

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI
DB-I

APPEAL NO. AT-46/2018

Assistant Commissioner Unit 30,
Sindh Revenue Board,
Shaheen Complex,
M. R Kiyani Road,
Karachi.....Appellant

Versus

M/s R. K. Chemicals Company,
Flat No. CC-6, Salman Terrace, Block 8,
Clifton,
Karachi.....Respondent

Date of filing of Appeal: 20.07.2018
Date of hearing: 19.04.2021
Date of Order: 17.05.2021

Mr. Muhammad Rehmatullah, AC-SRB for the appellant.

Mr. Ghulam Rabbani, advocate for respondent

ORDER

Justice © Nadeem Azhar Siddiqi: This appeal has been filed by the appellant/department challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.87/2018 dated 25.05.2018 passed by the Commissioner (Appeals) in Appeal NO. 268/2016 filed by the respondent against the Order-in-Original (hereinafter referred to as the OIO) No. 47/2016 dated 15.08.2016 passed by the Ms. Rafia Urooj, Assistant Commissioner (Unit-11) SRB Karachi.

02. The brief facts as stated in the OIO were that the respondent was operating in Sindh as a service provider in the category of "Commission Agent", Tariff Heading 9819.1300 of the Second Schedule to the Sindh







Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) read with the provisions of section 8 of the Act chargeable to Sindh Sales Tax (SST) at the rate of 14% with effect from 01.07.2015 on the amount of Commission earned as well as on any fee, royalty, remuneration or any charge realized as consideration for services provided.

03. It was alleged in the OIO that from the perusal of bank statement of the respondent for the tax periods from July-2015 to December-2015 it revealed that an amount of Rs.352,521,415/- was declared in business account involving SST of Rs.49,352,998/- ($352,521,415 \times 14\%$). Details of credited amount from July, 2015 to December, 2015 are as under:

	R.K. CHEMICAL COMPANY						Total
	TAX PERIODS						
	July	August	Sept	Oct	Nov	Dec	
Value of Service	29,165,586	41,237,000	60,366,905	69,015,935	64,593,625	88,142,364	352,521,415
Tax Due (14%)	4,083,182	5,773,180	8,451,367	9,662,231	9,043,108	12,339,931	49,352,998
Tax Paid							-
Short Payment	4,083,182	5,773,180	8,451,367	9,662,231	9,043,108	12,339,931	49,352,998

04. It was further alleged that respondent had failed to deposit SST with SRB and filed "Null" Returns from July-2015 to December-2015 which resulted in non-payment of SST of Rs.49,352,998/-. Moreover, it was mentioned that the respondent had filed incorrect SST returns (Form SST-03) which was in violation of section 30 of the Act read with rule 12 of the Sindh Sales Tax on Services Rules, 2011(hereinafter referred to as the Rules).

05. The respondent was served with a Show-Cause Notice (SCN) to explain as to why the tax liabilities of Rs.49,352,998/- should not be assessed and recovered under section 23 and 47(1A) of the Act in addition to the liability of default surcharge under section 44 of the Act. The respondent was also called upon to explain as to why penalties under serial No. 2, 3, 6(d), 11, 12, 13 and 15 of the Table under section 43 of Act should not be imposed for contravention of sections 2(22A) 3, 5, 8, 9, 17, 30 and 52 of the Act read with rules 13, 14, and 41B of the Rules.

06. The appellant filed Reply dated 16.02.2016 through its Authorized representative contending that all the entries were related to sale of



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goods and the relevant amounts were transferred from one account to other account. The Reply is reproduced for ready reference as under:-

"Our client is not only registered person with SRB as a "Commission agent" under the Tariff Heading 9819.1300, but it is also engaged in the trading of pharmaceutical goods. The alleged receipts tabulated in your aforementioned show-cause notice pertain to the trading business of our client which income is being properly declared by our client in their income tax returns. It also stated that there are number of credit entries which transferred from one to another bank account of our client.

However, in order to verify and substantiate our above said submission we are submitting herewith copies of the following information along with documentary evidences for your ready reference:

- (1) Party wise ledgers, along with invoices for your perusal*
- (2) Reconciled bank statements*
- (3) Details of contra entries*

It is also pertinent to submit that there are number of credit-entries, which relates to sales effected prior to July, 2015

On perusal of above detail and documentary evidences, your good self will very kindly observe that none of the recipient is liable to be taxed under the provision of the Act.

We hope that above submission would meet your satisfaction. You, are therefore, humbly requested to withdraw your aforesaid notice and oblige."

07. The appellant also submitted party-wise ledgers (exclusive of the details regarding outstanding receipts) via email dated 18.02.2016. The appellant filed another reply dated 14.03.2016 alongwith certain documents which is reproduced for ready reference as under:-

"It is reiterated that our client is not only registered with SRB as a "Commission Agent" under the tariff heading 9819.1300 but is also engaged in the trading of pharmaceuticals goods. The alleged receipts tabulated in your show-cause notice pertain to the trading business of our client which income is being properly declared by our client in their income tax returns.



However, in order to verify and substantiate our above said submission we are submitting herewith copies of the following documents as desired by you.

- (1) Sales invoices (as prelist attached with your aforesaid notice and marked as "A")
- (2) Purchase invoices (sample basis from July, 2015 to December, 2015)
- (3) E-filed income tax return for the tax year 2015.

It is also pertinent to submit that usually agreement is not required between buyer and supplier in case of trading business.

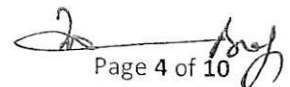
On perusal of our above detail and documentary evidences, your good self will very kindly observe that none of the receipt is liable to be taxed under the provision of the Act.

We hope that above submission would meet your satisfaction. You, are, therefore, humbly requested to withdraw your aforesaid notice and oblige.

08. The Assessing Officer (AO) passed OIO and directed the appellant to deposit SST of Rs.49,352,998/- along with default surcharge under section 44 of the Act. The AO also imposed penalty of Rs.577,661/- under Serial No. 3 of the Table under section 43 of the Act, penalty of Rs.2,467,650/- (5% of Rs.49,352,998/-) under Serial No. 11 of the Table under section 43 of the Act, penalty of Rs.2,467,650/- under Serial No. No. 12 of the Table under section 43 of the Act, penalty of Rs.11,025,922/- under Serial No. 13 of the Table under section 43 of the Act. The AO further ordered that the penalty under Serial No. 3 of the Table under section 43 of the Act shall further be calculated for the tax periods July, 2015 to December, 2015 as Rs.333.33 per day from 15.08.2016 till the date when payment was made. Thus the total penalties imposed amounted to Rs. 16,538,882/=.

09. The taxpayer challenged the OIO by way of filing of appeal before the Commissioner (Appeals) who held that the OIO suffered from legal infirmities and could not be sustained resultantly he allowed the appeal. Hence this appeal by the department.

10. The learned AC-SRB Mr. Muhammad Rehmatullah for the appellant submitted as under:-



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- i) The OIA was erroneous and unjustified and was passed ignoring the factual as well as legal points involved.
- ii) The Commissioner (Appeals) erred in setting aside the OIA on the ground that the OIO was passed merely on the basis of the entries available in the bank account of the respondent without considering that the AO had considered all the relevant documents produced by the respondent.
- iii) The Commissioner (Appeals) did not consider the fact that the respondent had failed to justify the credit entries in the bank statement.
- iv) It was duty and obligation of respondent who was a registered service provider to justify the credit entries shown in the bank statement. However it had miserably failed to justify the same.
- v) The Commissioner (Appeals) erred in holding that the AO failed to determine the nature of service provided or rendered by the respondent.
- vi) The Commissioner (Appeals) also erred in holding that the OIO was passed without reasons and was a non-speaking order.
- vii) On the basis of reconciliation statement the SST payable was rightly determined in OIO at Rs.5,693,654/- against the liability of Rs.49,352,998/-.

11. The learned representative for the respondent Mr. Ghulam Rabbani, advocate submitted as under:-

- i) The SST was levied even before the date of registration of the respondent i.e. from July 2015, whereas the respondent got voluntarily registered under the services category of Commission Agent, Tariff Heading 9819.1300 with effect from 08.10.2015.

ii) During the tax periods from July-2015 to December-2015 no commission was earned since no service was provided.

The entire transactions mentioned in the two banks statements were on account of trading of pharmaceutical products or transfer of amount from one account to another.

- iv) The OIO was time barred as the time for passing the order was extended without assigning any reason. No such notice was issued to the respondent nor copy of the same was supplied to it.



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v) The SST was determined only on the basis of figures available in bank statements without linking the same with the provision of service. Reliance was placed on the case of this Tribunal, reported as 2020 PTD 1834 (AC-SRB V/s Jadoon Flying Coach Service). It was submitted that the assessment made only on the basis of figures shown in the bank statement which was not maintainable.

vi) Reliance was also placed upon the case of DB of Sindh High Court in the case of Al-Hilal Motors Stores versus The Collector Sales Tax and Central Excise, East Karachi, reported as 2004-PTD 868.

12. In reply the learned AC further submitted that the burden was upon the respondent to prove that the entries available in its bank statements were related to sale of goods and not services.

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

14. The dispute is whether the entries/figures available in the bank statements of the bank accounts of the respondent pertained to providing of service as alleged by the appellant or trading of goods as alleged by the respondent. Moreover "Whether on the basis of bank statements alone the assessment order could be passed by the AO?"

15. In its reply dated 16.02.2016 the respondent had submitted that it was engaged in the trading of pharmaceutical goods and the alleged receipts in the bank statements pertained to the trading business.

Moreover such income was declared by the respondent in its income tax returns. It was also stated that there were number of credit entries which were transferred from one bank account to another and to substantiate its contention the respondent had submitted party wise ledgers, along with invoices, reconciled bank statements and details of contra entries. Furthermore the respondent vide its letter dated 14.03.2016 had submitted Sales invoices, Purchase invoices (sample basis from July, 2015 to December, 2015) and had also e-filed its income tax return for the tax year 2015.



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16. It is evident from the perusal of the SCN and OIO that the OIO was passed merely on the basis of credit entries available in the bank accounts and the AO made no efforts to link the said credit entries with the provision of service. It was presumed by the AO that all credit entries pertained to provision of services and he ignored all material provided by the respondent in this regard.

17. The determination of the value of service on the basis of entries available in the bank statements alone is illegal as it does not find mention in the Act and the Rules made thereunder. It is evident in section 3 read with section 8 of the Act that SST can only be levied on providing or rendering of service in furtherance of economic activity and not otherwise and the burden lied on the department to establish such economic activity. It is now well established that the SST could only be levied when the statute imposed the obligation by clear and unambiguous language and not on presumption and assumption of AO. Moreover the SST could only be levied under the substantive provision of law and not on mere convenience of AO. The AO instead of determination and recover of legal SST has adopted indirect method which is legally not permissible.

18. The AC-SRB was directed to prepare Reconciliation Statement during the pendency of appeal before this Tribunal on the basis of material provided by the respondent. The AC filed Reconciliation Statement dated 19.04.2021 on the basis of Income Tax Return for the year ended 2016 (2015-2016) showing the value of service at Rs.41,174,707/= involving SST of Rs.5,693,654/= after deduction of SST of Rs.70,805/=. The AC-SRB intentionally took the entire amount shown in the return under the column of payment for service u/s 153(1)(b) of the Act @ 10% at Rs.2,446,927/= and Brokerage/ Commission u/s 233 of the Act @ 12% at Rs.38,727,780/=. He however failed to consider that the tax periods involved in this appeal were from July-2015 to December-2015 (six months) and not the whole tax year 2015-2016.

19. The Assessing Officer while issuing SCN and passing OIO had failed to consider the details and documents provided by the respondent. Apparently the AO levied SST with a predetermined mind and was not



willing to consider the explanation offered and material produced by the respondent.

20. The AC-SRB during the pendency of appeal before the Tribunal filed Synopsis on 22.01.2020, submitting that the respondent besides sale of goods had also provided services of distribution of goods on commission basis. These services were duly covered under the definition of "Commission Agent" as provided under sub-section (22A) of section 2 of the Act. This was a new plea, raised before us and was not part of the SCN and OIO. This plea could not be adjudicated at this stage.

21. The learned advocate for the respondent agitated that the OIO was time barred as the order extending the time for passing OIO was passed without recording reasons or supplying such copy to the respondent. We have considered the contention and examined the order of extension of time. The Commissioner (Appeals) in the OIA had held that the SCN was issued on 01.02.2016 and the OIO was passed on 15.08.2016 and after deducting 18 days of adjournment, it is evident that the OIO was passed within the limitation period as per the provision of the Act. The respondent has not preferred the appeal against this finding which has become final and could not be adjudicated at this stage.

22. In view of the above discussions we do not find any merit in the appeal and consequently the same is dismissed. However the department is at liberty to issue fresh SCN to the respondent if sufficient material is available in support of the contention of the department that the respondent had provided taxable service of any nature after its registration with SRB on 08.10.2015.

We would like that the Board should look into the conduct of the Assessing Officer who issue SCN's and pass OIO blatantly, only on the basis of the entries available in the bank statements. Furthermore the AO's levy all the possible penalties available under section 43 of the Act without considering whether the same were applicable or not. The AO's also fail to establish *mensrea* on the part of the respondents. It may be appreciated that the purpose of imposition of penalties is to create deterrence in the mind of tax payers for adherence to the provision of



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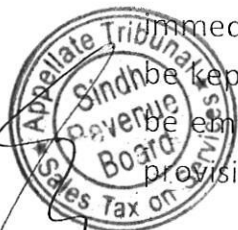
law rather than illegally achieving the targets assigned to the officer by the Board.

24. It is once again pointed out that while extending the time for finalizing the SCN proceeding and passing the OIO it is mandatory for the officers of SRB to record reasons in writing. In the instant case it is evident from the Note Sheets produced before us that the case was taken up on 17.03.2016 and was adjourned to 19.03.2016. Furthermore on 31.05.2016 the time was extended for 60 days in exercise of power under section 23 (3) of the Act. There is no tracking period between 19.03.2016 to 31.05.2016, and the AO recorded the reason for extending the time as under:

"Exercising the powers conferred us 23 (3) of the Act, 2011, I hereby adjourn the case for 60 days in order to reconcile the matter in detail".

Apparently the time for passing OIO was not extended but the case was adjourned and to cover up the delay this was used as extension under section 23 (3) of the Act. The reasons recorded by AO should be plausible and appeal to a prudent mind. It is true that provision do not specifically provide the presence of the parties at the time of passing of order of extension and supply of the copy thereof to them, but propriety, transparency and fitness of the proceedings requires that the order should be passed in presence of the parties after hearing them. However if the order is passed in the absence of parties due to some unavoidable circumstances the same should be provided to the parties immediately to avoid any suspicion as to the date of the order. It should be kept in mind that the principle of natural justice is always deemed to be embedded in the statute even if there is no such specific or express provision in the Statute.

25. It is foremost ingredient of natural justice that no adverse action can be taken against a person without providing him proper right of hearing and fair trial. Article 4 read with Article 10-A of the Constitution clearly stipulates that no action against a person can be taken without due process of law and the transparency of the proceedings is one of the component of fair trial and due process of law. In the reported case of



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Osman Abdul Karim versus Collector of Customs, PLD 1962 Dacca 162 it was held as under:-

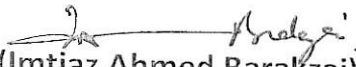
"But in exercising a judicial or quasi-judicial function, he decides a judicial Issue and must, therefore, act in a judicial spirit and manner in conformity to well-recognized principles of natural justice.

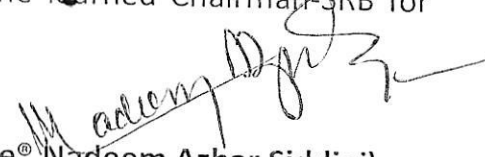
In another reported case of Commissioner Inland Revenue versus M/s Ali Hasan Metal Works, 2018 PTD 108 (DB LHC) it was held as under:-

"Authorities exercising quasi-judicial powers under a statute were bound to conduct fair adjudication as to be dealt in accordance with law, due process and fair trial were unalienable Fundamental Rights guaranteed under the Constitution".

26. We therefore once again request the learned Chairman-SRB to circulate this order within the Adjudication Officers of SRB with the directions to follow the same in later and spirit.

27. The copy of this order may be provided to the learned representatives of the parties as well as to the learned Chairman-SRB for necessary compliance.


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER


(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN

Certified to be True Copy

Karachi:

Dated: 17.05.2021

Copy Supplied for compliance:

- 1) The Chairman, Sindh Revenue Board, Karachi.
- 2) The Assistant Commissioner, SRB, for compliance
- 3) The Respondent through Authorized Representative.

Copy for information to:-

- 4) The Commissioner (Appeals), SRB, Karachi.
- 5) Office Copy.
- 6) Guard File.


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on

26/05/2021

Order Dispatched on

26/05/2021