

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD AT KARACHI

SB-I

APPEAL NO. AT-48/2018

M/s. Fumicon Services (Pvt) Ltd.....Appellant

Versus

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

Date of Filing of Appeal: 23.07.2018

Date of hearing: 11.10.2018

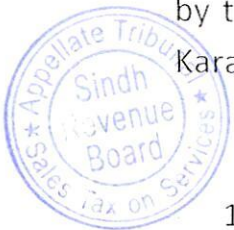
Date of Order: 16.10.2018

Mr. Abdul Sattar Adamjee, Director for Appellant in person.

Ms. Irfan Sohu, AC-SRB for Respondent.

ORDER

Justice[®] Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order-in-Appeal No.80/2018 dated 21.05.2018 passed by the Commissioner (Appeals) in Appeal NO. 89/2017 filed by the appellant against the Order in Original No. 186/2017 dated 23.06.2017 passed by the Assistant Commissioner, Unit 27 (Ms. Shumaila Yar Muhammad), SRB, Karachi.

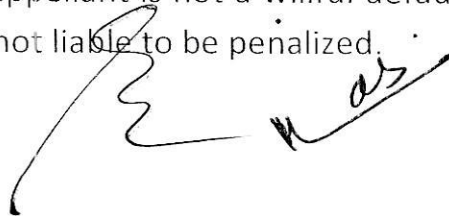


1. The facts of the case as mentioned in the Order-in-Original are that the Appellant is registered with SRB as a service provider in the category of "Fumigation Services" (Tariff Heading 9822.1000) of the Second Schedule of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) chargeable to Sindh sales tax.

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2. It was alleged in the order in original that from the scrutiny of the on line tax profile and record of the appellant available with SRB, it has been observed that appellant had reportedly provided taxable service of fumigation to various service recipients, but failed to deposit sales tax of Rs.109,299/= and also failed to file e>Returns for the tax periods November, 2015, January, 2016 to April, 2016 and June, 2016 to November, 2016.
3. A show-cause notice dated 26.01.2017 was issued to the appellant to explain as to why the sales tax of Rs.109,299/= may not be assessed and recovered from it along with penalties and default surcharge. Apparently the appellant has not replied the show-cause notice. However before the Assessing Officer Mr. Ashraf Sattar Adamjee appeared and agreed to deposit the tax of Ra.109,299/=, but failed to deposit the same.
4. The Assessing Officer passed assessment order in the sum of Rs.109,299/= along with penalty of Rs.1,315,654/= under Sr. No.3 of Table under section 43 of the Act and penalty of Rs.412,329/= under Sr. No.2 of Table under section 43 of the Act.
5. The said order of the Assessing Officer was challenged by the appellant by way of filing appeal before the Commissioner (Appeals), who dismissed the appeal for non-prosecution, hence this appeal before this forum.

6. Mr. Ashraf Sattar Adamjee submitted that unjustified and illegal penalties were imposed by the Assessing officer and confirmed by the Commissioner (Appeals) by dismissing the appeals for non-prosecution. He then submitted that reasons for not paying tax and filing returns were explained to the Assessing Officer as well as Commissioner (Appeals) but none have considered the same in its true perspective. He then submitted that appellant is not a willful defaulter and is a victim of circumstances and is not liable to be penalized.

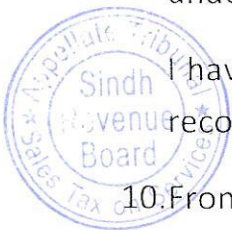
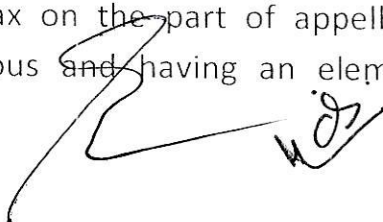




7. Mr. Ashraf further submitted that against the established liability of Rs.109,299/- in order in original he deposited a sum of Rs.255,488/- in discharge of his tax liabilities which shows his bonafide. He then submitted that the tax was not deposited within time due to personal and health reason and that he was suffering from psychiatric problem and due to medicine remained in sleeping condition. He then submitted that tax returns were also not filed for the above reasons and that some employees of the appellant left the organization and formed other company and there was no one to operate computers for online e-filing returns. He then submitted that huge amount of penalties were imposed against law without any just cause and reason. He then submitted that not only the tax has been paid but the e-returns were also filed.
8. Mr. Irfan Sohu submitted that the appellant has willfully and deliberately failed to deposit tax within prescribed time and has also failed to e-file monthly returns as prescribed in violation of specific provisions of law and the penalties were rightly imposed.
9. The learned AC confirmed that against the tax liability of Rs.109,299/= established in the order in original the appellant has deposited a sum of Rs.255,488/= and also e-filed all returns. The learned AC also filed Reconciliation Dated 11.10.2018 enhancing the penalties to Rs.2,776,331/= and 1,174,000/= under serial No. 3 and 2 of the Table under section 43 of the Act.

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

10. From perusal of order in original it appears that through the penalties of Rs.1,315,654/= under Sr. No.3 of Table under section 43 of the Act and penalty of Rs.412,329/= under Sr. No.2 of Table under section 43 of the Act were imposed but nowhere in the order in original it was stated or established that the willfulness, malafide and mensrea was present. It is now well settled principal of law that penalty can only be imposed if non-payment of tax on the part of appellant is proved as malafide, willful, contumacious and having an element of mensrea, which is



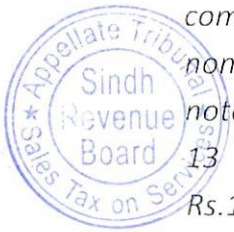
lacking in this case. The word "default" necessarily imports of an element of negligence or fault and means something more than mere non-compliance of statutory provisions. To establish default the Department must establish that the non-compliance of statutory provisions has been due to some avoidable cause. Mere non-deposit of tax without element of willfulness, malafide and mensrea cannot entail penalty. Though the appellant tried to explain the reasons for non-payment of tax and non-filing of returns, but the prime duty is of the department to prove mensrea and only then the burden is shifted upon the appellant to explain the reason of non-payment of tax and non-filing of e-returns. In the reported case of Pakistan through Secretary Ministry of Finance and others versus Hardcastle Waud (Pakistan) Limited (PLD 1967 SC 1) in his separate note Mr. Justice (as he then was) Hamoodur Rahman has held that *"Even in the case of a statutory offence the presumption is that mens rea is an essential ingredient unless the statute creating the offence by express terms or by necessary implication rules it out"*. In the reported case of Commissioner of Income Tax versus Habib Bank Limited @007 PTD 910 (H.C. Karachi) a learned DB of Sindh High Court has held that *"the penal provisions under the Income Tax Act are quasi criminal in nature and mandatory condition required for the levy of penalty u/s 111 is the existence of mens rea and therefore, it is necessary for the department to establish mens rea before levying penalty u/s 111"*. In the reported case of Collector Customs versus Nizam Impex (2014 PTD 478) a learned DB of Sindh High Court has held that *"If the party did not act malafidely with intention to evade the tax, the imposition of penalty and additional tax and surcharge is not justified. In such circumstances the Tribunal has discretion to waive/remmit additional tax and penalty"*. Same is the position in this case the department has failed to establish mensrea, malafides, willfulness and contumacious default on the part of appellant, which are necessary elements for imposing penalty and default surcharge.

11. In the reported case of Deputy Collector, Central Excise and Sales Tax, Lahore versus ICI Pakistan Limited, Lahore PTD 2006 1132 the Honorable Supreme Court 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 penalty under section 33 of the Act. However, it does not necessarily follow that in every case such levy was automatic requiring no determination at all." 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 e-returns within stipulated period. In view of the above I am satisfied that the penalty was imposed without any just cause.

12. Furthermore the penalty under serial No.2 of the Table under section 43 of the Act has been erroneously imposed against the provision of law and against the earlier order of Tribunal in Appeal NO. AT-92/16 (SLINGSHOT VS AC) decided on 25.01.2017 by DB-1 of this Tribunal. It is noted that in this case the default of non-filing of monthly returns pertains to 11 returns and Penalty @ Rs.10,000/- for each not filed return works out to Rs.110,000/- 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.1,315,654/- which is too harsh and excessive and is not tenable. The operative part of which is reproduced 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




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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. The above order of the Tribunal is still in field and has not been set aside by the Honorable High Court in referential jurisdiction and is 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 Department should follow the orders of Tribunal in later and spirit.

14. In view of above, this appeal is allowed and the penalties imposed by the Assessing Officer under Table 2 and 3 of section 43 of the Act are set aside. The copy of this order be provided to the learned representatives of the parties.


(Justice[®] Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi

Dated: 16.10.2018

Certified to be True Copy

Copies supplied for compliance:-

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


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Copy for information to:-

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