

(Quoted file)

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

SB-I

APPEAL NO. AT-45/2018

Assistant Commissioner, Unit No. 31, SRB, Karachi.....Appellant

Versus

M/s Executive Air international ServicesRespondent

Mr. Syed Waqas Zaidi, AC, SRB, for Appellant.

Mr. Asif Khaliq Shar Advocate for Respondent.

Date of filing of Appeal: 05.06.2018

Date of hearing: 05.09.2018

Date of Order: 28.09.2018

ORDER

Justice[®] Nadeem Azhar Siddiqi, Chairman: This appeal has been filed by the appellant challenging the Order-in-Appeal No.65/2018 dated 07.05.2018 passed by the Commissioner (Appeals) in Appeal No. 165/2017 filed by the Respondent against the Order- in-Original No. 324/2017 dated 24.11.2017 passed by the Assistant Commissioner (Ms. Shumaila Yar Muhammad) Assistant Commissioner –Unit-30, SRB, Karachi.



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01. The allegations against the appellant as mentioned in the Order-in-Original are that during the scrutiny of online tax profile of the appellant available with SRB, it was observed that the appellant had failed to deposit Sind sales tax for the tax periods January-2013 to April-2013 and September-2016 and also failed to e-file monthly sales tax returns for the aforesaid tax periods.

02. The respondent vide show-cause notice dated 23.05.2017 was required to explain as to why penalties under serial No.2, 3, 6(d), 11, 12 and 13 of Table under section 43 of the Act may not be imposed and why the unpaid amount of sales tax may not be assessed and recovered under section 23 and 47 of the Act along with penalties and default surcharge. The respondent filed written reply on 02.06.2017 in which it was stated that the tax for the month of December, 2013 was deposited in January 2014 and the tax for the period September, 2016 was deposited and reflected in the return of October, 2016. It was also stated that during the period January, 2013 to April, 2013 the respondent was not registered and the tax was withheld by the service recipients. It was further stated that penalties can only be imposed where the respondent has evaded the tax or committed fraud. The respondent filed another reply dated 07.08.2017 and submitted that notwithstanding, the returns for the months of December-2013, and September-2013 and September-2016 were missed, though the tax was paid and now the respondent has filed returns for the said tax periods.

03. The Assessing Officer after hearing passed order against the respondent imposing penalty of Rs.894,800/= under Sr. No.2 of Table under section 43 of the Act for violation of non-filing of returns.

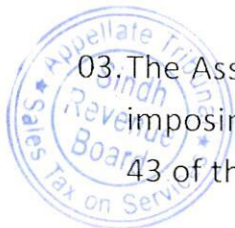
04. The said order of the Assessing Officer was challenged by the respondent by way of filing appeal before the Commissioner (Appeals), who allowed the appeal, hence this appeal by the Department.

05. Mr. Waqas Zaidi AC submitted that the respondent was liable to be registered as it had provided taxable services under tariff heading

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9826.0000 (Airport Services) and it was also registered with Federal Board of Revenue from 1st January, 1995. He then submitted that the respondent being a person liable to be registered is required to file e-returns under section 30 of the Act of 2011 and since the respondent has filed to file e-returns as provided under Rank 13 of Sindh Sales Tax on Services Rules, 2011 and the penalties under Table 2 of Section 43 of the Act of 2011, was properly and rightly imposed. He then submitted that the Commissioner (Appeals) erroneously and without justification waived the penalty for non-filing of returns.

06. Mr. Asif Khaliq Shar advocate supported the order of the Commissioner (Appeals) and submitted that the discretion was rightly exercised as the department has failed to establish mensrea on the part of the respondent. He then submitted that though the respondent was not bound to file e-returns prior to date of registration, even then complied the order of Commissioner (Appeals) and the returns were filed. He then submitted that Rule 13 also speaks about the filing of e-returns by the registered person and not by the person liable to be registered. He then submitted that due tax was withheld by the recipients of services and was deposited with SRB and no financial loss was caused to the exchanger. He then submitted that no e-returns can he filed without a user ID and password to be given by SRB.

07. Mr. Waqas after going them the record has submitted that the respondent got voluntarily registration on 07.06.2013 and is liable to file all e-returns from the date the respondent has provided taxable airport service.

08. Mr. Asif Khaliq Shar place on record photocopies of acknowledgment slips of filing of e-returns for the tax periods from January, 2013 to April, 2013.

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

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09. The dispute is in respect of non-filing of returns prior to registration and after the registration. The respondent was registered on 07.06.2013. The Commissioner (Appeals) in para 5 of his order has held as under:

"The appellant was required to file e-returns in question under the law and there is no excuse in law for those who remained unregistered for such periods not to file returns. The Judgment by the Honorable Tribunal, in such circumstances speaks about imposition or otherwise of penalty and does not absolve from filing of return. For the given reason the OIO is upheld in principle. However, the appellant will only be required to pay the penalty if it fails to file returns in question within a period of 15 days from the date of receipt of order accordingly".

10. The reason assigned by the learned Commissioner (Appeals) for reaching the above conclusion were mentioned in para 4 of the Order, which read as under:

".....As a matter of fact and record the appellant was not registered with SRB during the tax period from January, 2013 to April, 2013, the sales tax was withheld by the service recipients during the periods the appellant remained unregistered. In the hearing before me the appellant agreed to file returns in question and the onward tax is also being paid without needing to initiate any proceedings. There is also no tax evasion on record and respondent has also accepted that the payment of tax for the previous periods was made by the appellant or by the recipient. In the circumstances the non-filing becomes a procedural lapse and the malafides or mensrea cannot be established with a reasonable certainty".

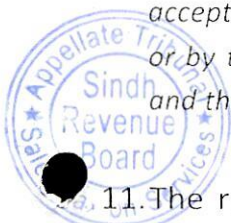
11. The respondent before this order had already filed the returns for the periods on 27.04.2018 and the order of Commissioner (Appeals) has been complied with. I do not find any illegality or infirmity in the order of Commissioner (Appeals) and the discretion vested in him has been properly exercised. Even for imposing penalty for non-filing of returns the department has to establish mensrea and malafides on the part of the respondent which is lacking in this case. The order in original is silent in this regard.

12. Before parting with this order, despite the fact the respondent has not filed appeal against the Order of Commissioner (Appeals) it is necessary to point that upholding the OIO for imposing penalty as calculated by the Assessing Officer for non-filing of returns is not proper and legal and

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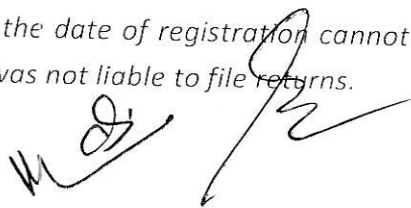


is against the order dated 25.01.2017 passed by DB of this Tribunal in Appeal No. AT- 92/16 Slingshot VS Assistant Commissioner, which read as under:

"Besides, the learned counsel took the plea that the quantum of penalty imposed by the A.C. was not only harsh but unjustified and based on lack of proper interpretation of the penal provision. He argued that section 43(2) provided Rs.10,000/- only one time for an offence whereas the A.C. had compounded the penalty with every month for the whole period of default of non-filing of returns for 13 months, December 2014 to February 2016. It is noted that in this case the default of non-filing of monthly returns pertains to 13 returns for the months of December 2014 to February 2016. Penalty @ Rs.10,000/- for each not filed return works out to Rs.130,000/- in aggregate. However, the Assistant Commissioner multiplied the number of returns with the number of months for which it continued and imposed penalty of Rs.1,206,000/- which is too harsh and excessive. The intention of legislation in the enactment of penal provision is always deterrent and corrective in nature. Here also the phrase per month appears to be related to a return of sales tax which is to be filed every month. It is now well settled principle of law that if there appears any ambiguity in any provision of law the same has to be resolved in favor of tax payer as held in M/s Mehran Associates Versus Commissioner Income Tax, Karachi 1993 SCMR page 274. It was also held by Sindh High Court in M/s Citi Bank versus Commissioner Inland revenue that if two reasonable interpretations are possible, the one favoring the tax payer will be adopted. Multiplying the amount of penalty with number of months will be illogical and against the spirit of law.

13. Regarding the penalty for non-filing of returns the DB of this Tribunal in an earlier order dated 09/07.2015 passed in Appeal No. No. 28/14 National Asset Management Co. vs. SRB has held as under:

"Penalty for non-filing returns before the date of registration cannot be imposed as the appellant was not registered and was not liable to file returns.



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14. The above orders of the Tribunal are still in field and have not been set aside by the Honorable High Court in referential jurisdiction and are binding upon the Commissioner (Appeals) and Assessing Officers. Any order/decision of the Assessing Officer and the Commissioner (Appeals) cannot be sustained if the same is against the order/decision of Tribunal. The Commissioner (Appeals) is fully aware about the above orders as the copies of the above orders were sent to him and he should follow the same in later and sprit.

15. In view of the above discussion the appeal is dismissed. The copy of the order may be provided to the parties.



(Justice (R) Nadeem Azhar Siddiqi)
Chairman

Karachi.

Dated.28.09.2018

Certified to be True Copy

Copies Supplied to:

- 1) The Assistant Commissioner, SRB, Karachi.
- 2) The Respondent through Authorized Representative.
Copy for Information.
- 3) The Commissioner Appeals, SRB.
- 4) Guard File.
- 5) Office File



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