

(Court file)

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-1

APPEAL NO. AT-115/2018

Assistant Commissioner, SRB, Karachi.....Appellant

Versus

M/s Falcon-I (Pvt) Ltd.....Respondent

Date of filing of Appeal: 03.12.2018

Date of hearing: 10.04.2019

Date of Order: 06.05.2019

Mr. Vickey Dhingra, AC and Mr. Javed Ali, AC-SRB for appellant.

Mr. S. M. Rehan, Chartered Accountant and Mr. Ahsan Iqbal, ITP for respondent

ORDER

Justice ® Nadeem Azhar Siddiqi: This appeal has been filed by the appellant/department challenging the Order-in-Appeal No.216/2018 dated 13.11.2018 passed by the Commissioner (Appeals-1) in Appeal No. 189/2018 filed by the respondent/taxpayer against the Order-in-Original No.796/2018 dated 22.09.2018 passed by the Assistant Commissioner (Mr. Vickey Dhingra) SRB, Karachi.



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01. The facts as stated in the order-in-original are that the respondent is engaged in providing and rendering the taxable vehicle tracking services and registered with SRB since 11.11.2011 chargeable to Sindh sales tax falling under Tariff Heading 9812.9490 of the Second Schedule of the Sindh Sales Tax on Service Act, 2011 (hereinafter referred to as the Act).

02. The respondent was selected for audit under section 28 (1) of the Act for the period July, 2016 to June, 2017. It was alleged in the order in original that As per the audit observations the respondent has provided taxable services, but failed to charge and deposit tax amount as under:

S. No.	Description	F/S	Amount (Rs.)	Tax rate	Sindh Sales Tax
a.	Revenue from sales of Tracking Devices	Note 19	17,021,080	19%	34,014,005
b.	Rental Income from Tracking Devices	P & I.	154,307,572	19%	29,318,439
c.	Activation Charges	Note 21	483,00	19%	91,770
d.	Misc. Other Income	Note 21	1,873,226	19%	355,912
Total			335,684,878		63,780,127

03. It was also alleged that the respondent has claimed/adjusted inadmissible input tax of Rs.102,121/= under section 15A (1) (jj) of the Act of 2011 read with Rule 22 (2) of the Rules, 2011. It was also alleged that for the tax periods under consideration the respondent late filed the monthly tax returns and late deposited the tax for the tax periods January, 2017 i.e. 11.03.2017 and 15.02.2017.

04. A show-cause notice dated 02.07.2018 was served upon the respondent to show-cause why SST amounting to Rs.63,780,127/= may not be assessed and recovered along with default surcharge and penalty under serial No.3 of Table under section 43 of the Sindh Sales Tax on Services Act, 2011.



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05. In the show-cause notice the respondent was also required to show-cause as to why the Input tax of Rs.102,121/= may also be disallowed and recovered along with default surcharge and penalty under serial No.3 and 6 (d) of Table under section 43 of the Act, besides imposing of penalties under serial No. 2, 3, 11, 13, and 15 of Table under section 43 of the Act.

06. The respondent filed reply dated 20.08 2018 and submitted that sale of tracking device are not telecommunication services but supply of goods against which sales tax has already been paid in FBR. It was also stated that rental income from devices is not sale, which is not taxable service. It was also stated that revenue from activation charges are not taxable under the Act of 2011. Regarding the revenue from other income it was stated that the income comprise of premature termination of tracking services and the income is transferred to the profit and loss account and the Sindh sales tax was already paid and charging the tax again tentamount to double taxation. Regarding late filing of the returns it was stated that the same was assigned to an employee who went to his hometown without intimation. Regarding input tax adjustment it was stated that the same was used in providing taxable services and are admissible.

07. The Assessing Officer passed order in original determining the tax liability of Rs.63,851,192/= along with default surcharge and imposing penalty of Rs.3,316,832/= under serial No. 3 of Table under section 43 Act and further penalty of Rs.7,000/= under serial No. 2 of Table under section 43 of the Act for non-filing of tax return and default surcharge of Rs.15,444/=



08. The respondent has challenged the order in original before Commissioner (Appeals-1) who upheld the order in original to the extent tax amount and default surcharge and setaside in respect of penalties.

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09. The learned AC submitted that the department is aggrieved by the findings of the learned Commissioner (Appeals) by which the penalties imposed by the Assessing Officer was set aside.
10. The learned AC submitted that penalties were rightly imposed in accordance with law for violation of various provisions of law and rules as mentioned in the order in original. He also submitted that learned Commissioner (Appeals) has erroneously and wrongly exercised his jurisdiction in waiving the penalties without considering that default in payment of tax and non-filing of returns were established on the record. He also submitted that waiver of penalties without any justification will encourage the defaulter tax payers not to pay tax and file tax returns as provided. The learned AC submitted that mensrea was established on the record.
11. Mr. S.M. Rehan the learned representative of the respondent supported the order in appeal and submitted that penalties were rightly waived as the mensrea was neither discussed in the order in original nor the same was established. The department was also failed to establish that the input tax was claimed malafidely to evade tax. He further submitted that default was not due to any act or omission on the part of the respondent but due to disallowance by the department the input rightly claimed by the respondent against the tax paid to FBR. He then submitted that the parties were in contest with each other and in view of various judgments of superior courts and this Tribunal the Commissioner (Appeals) has rightly waived the penalties. He also challenged the imposition of default surcharge and submitted that the same is without justification.
12. We have heard the learned representative of the parties and perused the record made available before us.
13. The appeal has been filed against the order of waiver of penalties by the Commissioner (Appeals). The Commissioner (Appeals) in para 10 of the order in appeal has held as under.



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"10. As far as the penalties are concerned, the above findings will show that a huge quantity of work has been done for reaching on a true interpretation, when reading the entries with the provisions of the Act, 2011 and the Rules made thereunder. Further, the submission of the Appellant regarding his employees leave without information is also reasonable and there is also no considerable delay in filing return or payment of tax. So, therefore, this is a true matter of interpretation as well and malafides cannot be attributed to the Appellant. In view whereof the penalties could not be imposed".

14. That as far the imposition of penalties under serial No. 2 and 3 of Table under section 43 of the Act, it has to be seen that non-payment of tax was not due to any slackness or malafides on the part of the appellant. It was the result of finding of the audit report which says that the respondent failed to charge and deposit the sales tax due and due to disallowance of input tax by the department. The contention of the appellant is that the sale of device and other services are not taxable. There is a consent between the parties and it cannot be said that the respondent willfully and malafidely failed to pay the tax. In the matter of contest and interpretation the Commissioner (Appeals) has rightly set aside the penalties imposed by the Assessing officer. The imposing of penalties in case of committing default in payment of tax or late filing of returns is not automatic and some determination with regard to element of mensrea is required. In the reported judgment of Dy. Collector Central Excise and Sales Tax versus ICI Pak. Ltd. Lahore, 2006 SCMR 626 the Supreme Court of Pakistan has held that"In an appropriate case of default in payment of sales tax, a manufacturer or producer of goods could be burdened with additional sales tax under section 34 of the Act as well as the penalty under section 33 of the Act. However, it does not necessarily follow that in every case such levy was automatic. It was further held that ".....In case of failure of a registered person to pay the sales tax within time, he shall also be liable to pay additional tax and surcharge. The liability being not automatic would be determined by the appropriate authority as to whether or not there was any reasonable ground for default in payment of Sales Tax which could be considered to be willful and deliberate".



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15. 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 penalty is a necessary consequence or corollary of non-payment of sales tax and non-filing of return within stipulated period. In view of the above we are satisfied that the Commissioner (appeals) has rightly waived the penalties, which were imposed by the Assessing Officer without any just cause.

16. The imposition of penalty is quasi criminal and presence of mensrea is mandatory as held in the reported judgment of Commissioner Income Tax versus Habib Bank Limited, 2007 PTD 901 (DB SHC) It has been held that "13. There can be no cavil to the arguments of the learned counsel for the respondent that the penal provisions under the Income Tax Act are quasi-criminal in nature and mandatory condition required for the levy of penalty under section 111 is the existence of mensrea and, therefore, it is necessary for the department to establish mensrea before levying penalty under section 111. There is plethora of judgments of the superior courts on India and Pakistan from the very inception of Income Tax Act, 1922, on this point"..... In the reported judgment of Pakistan through Secretary Ministry of Finance versus Hard Castle Waud (Pakistan) PLD 1967 SC I it has been held that even in statutory offence the presumption is that mensrea is an essential ingredient for imposing penalty.

17. Furthermore the discretion vests in the Commissioner (Appeals) to impose or not to impose penalty. The discretion has been rightly exercised by the Commissioner (Appeals). In the reported judgment in the case of Assistant Collector, Customs and Central Excise, Division III, Sukkur versus Mari Gas Company Limited 2003 PTD 818 a DB of Sindh High Court has held that "In view of the wordings of the provision, according to Mr. Moton, if a person fails to pay the duty within the time prescribed by law, he is bound to pay additional duty at the rate specified in the provision. We are afraid we cannot agree with the arguments advanced by Mr. Moton because there is a clear distinction between the phrases "shall pay" and "shall be liable to pay". The use of the 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



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impose additional tax or waive it totally if, in his opinion, the circumstances so require.....In the present case, the use of the words "he shall be liable to pay" in section 3-B of the Act also vests in the Adjudicating Officer, the discretion to levy or forego the Additional Sales Tax in case of failure of a person to pay the sales tax keeping in view the facts and circumstances of the case and the reason for non-payment.

18. The learned AC has relied upon the reported judgments in the case of Commissioner Inland Revenue versus Madina Cotton and Oil Mills, 2016 PTD 643 a DB judgment of Lahore High Court and Commissioner Inland Revenue, Lahore versus Saritow Spinning Mills Ltd, Lahore, 2016 PTD 786 a DB judgment of Lahore High Court. The case of Madina Oil Mills is in respect of non-filing of returns of zero rating service. In the judgment no case law of superior courts has been considered regarding the requirement of imposing penalty. The case of Saritow Spinning Mills is in respect of a question that the additional tax (substituted with default surcharge) under section 34 of the Sales Tax Act, 1990 for late payment of sales tax is not in the nature of fine and is thus not hit by the statutory allowance under section 21 (g) of the Income Tax Ordinance, 2001. The conclusion drawn by the Honorable Lahore High Court was that since the additional tax is not a fine/penalty, thus the same is not hit by the provisions of section 21 (g) of the Ordinance and same is allowable/admissible deduction. The facts of the reported judgment are distinguishable from the facts of this case. The judgment in Mari Gas supra is of DB of Sindh High Court and is binding on this Tribunal under Article 201 of the Constitution.




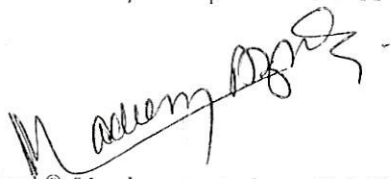
19. The learned AC leaving the numerous reported judgments of the Sindh High Court and Supreme Court of Pakistan, available on the question whether the penalty and default surcharge can be imposed without establishing mensrea, malafides and intention to evade tax. The Commissioner (Appeals) as well as this Tribunal has the power to waive the default surcharge and penalty. The learned AC has relied upon the cases the facts of which are distinguishable from the facts of the case in hand.

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20. In our view the Commissioner (Appeals) has rightly waived the penalties imposed by the Assessing Officer.

21. In view of the above this appeal has no merit and the same is accordingly dismissed. 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: 06.05.2019

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REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Copies supplied for compliance:-

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

Copy for information to:-

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

Order issued on

09/05/19

Registrar

Order Dispatched on

09/05/19

Registrar