

(Guard file)

BEFORE THE APPELATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-1

APPEAL NO. AT-109/2018

The Assistant Commissioner, SRBAppellant

Versus

M/s Wateen Telecom (Pvt) Limited.....Respondent

Mr. Javed Ali, AC-SRB for appellant.

Mr. Aqeel Ahmad, ACA for respondent.

Date of Filing of Appeal: 13.11.2018.

Date of Hearing: 03.12.2018

Date of Order: 11.12.2018

ORDER

Justice (R) Nadeem Azhar Siddiqi. This appeal has been filed by the appellant challenging the Order-in-appeal No. 170/2018 dated 19.09.2018 passed by the Commissioner (Appeals) in Appeal No. No. 142/2015 partly allowing the appeal filed by the respondent against the Order-in-Original No. 290/2015 dated 19.05.2015 passed by the Assistant Commissioner (Ms. Nida Noor), SRB, Karachi.



1. In short, the facts of the case as stated in Order-in-Original are that the respondent is a registered person and engaged in providing taxable services of Telecommunication Services under tariff heading 98.12 of the Second Schedule of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) chargeable to Sindh sales tax @ 19.5%.
2. The allegations against the respondent are that it had claimed inadmissible input tax adjustment during the tax periods March, 2014 to June, 2014 amounting to Rs.66,082,768/= on following accounts.
 - (a) Claimed inadmissible input tax adjustment of Rs.39,460,534/= against payment of FED paid to Federal Government.
 - (b) Claimed inadmissible input tax adjustment of Rs.7,926,192/= in respect of sales tax paid on purchase or receipt of goods and services that were not used or consumed in providing or rendering taxable telecommunication services.
 - (c) Claimed inadmissible input tax adjustment of Rs.18,696,042/= on services that were not deposited by the supplier or the service provider.
3. A show cause notice dated 16.10.2014 was served upon the respondent to show cause why sales tax amounting to Rs.66,082,768/= may not be assessed and recovered along with default surcharge and penalties under serial No.3, 11 and 6(d) of the Table of section 43 of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act).
4. The respondent filed first written reply dated 11.11.2014 and submitted that vide SRO dated 05.06.2006 issued by Federal Government, excise duty on telecommunication services shall be levied and collected as if it were tax payable under section 3 of the Sales Tax Act, 1990. The respondent filed second reply on 14.11.2014 and submitted that out of Rs.39,460,535/= a sum of Rs.15,149,870/= is against Sindh sales tax and the remaining pertains to other jurisdiction. The respondent filed third reply dated 04.12.2014 and submitted



that banking services are part of today's business and no business can be conducted efficiently without modern banking services. The input tax on banking services are levied by the banks in connection with various banking transactions entered by the respondent for the purpose of business. The respondent also submitted that security services were acquired for the protection of sensitive sites and offices.

5. Finally after hearing, the order in original was passed disallowing the input tax adjustment of Rs.66,082,768/= and ordered to be recovered along with default surcharge and penalties of Rs.3,304,138/= under serial No.3 of Table of section 43 of the Act.
6. The respondent has challenged the order in original before Commissioner (Appeals) who allowed the appeal in favour of the respondent, hence this appeal by the Department.
7. Mr. Javed Ali the learned AC for SRB submitted that the Commissioner (Appeals) erroneously set aside the tax amount of Rs.18,696,042/- claimed by the Respondent as Input Tax on account of purchases from Telenor LDI. He then submitted that input tax was disallowed by the Assessing Officer as the invoices numbers and dates of two invoices did not match with the invoice number and dates mentioned in the returns filed by the appellant. He also submitted that the invoice numbers and dates given by the Telenor LDI in its returns also did not match with the invoice numbers and dates given by the respondent in its returns. He also submitted that Commissioner (Appeals) has wrongly waived the penalty imposed by the Assessing Officer. Mr. Javed Ali also placed on record photo copy of the reconciliation submitted by the Assessing Officer before the Commissioner (Appeals). He further submitted that the application for correction of returns filed by the respondent and condonation for delay in revising the returns were filed with the Commissioner-I, was rightly rejected on 02.08.2018. (The officer neither possessed copy of application nor the order passed thereon). The learned Ac also submitted that the

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Commissioner (Appeals) was not justified in setting aside the penalties imposed by the Assessing Officer, which were imposed under the provisions of law.

8. Mr. Aqeel Ahmed the learned representative of the respondent has fully supported the order of Commissioner (Appeals) and submitted that tax as determined by Commissioner (Appeals) amounting to Rs.10,959,614/- was deposited on 26.09.2018 and Default Surcharge of Rs.4,714,516/- was deposited on 07.11.2018. Mr. Aqeel further submitted that the Respondent cannot be penalized to pay huge amount of tax due to mistake in giving the invoices number and date in the returns and the Commissioner (Appeals) for valid reasons has accepted the contention of the respondent. He then submitted that the application for correction in the returns for May and June, 2014 was initially filed on 29.06.2018 through SRB web portal and since no response was received another manual application was made on 03.07.2018 to Commissioner-I which was decided on 02.08.2018 by the AC (Vicky Dhingra) Unit-I (who was the concerned officer at the relevant time) without any notice or providing of hearing. He then submitted that the respondent has now filed application for correction and condonation to the Chairman, SRB vide letter dated 11.09.2018, which is still pending. He further submitted that the service provider M/s Telenor LDI has also issued certificate to the affect that the input tax claimed by the respondent was deposited with SRB and the documents i.e. certificate, relevant returns and copies of invoices were placed before the Commissioner (Appeals). He then submitted that the respondent before the Commissioner (Appeals) has filed certificate to the affect that the respondent has not claimed the input tax in any other period. Mr. Aqeel has placed on record photo copies of all documents referred above. He then submitted that penalty and default surcharge can only be imposed subject to establishing mensrea and malafide on the part of the tax payer by the department, which is lacking in this case, and that issuing a show cause notice without any details available with the Assessing Officer amounts to a fishing and roving inquiry amounting

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to harassment of a potential tax payer and submitted that during the tax periods i.e. March to June, 2014 the respondent declared output tax of more than 90 million and that inadmissible input tax of Rs.66,082,768/- confronted through show cause notice was never claimed by the respondent which can be ascertained from the reconciliation report submitted by Assessing Officer before the Commissioner (Appeals). He also submitted that penalties cannot be imposed without establishing mensrea and the learned Commissioner (Appeals) has rightly setaside the same.

9. Mr. Javed Ali in rebuttal submitted that since the number and date of invoices did not match the Commissioner (Appeals) was not justified to hold that mismatch of invoice numbers and date is a clerical error and has wrongly provided relief to the respondent.

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

10. As per the order in original the respondent has claimed input tax adjustment of Rs.66,082,768/= which was disallowed by the Assessing Officer for the reasons mentioned in the Assessment Order. The respondent claimed that this amount was never claimed as input tax adjustment and placed reliance on the Reconciliation Report prepared by Mr. Vickey Dhingra, AC-Unit 21 filed before the Commissioner Appeals. The contention of the respondent has force and is confirmed from the contents of the Reconciliation Report. It appears that the show cause notice was issued for exaggerated amount without proper application of mind.

11. After the Reconciliation before the Commissioner (Appeals) the respondent agreed to deposit the Sindh sales tax in respect of items mentioned in sub-para (a) and (b) of para 2 above and the dispute remains with regard to sub-para (c) of para 2 above. The respondent after the order in appeal not only deposited a sum of Rs.10,959,614/=



on account of Sindh sales tax but also deposited an amount of Rs.4,714,516/= on account of default surcharge. The dispute is that the invoices of Telenor LDI against which the input tax has been claimed by the respondent did not match/reconcile with invoices of what M/s Telenor has declared in its return. The Commissioner (Appeals) has resolved the dispute as under:

3.In this regard he also took me to the contents of the Invoices of Advance Payment, contents of which were clearly reconcilable, as the same were mentioned in the main invoice. I have also studied and read the invoices with the copies of returns filed by M/s Telenor LDI and the certificate issued by it. It appears to me that one to the Invoices bearing No.54-83-6419-1 dated 03.05.2017 matches as to number but date is mention in the return of M/s Telenor LDI as 03.06.2014. Whereas, the Number of the other Invoice bearing No.54-83-6274-1 dated 03.05.2014 is entered in the return as 54-83-62741-1 but date has correctly been entered. In this regard the Appellant has also submitted that an application was also filed for revision of returns and to make good the record but for the reason of time limitation as is given in the law of Commissioner refused to allow such application. And that, for being aggrieved from the refusal of the Commissioner an application has now been filed before the Board, through Chairman SRB. As a matter of fact M/s Telenor LDI has issued the Certificate mentioning the correct numbers and dates of Invoices against which the payment has been made by them. The copies of the invoices have also been provided which reconcile with the number mentioned in the Certificate issued by M/s Telenor LDI. The fact of a subordinate Invoice of advance payment has also been clarified to me. There is no denial on part of the Respondent to the fact that the invoices pertained to taxable services, but the contention appears to be of mismatch of invoices numbers or dates of invoices only. In my humble opinion if the record entered in the returns was erroneous the same could be reconciled and made good from the invoices. The perusal of invoices shows that the same were legal and valid invoices, which have also been certified by the service provider. In such circumstances I find that it is only a clerical mistake which has been made at the time of entering such data in the system and for such clerical mistake, in presence of Certificate issued by M/s Telenor LDI and also in presence of copies of Invoices in question (appearing to be the valid invoices as per the Rules, 2011) the input adjustment cannot be refused.

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12. We have considered the above noted conclusion drawn by the learned Commissioner (Appeals) and do not find any illegality and infirmity. The finding recorded by the learned Commissioner (Appeals) is in consonance with the record produce before him.
13. Apparently the learned AC while preparing the Reconciliation was hyper technical in rejecting the input claim of the respondent on the basis of form (mistaken number of invoice and dates inserted while filing the returns) without going into the substance of the transactions. Sufficient material was available on record to correct the mistake. In the reported judgment in the case of Habib Insurance Limited versus Commissioner of Income Tax (Central), Karachi PLD 1985 Supreme Court Page 109, it has been held that *"It is true as contended by the learned counsel for the appellant that in Revenue cases one must look at the substance of thing and not at the manner in which the account is stated"*. From the comparison of the invoice number on the invoice and the return it is apparent that the same is a human error and nothing beyond that. The respondent has placed sufficient material on record to rectify the error if committed during filing of returns and on the basis of the material provided by the respondent the mistake can be ignored and relief can be provided to the respondent, which the Commissioner (Appeals) has rightly provided to the respondent.
14. As far as the penalties are concerned the learned Commissioner for sufficient cause has waived the penalty. The penalty can only be imposed provided the department is able to prove mensrea on the part of taxpayer. Every error or omission cannot be penalized without first establishing mensrea. The Assessing Officer has even not said that mensrea is present what to say about establishing the same. The Commissioner (Appeals) is vested with the powers to impose or not to impose penalty. In the reported case of Malt-79 Manufacturers vs. Collector 1995 PTD 345 Honorable Lahore High Court has held that expression *"shall be liable"* in contradistinction to *"shall pay"* clearly vests discretion in the Adjudicating Officer to levy or not to levy additional sales tax even in the event of failure of a person to pay the sales tax keeping in view the facts and circumstances of the case and reason for non-payment". The

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principles laid down in the reported cases are squarely applicable to this case despite of the fact that the same related to Sales Tax Act, 1990.

15. In the another reported case of Assistant Collector Customs and Central Excise, Karachi versus M/s Mari Gas Company Limited 2003 PTD 818 a learned DB of High Court of Sindh has held that *"The use of phrase "shall pay" makes it mandatory on the person to pay the amount while the use of the words "he shall be liable to pay" gives a discretion to the concerned officer of the Excise Department to impose additional tax or waive it totally if, in his opinion, the circumstances so require"*. In the Table, Column (2) of Section 43 of the Act the phrase "Such person shall be liable to pay penalty" was used which gives discretion to the officer to impose or not to impose penalty. In our view the Commissioner (Appeals) has rightly exercised discretion in favour of the respondent. The judgment of Sindh High Court if not set aside by the Supreme Court is binding upon the judicial officers as well as administrative officers.
16. The learned Ac relied upon two reported judgments 1) Commissioner Inland Revenue versus Madina Cotton Ginners and Oil Mills, 2016 PTD 643 (DB-LHC) 2) Commissioner Inland Revenue, Lahore versus Saritow Spinning Mills Ltd., 2016 PTD 786 (DB-LHC). The facts of these reported cases are distinguishable from the facts of the case in hand. The first case deals with the penalty of non-filing of returns. The second case deals with the payment of additional sales tax and it was held that the same is not in the nature of fine. More over the two judgments cited by the AC from other jurisdiction has a persuasive value and is not binding in Sindh, whereas the judgment in the case of Mari Gas Company Limited supra delivered by Sindh High Court is binding on the department as well as on this Tribunal.
17. Before parting with this order it appears necessary to comment on the manner the decision was taken on the application of the respondent for permission to revise sales tax returns for May and June, 2014 filed before the Commissioner-I, SRB (we are not commenting on the decision for the reason that an application against the decision of AC is pending before the Board). Firstly from the decision it appears that the same was taken without notice and without providing any right of hearing to the

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appellant or its representative in violation of principle of natural justice and "*audi alteram partem* (no one can be condemned unheard). This principle applies to judicial, quasi-judicial and administrative bodies (PLD 1997 Karachi 1). The right of hearing has to be read in every statute even if the said statute does not provide for right of hearing (PLD 1981 Karachi 311). Secondly the decision was taken or signed by Mr. Vickey Dhingra, AC-SRB who has represented SRB before Commissioner (Appeals). The taking of decision or signing the decision by the AC representing the department before Commissioner (Appeals) violates the principle of "no one can be judge in his own cause". Furthermore Article 4 of the Constitution of Pakistan provides that right of individual to be dealt with in accordance with law. To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen. After insertion of Article 10A in the Constitution a person shall be entitled to a fair trial and due process of law. Due process of law includes the right to be treated according to law and right of hearing is the part of due process of law. It appears to us that the officers who are vested with quasi-judicial powers are not aware about the basic principle of law. We are sanguine that the Board will look into the matter and take necessary steps to avoid repetition of the same.


A copy of this order may be provided to the Learned Chairman, SRB for placing the same before the Board for its perusal and necessary action in this regard. We are also sanguine that the Learned Chairman will let us know about the progress in the matter.

16. We also wants to draw the attention of the Board and the learned Chairman of the Board towards the latest decision of the Honorable Supreme Court of Pakistan in the case of Pakistan through Chairman FBR versus Hazrat Hussain and others (2018 SCMR 939) in which it was held that ".....It is to be noted that appeals should not be filed as a matter of routine or because a decision has been rendered against the Department. Decisions should be taken on a reasonable basis. It is not advisable for government departments to waste public time and money by filing appeals routinely.....".

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17. The above judgment in view of Article 189 of the Constitution becomes binding precedent for all forums in the country (2014 SCMR1557).
18. In view of the above discussion we found no substance in the appeal which is accordingly dismissed.
19. The copy of this order may be provided to the learned Representatives of the Parties.


(Agha Kafeel Barik)
TECHNICAL MEMBER


(Justice[®] Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi

Dated: 11.12.2018

Copies supplied for compliance:-

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

Copy for information to:-

- 3) The Commissioner (Appeals), SRB, Karachi.
- 4) Office copy
- ✓ 5) Guard file.