

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

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APPEAL NO. AT- 06 /2018

M/s Domga Security & Consultancy
Services (Pvt.) Ltd.....Appellant

Versus

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

Mr. Muhammad Ahmadullah Khan, Advocate for Appellant

Mr. Nasir Bachani, AC - SRB for Respondent

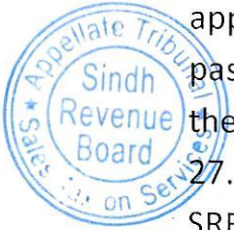
Date of hearing 02.05.2018

Date of Order 16.05.2018

ORDER

Justice[®] Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order-in-Appeal No.20/2018 dated 03.02.2018 passed by the Commissioner (Appeals) in Appeal No. 90/2016 filed by the Appellant against the Order-in-Original No. 244/2016 dated 27.02.2016 passed by the Assistant Commissioner (Mr. Nasir Bachani) SRB, Karachi.

01. The facts of the case as mentioned in the Order-in-Original are that the appellant is registered with SRB as service provider in the category of Security Agencies falling under Tariff Heading 9818.1000 of the 2nd



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schedule of the Sindh Sales Tax on Service Act, 2011 (herein after referred as the Act).

02. It was alleged in the Order-in-Original that scrutiny of the Audit Report of the appellant for the financial year 2014 revealed that their total income from the aforesaid taxable service in Sindh was Rs.77,891,571/=, whereas their total receipt of income for the said taxable services in Sindh declared through monthly sales tax returns (July, 2013 to June, 2014) stood at Rs.30,936,713/=. This clearly reflects undervaluation of the receipt by Rs.46,954,858/= liable to Sindh sales tax of Rs.4,695,485/=.

03. That a show-cause notice dated 21.04.2015 was served upon the appellant to explain as to why tax liabilities of Rs.4,695,485/= may not be assessed and determined under section 23 and section 47 (1A) of the Act of 2011 and recovered along with default surcharge under section 44 of the Act and penalties under serial No. 3 and 6 of the Table of Section 43 of the Act.

04. The appellant filed its reply dated 29.04.2015 received on 04.05.2015. In the reply it has been stated that the Chairman, SRB has extended the date of Registration till 26.08.2013. It was further stated that the appellant started collection of SST from its clients and informed them to pay SST from September, 2013. It was also stated that assessment of sales tax of Rs. 4,695,485/= was erroneous as the appellant got registration in the last days of August, 2013 and started charging SST from their clients since then. The appellant vide letter dated 01.06.2015 submitted that it was trying for the retrieval of amount stuck with clients and soon would be able to deposit the same.

05. That the Assessing Officer in order in original stated that Proprietor of appellant appeared before the Assessing Officer on 04.08.2015 and requested for extension of time. The Manager of appellant appeared before the learned Assessing Officer on 10.09.2015 and requested for further extension of time until 20.10.2015 to clear all outstanding



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amount of SST. The Manager of appellant again appeared before the Assessing Officer on 16.11.2015 along with necessary documentary evidence explaining the factum that the appellant is approaching all the clients and pressing them for their unpaid amount. Again the appellant on 04.01.2016 sought time till 05.02.2016. The learned AC placed on record a chart showing the time obtained by the appellant supported with diary sheets.

06. The Assessing Officer after various hearings and detail discussion has passed Order-in-Original determining the sales tax liability of Rs.4,857,184/= along with default surcharge and penalty of Rs.242,859/= under serial No. 3 of the Section 43 of the Act and further penalty of Rs.4,857,184/= under serial No.6 of Section 43 of the ACT.

07. The appellant challenged the said order of the Assessing Officer by way of filing appeal before the Commissioner (Appeals), who dismissed the appeal upholding the order in original to the extent of payment of tax of Rs.4,695,485/= along with default surcharge and penalty of Rs.234,774/= under serial No.3 of Table of Section 43 of the Act. The appellant has now challenged the said order in appeal passed by the Commissioner (Appeals) before this forum.

08. On 10.04.2018 Mr. Ahmadullah Khan the learned advocate for the appellant raised a plea that order in original was barred by time as the Show Cause Notice was issued on 21.04.2015 and order in original was passed on 27.02.2016 on 312 days instead of 180 days.

09. Mr. Nasir Bachani the learned AC for respondent submitted that the tax periods involved are from July, 2013 to June, 2014 and the SCN was issued on 21.04.2015 and by an amendment vide Finance Act, 2014 effective from 07.07.2014 in subsection (4) of Section 23 the time limit of 30 days was omitted and any time taken through adjournments shall be excluded. He then submitted that he had already placed on record Note Sheets duly signed by the representative of the appellant to show the time sought by the appellant by way of adjournments/extension of



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time. He then submitted that that the periods mentioned in section 23 is not mandatory as no consequence was provided in the Act and relied upon the reported case of M/s Dowell Schlumberger (Western) SA vs. Federation of Pakistan 2016 PTD 1702 of Islamabad High Court.

10. Mr. M. Ahmadullah, Khan Advocate in rebuttal submits that the photocopy of Note Sheet provided by the department is self-explanatory and has no legal sanctity in law and the department is allowed to exclude 30 days on account of adjournment in sub section (4) of Section 23 of the Act of 2011.

11. On 02.05.2018 Mr. Nasir Bachani the learned AC submitted that SCN was issued on 21.04.2015 and the order in original was passed on 27.02.2016. He then submitted that the SCN dated 21.04.2015 was issued after amendment dated 07.07.2014 in Section 23(4) of the Act and as such there was no time limit for grant of adjournment/extension of time. He then submitted that the order in original was passed on 312th day from the date of SCN dated 21.04.2015 and after excluding the time obtained by appellant through adjournments or extension of time the order is within time and not time barred as claimed by the appellant.

12. Mr. Ahmadullah, Advocate submitted that the subsequent amendment will not effect this case as the tax periods involves in this appeal are from 1st July, 2013 to 30th June, 2014 and that the amendment in Section 23(4) is applicable prospectively from 7th July, 2014. He relied upon Article 264 of the Constitution and Section 6 of General Clauses Act of 1897. He placed on record photocopy of reported case of Niaz Muhammad vs. Federation of Pakistan 2008 PTD 1517.

13. Mr. Ahmadullah, Advocate submitted that in subsection (3) & (4) of Section 23 of the Act the legislature used the word shall which makes the provision mandatory, therefore the department cannot grant extension on its own beyond the period of 30 days as provided before the amendment in Section 23(4) and relied upon the reported case of Collector Sales Tax Gujranwala vs. M/s Super Asia Muhammad Din &



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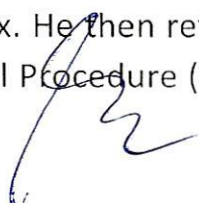
Sons. (The judgment is in respect of mandatory and Directory provisions and on limitation for passing the order).

14. Mr. Ahmadullah, Advocate then submitted that the tax period as per Section 2(95) is one month and the assessment order beyond one month cannot be passed and relied upon the reported case of M/s Sarhad Restaurant Lahore vs. CIR Appeals 2016 PTD (Trib.) 445 (an order of Inland Revenue Appellate Tribunal on the point of passing Assessment order of 1 month under Sales Tax Act 1990).

15. Mr. Nasir Bachani submitted that when the show cause notice was issued on 21.04.2015 and the amendment of 2014 was in field and the case has to be decided on the basis of law existed at the date of commencement of action and by deciding the case on the basis of law in existence no retrospective effect was given. He then submitted that the time obtained by the appellant by way of adjournments was rightly excluded as per law. He also submitted that the tax period is of one month and by passing assessment for more periods neither any illegality was committed nor any prejudice has been caused to the appellant as full opportunity of hearing was provided to the appellant.

16. Mr. Ahmadullah the learned advocate for the appellant additionally submitted that the client M/s Mehran University refused to accept the tax invoices on the ground that the University is owned by Government of Sindh. He submitted that law does not provide any mechanism if the party refused to accept the tax invoices and refused to pay the tax. He then submitted that Mehran University is liable to deduct 20% of the tax and to pay balance 80% to the appellant for deposit with SRB and since the appellant has not received the tax from the client it is not liable to deposit the tax with SRB.

17. Mr. Nasir Bachani the learned AC submitted that as per subsection (1) of section 9 of the Act the registered person providing service is liable to pay the tax. He then referred to sub rule (3) of Rule 3 of the Sindh Sales Tax Special Procedure (Withholding) Rules, 2014 and submitted that the

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responsibility of withholding agent is to withhold an amount equal to one-fifth of the total amount of sales tax shown in the sales tax invoice and shall make the payment of balance amount to service provider.

We have heard the learned representative of the parties and perused the record made available before us.

18. The first point raised by the appellant is that the order in original was passed beyond the time prescribed in subsection (3) of section 23 of the Act and the department cannot exclude more than thirty day time obtained through adjournments. The subsection (3) of section 23 of the Act provides that any order under subsection (1) shall be made within one hundred and twenty days of issuance of the show-cause notice or within such extended period as the officer of SRB may, for reasons to be recoded in writing, fix provided that such extended period shall in no case exceed sixty days. Subsection (4) of section 23 of the Act provides that in computing the period specified in sub section (3), any period during which the proceedings are adjourned on account of a stay order or proceedings under section 65 or the time taken through adjournment by the person shall be excluded. Earlier subsection (4) of section 23 of the Act provides that a period of 30 days on account of adjournments can be excluded. The law was amended vide Sindh Finance Act 2014 effective from 7th July, 2014 and the words "not exceeding thirty days" were omitted. The consequence of the amendment appears that now there is no limit for excluding time on account of adjournments. In this matter the show-cause notice was issued on 21.04.2015 and the order in original was passed on 27.02.2016 meaning thereby that the order was passed on 312th day from the show-cause notice. It is on record that appellant has obtained 132 days by way of extension/adjournments. If 132 days is deducted from 312 days the numbers of days left are 180. As far as the arguments of the learned advocate for the appellant that statute dealing with substantive law are prospective is concerned is correct. However in this case the law was amended before the issuance of the show cause notice and the proceedings has to be decided on the basis of law which was existed on the date of issuance of show cause



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notice (commencement of action). In the reported case of Mian Rafiuddin versus Chief Settlement and Rehabilitation Commissioner PLD 1972 SC 252 at page 306 it was held that *"It is well settled that when the law is altered during the pendency of action, the rights of the parties are decided according to the law as it existed when the action was begun and not the law that existed at the date of judgment or order"*. In this case the law was not amended during the pendency of proceedings; therefore, the case was rightly decided according to the law as it existed when the action was begun. We hold that order in original was not time barred.

19. As far as the contention of Mr. Ahmadullah, Advocate that the tax period as per Section 2(95) is one month and the assessment order beyond one month cannot be passed has no force, the learned AC has rightly submitted that by passing assessment for more periods collectively neither any illegality was committed nor any prejudice was caused to the appellant as full opportunity of hearing was provided to the appellant. The facts of the reported case of M/s Sarhad Restaurant Lahore vs. CIR Appeals 2016 PTD (Trib.) 445 have distinguishable facts. In the reported case a team of officers was deputed at the business premises for a period of 28 days, who reported supplies made by the registered person showing average per day value of supplies and on the basis of said report the adjudication officer concluded that during the period from July, 2010 to June, 2011 the registered person had suppressed the value of supplies by 748%. In this context the learned Tribunal in para 9 has held that *"In our considered view, adjudicating authority has misdirected himself by taking the whole year consisting of 12 tax periods for amendment instead of one tax period. If at all in the result of monitoring the department was of the opinion that the registered person/appellant had declared wrong results or short paid taxes, the best course as per law was to point out a period consisting of one month in which the particulars were wrongly declared"*.

20. The next argument of Mr. Ahmadullah the learned advocate for the was that the client refused to accept sales tax invoice and refused to pay the



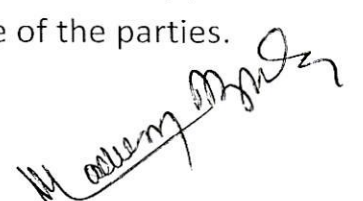
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sales tax and law does not provide any mechanism to deal this situation. He may be correct that law and rules do not provide any solution of this problem. But the fact remains that subsection (1) of section 9 of the Act provides that where a service is taxable by virtue of subsection (1) of section 3 of the Act the liability to pay the tax shall be upon the registered person providing the service. Further subsection (2) of section 13 provides that the Board may by notification require any person or class of persons, whether registered or not, to withhold full or part of the tax charged form or invoiced to such person on the provision of any taxable service and to deposit tax. The appellant being service provider is entitled to pass on the tax to the service recipient by mentioning the tax amount on the invoice. The appellant has to act as the tax collector on behalf of the Government of Sindh/SRB and the burden of payment of sales tax was on the recipient of service. The appellant is correct to the extent that as per withholding Rules the service recipient is liable to deposit one-fifth of the tax amount and the appellant is liable to deposit the remaining four-fifth of the tax amount.

21. As far as the default surcharge and penalty is concerned the mensrea, willfulness and malafide on the part of the appellant is lacking, which is essential for imposing default surcharge and penalty. The appellant is not liable to pay the default surcharge and penalty.
22. In view of the above discussion the appeal is partly allowed. The appellant is liable to pay four-fifth of the tax determined by the respondent. The department may recover one-fifth amount from the service recipient (s) after completing the required formalities.
23. The appeal is disposed of in the above terms. The copy of the order be provided to the authorized representative of the parties.


(Agha Kafeel Barik)
Technical Member


(Justice[®] Nadeem Azhar Siddiqi)
Chairman


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Karachi, Dated: 16.05.2018

Copies supplied to:-

1. The Appellant through Authorized Representative.
 2. The Assistant Commissioner, SRB, Karachi.
- Copy for information to:-
- 3) The Commissioner (Appeals), SRB, Karachi.
 - 4) Office copy
 - 5) Guard file.

