

(Guard file)

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD KARACHI

DB-1

APPEAL NO. AT-116/2018

M/s Kings Food (Pvt) Ltd.....Appellant

Versus

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

Mr. S. M Rehan, FCA and Mr. Ahsan Iqbal, ITP for appellant.

Mr. Ghulam Mustafa, AC, SRB for respondent

Date of filing of Appeal 04.12.2018

Date of hearing: 24.12.2018

Date of Order: 24.12.2018

ORDER

**Justice (R) Nadeem Azhar Siddiqi.** This appeal has been filed by the appellant challenging the Order in Appeal No.223/2018 dated 30.11.2018 passed by the Commissioner (Appeals) in Appeal No. 38/2018 confirming the Order-in-Original No. 53/2018 dated 09.02.2018 passed by the Assistant Commissioner (Mr. Ghulam Mustafa Kathio), SRB, Karachi.

01. In short, the facts of the case are that the Appellant E-signed up/ registered with SRB and acquired the taxable services of advertisement under tariff heading 98.02 and the sub-heading thereof of the Second Schedule of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to the Act of 2011) subject to levy of Sindh sales tax.



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02. The allegation of the appellant in the order in original are that during the scrutiny of the record available with SRB reveals that the appellant received taxable services and withheld the Sindh sales tax amount of Rs.15,975,818/= from August, 2011 to April, 2017 and the appellant has deposited Rs.1,207,875/= leaving a balance of Rs.14,767,943/= which was not deposited.
03. That a Show-cause notice dated 02.01.2018 was issued to the appellant to explain as to why sales tax amounting to Rs.14,767,943/= may not be assessed and recovered along with default surcharge and penalties.
04. The appellant has taken a plea that an amount of Rs.4,478,246/= deposited which was not considered.
05. Finally the Assessing Officer has passed assessment order in the sum of Rs.14,767,943/= along with default surcharge and penalty of Rs.738,397/= under serial No.3 of section 43 of the Act, Rs.738,397/= for not complying the relevant provisions of the notification of the Act, 2011 and Rs.14,767,943/= under serial No. 11-A, of section 43 of the Act.
06. The order in original was challenged before the Commissioner (Appeals) who upheld the order in original, default surcharge and penalties.
07. Mr. S.M. Rehan filed details of withholding by the appellant. The withholding for the periods 01.08.2011 to 30.06.2013 was amounting to Rs.15,742,599/-. The withholding by appellant for the period from 01.07.2013 to 30.04.2017 comes to Rs.32,099/ making total withholding of Rs.15,744,698/-.
08. Mr. S. Rehan submitted that from the statement filed today by Mr. Ghulam Mustafa AC it is apparent that on different dates the appellant has deposited a sum of Rs.14,286,426/- on account of withholding of Sindh Sales Tax. According to Mr. S.M. Rehan the short fall comes to Rs.481,517/-, which the appellant is ready to deposit with SRB. Mr. S.M. Rehan has pointed out that in the SCN dated 02, January 2018 the amount confronted was 15,975,818/- out of which an amount of

*MDZ*

*R/S*



Rs.1,207,875/- was adjusted leaving a balance of Rs.14,767,943/- and order in original was passed without considering the deposits made by the appellant. He then submitted that despite providing details and copies of cheques of Rs.4,478,246/- the amount was not adjusted and now on the direction of Tribunal the AC has produced the details of tax deposited with SRB during the tax periods involved in this appeal. He submitted that apart from Rs.1,20,7875/- adjusted during the order in original proceedings the appellant also deposited a sum of Rs.14,286,426/- which was not adjusted from the amount confronted in the SCN and order in original. He submitted that this clearly reflects malafide on the part of the Assessing Officer.

09. Mr. S. M. Rehan has also submitted that the Commissioner (Appeals) has also failed to go into the merits of the case and has failed to consider the implication of amalgamation of appellant with Hilal Confectionary (Private) Limited and without any proof of mensrea upheld the penalties and default surcharge. He then submitted that it was the duty of the Commissioner (Appeals) to consider the pleas raised by the appellant and to allow adjustment of the tax already deposited and by not doing so the Commissioner (Appeals) has gone beyond jurisdiction.

10. Mr. Ghulam Mustafa placed on record a statement showing total amount deposited by appellant on account of withholding Sindh Sales Tax in the sum of Rs.14,286,426/-. He then submitted that earlier an amount of Rs.1,207,875/- is also included in the amount shown in this statement filed today. He submitted that appellant is required to deposit Rs.1,689,392/- and not Rs.481,517/- as claimed by the appellant and the appellant is also liable to pay penalties and default surcharge as imposed by the Assessing Officer.

11. Mr. S.M. Rehan in rebuttal submitted that the amount of Rs.1,207,875/- earlier adjusted was not included in the amount shown in the statement filed today. He then submitted that there was a serious contest between the parties regarding deposit of withholding amount and that mensrea is lacking and the appellant is not liable to pay any penalty and default



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surcharge. He then submitted that respondent has failed to establish and prove that the earlier adjusted amount is included in the amount shown in the statement filed today.

12. With the help of the learned Representatives of the parties a reconciliation was prepared which reflects as under:-

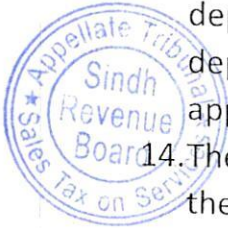
**RECONCILIATION**

Gross liability as per OIO	Rs.15,975,818/-
Less adjusted in OIO	<u>Rs.1,207,875/-</u>
Amount payable as per Assessment order	<u>Rs.14,767,943/-</u>
Less CPRs now available and shown In the statement dated 24.12.2018	<u>Rs.14,286,426/-</u>
Balance to be deposited by the appellant	<u>Rs.481,517/-</u>

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

13. The appellant in reply to the show-cause notice has submitted that an amount of Rs. 4,478,246/= which was neither considered by the AC nor the Commissioner (Appeals) in its true perspective. Now at this stage when directed by the Tribunal the AC comes with a statement that total withholding deposited by the appellant was Rs.14,286,426/= and after deposit of this amount only an amount of Rs.481,517/= remains to be deposited by the appellant, which the learned representative of the appellant has agreed to deposit.

14. The Assessing Officer apart from imposing penalty under serial No.3 of the Table under section 43 of the Act also imposed penalty equal to the amount of tax involved under serial No. 11-A of the Table under section 43 of the Act. The Commissioner (Appeals) while upholding the penalty neither established mensrea nor considered that the Ac has failed to provide the details of the contravention of the rules or notification in relation to withholding. The imposition of penalty is quasi-criminal, existence of mensrea is mandatory condition for imposing such penalty and the department must establish mensrea before imposing such penalty (Commissioner Income Tax versus Habib Bank Limited 2007 PTD



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901 (DB Judgment of Sindh High Court). The Judgment of the Sindh High Court is binding upon the Officers of SRB and by not following the same the Officers are committing contempt of the High Court of Sindh and a reference can be sent to the High Court.

15. The Commissioner (Appeals) in para 33 has held that mensrea is duly established. Perhaps while holding so the Commissioner (Appeals) has fails to look into the order in original in which the AC has said nothing about the establishment of mensrea. It appears that the Commissioner (Appeals) was more loyal than the King.

16. The learned representative of the appellant has raised certain legal questions (also highlighted in the order in appeal), but in view of the above re-conciliation and the consent of the learned representative of the appellant to deposit the balance withholding of tax discussion on those legal issues are not necessary.

17. Before parting with this order we are constrained to observe that the AC and Commissioner (Appeals) acted negligently in determining the tax liability of Rs.14,767,943/- without properly going into the pleas raised by the appellant and created unnecessary harassment for a potential tax payer. We may also observe that such activities bring bad name to SRB and the Board should look into the matter and should initiate disciplinary proceedings against those who bring bad name to SRB.

18. In view of the above the appeal is allowed. The order in original and order in appeal are set aside except to the extent of deposit of tax amounting to Rs.481,517/=, which the appellant will deposit within fifteen days from the date of receipt of this notice, failing which the appellant is also liable to deposit penalty under serial No.3 of the Table under section 43 of the Act and default surcharge.

19. The copy of the order may be provided to the learned representative of the parties.

(Agha Kafeel Barik)

TECHNICAL MEMBER

(Justice<sup>®</sup> Nadeem Azhar Siddiqi)

CHAIRMAN

For REGISTRAR  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD

Karachi

Dated: 24.12.2018

Copies supplied for compliance:-

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

Copy for information to:-

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

