surcharge of Rs.458,445/= under section 44 of the Act and penalty of Rs.63,757/= under Table 3 of section 43 of the Act and Rs.180,000/= under Table 2 of section 43 of the Act.

05. The said order of the Assessing Officer was challenged by the respondent by way of filing appeal before the Commissioner (Appeals), who has ordered that the respondent will only be required to pay the default surcharge of 5% as was given in the bracket of 19.05.2017 to 25.05.2017 as per para 1 (a) of the Notification dated 18.05.2017. The Commissioner (appeals) further ordered that the amount paid in excess of 5% of the default surcharge is required to be adjusted from among the future liability of the respondent.

06. Mr. Kumail Badami the learned representative of the respondent placed on record photocopy of CPR's of Rs.702,202/- on account of payment of default surcharge and penalties and submitted that the payment was made under protest to avoid further penalties and default surcharge.

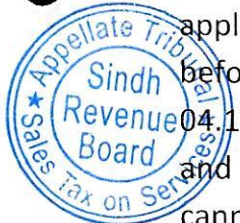
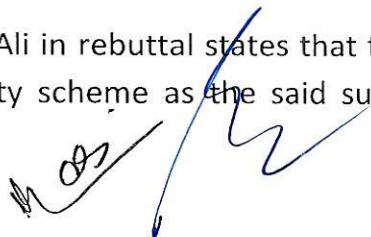


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07. Mr. Turab Ali the learned AC for the appellant submitted that the amnesty dated 18.05.2017 scheme was not available to the appellant and the Commissioner (Appeals) has wrongly applied the amnesty scheme. He then submitted that the amnesty issued with certain conditions and the Respondent has failed to meet such conditions. He then submitted that under the amnesty scheme the penalties and default surcharge already paid prior to issuance of amnesty cannot be adjusted. He then submitted that amnesty of SRB was not applicable to cases pending in appeal whereas the Notification of FBR in para 2 specifically made applicable to the cases pending in appeals. He then submitted that the facts of case of S. Waheeduddin 2006 PTD 336, of Lahore High Court are different from the facts of the case in hand. He argued that since the appellant had already paid the tax amount as well as the penalty and default surcharge it was not entitled to claim benefit under amnesty scheme and is not entitled to the adjustment of the amount of penalty and default surcharge already paid. Mr. Turab Ali further submitted that the amnesty scheme of 18.05.2017 was discriminatory and that all amnesties whenever issued were discriminatory in nature and respondent cannot claim amnesty of its choice.

08. Mr. Kumail Badami the learned representative of the Respondent submitted that the amnesty scheme of FBR dated 12.06.1998 and amnesty scheme of SRB dated 18.05.2017 are similar in nature and that clause IX of SRB amnesty clearly apply to the case pending in appeal before Commissioner (Appeals). He then submitted that the facts of S. Waheeduddin supra are fully applicable in view of clause 2(i) (ix) of amnesty scheme. Mr. Badami submitted that the facts of reported case of Balana Restaurant PTD 2010 page 1286 are altogether different and not applicable. He then submitted that Respondent was registered in August 2014, before the issuance of SCN and sales tax on franchise services was firstly paid on 04.12.2014 and there was no mensrea available on the part of the respondent and in any case without element of mensrea default surcharge and penalty cannot be imposed and that the Commissioner (Appeals) has already held that tax on franchise services is to be paid on remittance of franchise fee. He then submitted that the respondent has discharged its liabilities before passing of the order in original and is entitled to the benefit of the amnesty.

09. Mr. Turab Ali in rebuttal states that the case is not covered under clause 2.9. of the amnesty scheme as the said sub clause IX is to be read with clause 2 of amnesty.



I have heard the learned representative of the parties and perused the record made available before me.

10. From the perusal of record it appears that show-cause notice was issued on 21.11.2016 and the due tax was deposited by the respondent on 19.12.2016 before passing of the order in original which was passed on 13.04.2017 and the default surcharge and penalties imposed were deposited on 26.04.2017 after thirteen days of passing of order in original. This shows the compliant attitude of the respondent.

11. The default surcharge and penalties can only be imposed if the department established mensrea on the part of the respondent. The order in original is silent in this regard. No attempt has been made by the department to establish mensrea on the part of the respondent. Even if the case of the respondent has not come within the scope of amnesty scheme dated 18.05.2017 the department before imposing penalty should established mensrea, malafide and willfulness on the part of the respondent which is lacking in this case.

12. To establish willfulness, malafide and mensrea the Department must establish that the non-compliance of statutory provisions has been due to some avoidable cause. Mere non-deposit of tax without element of willfulness, mensrea and malafide cannot entail default surcharge and penalty. In the reported case of Pakistan through Secretary Ministry of Finance and others versus Hardcastle Waud (Pakistan) Limited (PLD 1967 SC 1) in his separate note Mr. Justice (as he then was) Hamoodur Rahman has held that *"Even in the case of a statutory offence the presumption is that mensrea is an essential ingredient unless the statute creating the offence by express terms or by necessary implication rules it out"*. In the reported case of Commissioner of Income Tax versus Habib Bank Limited [(2007) 95 Tax 336 (H.C. Kar.)] a learned DB of Sindh High Court has held that *"the penal provisions under the Income Tax Act are quasi criminal in nature and mandatory condition required for the levy of penalty u/s 111 is the existence of mensrea and therefore, it is necessary for the department to establish mensrea before levying penalty u/s 111"*. In the reported case of Deputy Collector, Central Excise and Sales Tax, Lahore versus ICI Pakistan Limited, Lahore PTD 2006 1132 the Honorable Supreme Court has held that *"In an appropriate case of default in payment of sales tax, a manufacturer*



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or producer of goods could be burdened with additional sales tax under section 34 of the Act as well as penalty under section 33 of the Act. However, it does not necessarily follow that in every case such levy was automatic requiring no determination at all." In this case also there is no independent determination at all in this regard and it was taken for granted by the Assessing Officer that the liability to pay default surcharge and penalty is a necessary consequence or corollary of non-payment of sales tax within stipulated period.

13. The learned Commissioner (Appeals) for valid reasons waived the default surcharge and penalties imposed by Assessing Officer. The Commissioner (Appeals) should also waived 5% of the default surcharge imposed by him for the reason of lack of mensrea, malafide and willfulness. However since the respondent has not challenged the order in appeal the same has become final.

14. In view of the above I am satisfied that the Assessing Officer has imposed default surcharge and penalty without any just cause and the Commissioner (Appeals) has rightly waived the same.

15. The appeal is dismissed.



(Justice (R) Nadeem Azhar Siddiqi)  
CHAIRMAN

Karachi

Dated: 16.03.2018

Certified to be True Copy

Copies Supplied to:

- 1) The Assistant Commissioner SRB, Karachi.
- 2) The Respondent through Authorized Representative



REGISTRAR  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD

Copy for Information

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