

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD

APPEAL NO. AT-50/2018

M/s Chain of Get Smart Gym. .... Appellant

**Versus**

Assistant Commissioner, SRB Karachi. .... Respondent

Dr. Manzoor Memon (ITP) ..... For Respondent

Ms. Rafia Urooj AC-SRB ..... For Appellant

Date of hearing 26.09.2018

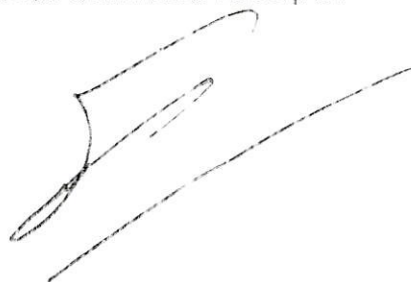
Date of Order 28.09.2018

ORDER

Mr. Agha Kafeel Barik: This appeal is filed against order of Commissioner (Appeals) dated 06.06.2018 whereby he dismissed appellant's appeal for non-prosecution. The Commissioner (Appeals) has noted that the appeal was fixed for 13 times but the appellant turned up only twice, whereas he obtained adjournments for 226 days. Finally the case was fixed for hearing on 06.06.2018 when again he did not turn up which resulted in dismissal of appeal by the Commissioner (Appeals) for non-prosecution.

02. The facts of the case are as under:

The appellant is an individual ~~is~~ earning income as provider of services of "Health Care Centre or Gym" and registered with SRB under tariff code 9821.1000 of 2<sup>nd</sup> Schedule which services are subjected to G.S.T since 01.07.2013. The AC Unit-24, SRB has recorded that the scrutiny of appellant's Income Tax returns for the tax year 2015, relevant to Financial year from 1<sup>st</sup> July, 2014 to 30<sup>th</sup> June, 2015 revealed that he had earned income / receipts of Rs. 2,490,000/- during the said period but failed to pay / deposit any Sindh Sales Tax which worked out to Rs. 373,500 @ 15% on these admitted receipts.



03. Informal notice requiring relevant documents followed by show cause notice dated 08.11.2016 were issued which were partly complied. The owner Mr. Shahid Anwer and Mr. Shafiq Manager who attended at the initial stage told the assessing officer irrelevant stories but did not submit relevant documents nor deposited Sindh Sales Tax.

04. Mr. Saleem Shaikh the learned A.R who appeared before the Assistant Commissioner, Unit-24 took the plea that since the appellant was registered with SRB on 9<sup>th</sup> April 2016, he cannot be held liable to Sindh Sales Tax for the period prior to that date of registration and cited some decision of Appellate Tribunal of Inland Revenue.

05. On subsequent dates fixed for hearing by the AC-SRB the learned A.R. eluded to submit any documents or pay Sindh Sales Tax and repeated his argument that Sindh Sales Tax was not payable prior to date of registration 9<sup>th</sup> April 2016. This resulted in the finalization of assessment proceedings by the AC Unit-24 who passed order under section 23/47 (1), 43 (3) 43 (15) and 44 on 11.07.2017 creating tax of 3,73,500/- and in position of penalty of 3,570,330/- under section 43 (3) of Sindh Sales Tax Act, 2011.

06. The Commissioner (Appeals) dismissed registered person's appeal for non-prosecution vide his order dated 06.06.2018. In his order he has noted that the appeal was fixed 13 times for hearing, but the appellant failed to appear except twice i.e. on 12.01.2018 and 06.03.2018. Adjournments were taken without assigning any reason. The commissioner (Appeals) has also noted that while 301 days had lapsed from the date of filing of appeal on 10.08.2017, 226 days were wasted in adjournments obtained by the appellant. He also noted that appellant's attitude of non-compliance was also recorded by the assessing officer.

07. Aggrieved of the order of Commissioner (Appeals) this appeal has been filed before us:

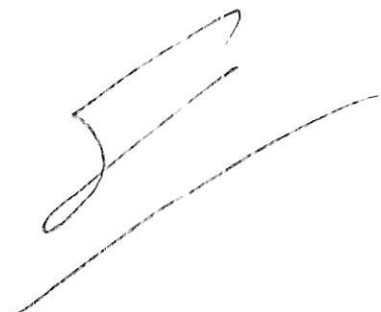
In the grounds of appeal the appellant has raised following issues.

(a) That the dismissal of appeal by Commissioner (Appeals) was not justified as the appellant has been complying with notices and also attending

hearing and that on the last hearing adjournment was sought by e-mail for the reason that the A.R. was on Umrah. The Commissioner (Appeals) ignored his application.

- (b) That the order-in-original dated 11.07.2017 is time barred under the provisions of section 23 (3) as the show cause notice was issued on 15.11.2016 and there is time lag of 239 days between the two dates as against 120 provided in law.
- (c) That the appellant is not liable to pay Sindh Sales Tax for the period before registration in April, 2016 in view of some case law of Appellate Tribunal of Inland Revenue.

8. Dr. Manzoor Ahmed Memon ITP who appeared for the appellant stated that the service of Health Care Centre and Gym was brought to tax net w.e.f. 11.07.2013 whereas the appellant was registered on 09.04.2016 and as such he is liable to Sindh Sales Tax from that date and was not liable to pay tax for the earlier period as alleged by the AC. He also alleged that enough opportunities were not provided at any stage. He also argued that as raised in ground no. V of appeal the order-in-original was time barred as it was passed in 237 days instead of 180 days as provided in section 23 of the Act. The show cause notice under section 23 was issued on 08.11.2016 and order was passed on 11.07.2017. The learned A.R also cited a case law, a decision of Appellate Tribunal Inland Revenue (Lahore Bench) in STA 721/LB/2015 dated 15.12.2017 with the argument that provisions of Sales Tax are applicable only to registered person and since the appellant was not registered till 09.04.2016 he cannot be held liable to Sindh Sales Tax for the period before that. About the penalty of Rs.3,570,330/- imposed under section 43 (3) the learned A.R argued that firstly the quantum of penalty was not confronted in show cause notice which would otherwise alert the appellant about the gravity of the matter. Secondly, the calculation which is not given in the impugned order is totally incorrect and the amount of penalty Rs.3,570,330/- is totally disproportionate to the principal amount of tax payable Rs.373,500/-; it is about 10 times of the tax payable.





09. The Learned AR cited the following judgments in support of his argument that no tax can be charged for the period before registration

2006 PTD Trib 2673

2018 PTD Trib 534

The learned AR further stated that Get Smart Gym is not a classic gym and is not fully commercial. According to him it is basically a body building promotional facility as the owner is the President of Sindh Body Building Association and holder of many international honors. About the penalty of 3,570,330/- imposed under section 43 (3) for non-payment of sales tax at 373,500/- he stated that it was very harsh and out of proportion. Since it was not intentional nor there was any element of mens rea the imposition of such exorbitant amount of penalty was unjustified and unlawful. He cited many decisions on this issue, some of which are referred as: 2017 PTD (Trib) 21073 (A.T.SRB) in appeal No. AT 35 of 2016 decided on 23.01.2017 in AC, SRB vs. Optirius Capital Management it is held as under:

*"Mere non-deposit or tax of failure to pay tax without element of intentional willfulness and mala fide could not entail penalty. In the reported case of Pakistan through Secretary Ministry of Finance and others v. Hardcastle Waud (Pakistan) Limited (PLD 1967 SC 1) in his separate note Mr. Justice (as he then was) Hamood ur Rehman has held that "Even in the case of 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 v. Habib Bank Limited 2007 PTD 901 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 under section 111 is the existence of mens rea and therefore, it is necessary for the department to establish mens rea before levying penalty under section 1,11". Both the above referred case law fully applied to the facts of this case. In this case also the mens rea is missing.*



In 2006 SCMR 626 the honorable Supreme Court held that surcharge / penalty is not automatic,

In PLD 1967 SCI it is held that "mens rea must be established before resorting to penalty provisions"

The learned AR also pleaded that the Commissioner (Appeals) dismissed appeal for non-prosecution although application for adjournment was submitted by e-mail and, also by post earlier.

12. Ms. Rafia Urooj the learned AC-SRB, in rebuttal to the arguments of the learned A.R, submitted that as recorded in Para 12 of order-in-original the show cause notice was actually served on 28.03.2017 on Mr. Saleem Sheikh the learned A.R who told the AC that it was not received by the appellant and then adjournment of 10 days was also allowed for compliance. Thus the time consumed should be reckoned from 28.03.2017. Further the AC had extended the time for assessment beyond 120 days under section 23 (3) as recorded by her in Para 21 of her order. About opportunities the learned AC-SRB pointed out that the order-in-original is full of recording of various persons attending before the AC but not submitting necessary required documents. The hearing of appeal before Commissioner (Appeals) also lingered on due to non-compliance of the appellant. The Commissioner (Appeals) has recorded that a number of 301 days lapsed in the pendency of appeal and that out of it 226 days were wasted on adjournments sought by the appellant himself. About the case law on the subject she stated that the decisions of Appellate Tribunal Inland Revenue were not binding on Appellate Tribunal, SRB. On the other hand she cited a decision of this Tribunal in M/s MAB Services (Pvt.) Ltd. in appeal No. AT-32/2018 dated 04.07.2018 on the subject, and quoted relevant part as under:

*"It is noted that Business Support Services were brought to tax net under tariff code 9805.9200 through Finance Act, 2013. It is also noted that the appellant is a limited company and there is enough evidence, such as its financial statement, to prove that it was engaged in economic activity, as*





defined in section 4 and was providing taxable services prior to the date of his registration i.e. 25.01.2015. Being a company it has no explanation as to why it did not issue invoices with Sales Tax charged to its customers and why it did not recover tax from them to pay in government treasury. If it did not recover it from the recipients it cannot absolve himself from the obligation of paying it to the government. The arguments that since it got registration on 25<sup>th</sup> November, 2015 it was not liable to pay tax for the period prior to the said date and also to file Sales Tax return is also unfound. In this way every defaulter would go scot-free taking advantage of late registration / enrolment.

"As decided in earlier two decisions of the Tribunal in M/s Target TMC and M/s National Asset Management the action for default of non-filing of returns under section 30 can be condoned on technical grounds. But as provided in Section 3 every person liable to be registered is under the same obligation as a person registered under section 24. The appellant was very much liable to be registered since the date it started economic activity and provided taxable and received payments."

13. The learned AC-SRB further argued that the assessing officer AC-Unit 25 SBR did confront the appellant of her intention of imposition penalty vide Para 5 of her show cause notice dated 08.11.2016 and that since the order in original was not finalized she could not quantify the amount. Moreover, since Section 23 provides for assessment of tax as well as imposition of penalties under section 43 both and also default surcharge it is not necessary to issue separate show cause notices for assessment of tax and imposition of penalties.

14. The issues raised in the grounds of appeal and verbal as well as written arguments of the learned A.R and the AC SRB are discussed as under:

14.1 There is no evidence of adjournment sought on 06.06.2018 by e-mail from Commissioner (Appeals). Moreover, it was not the first time that adjournment

was sought; the learned A.R. has failed to refute the statement of the Commissioner (Appeals) that 301 days had lapsed in the pendency of appeal and that total number of 226 days adjournments was obtained by the appellant.

14.2 About the issue of alleged order-in-original having time barred it is noted that.

i. Firstly, the AC Unit-24 had extended time for assessment vide Para 21 of her order, for which she was authorized under the provisions of Section 23 (3) of the Act.

ii. Secondly, the numbers of days of adjournments are to be excluded under section 23 (4) of the Act.

iii. Thirdly, during the assessment proceedings of the case on 28.03.2017, the learned A.R appeared before the AC Unit-24 and informed that he had not received any show cause notice and requested a copy of the same, and also requested for adjournment. The officer concerned has recorded this event at Para 12 of her order and also that the request of the A.R. was taken into consideration and that next hearing was fixed on 10.04.2017. This means that the show cause notice was actually served on the A.R of the appellant on 28.03.2017 and not 15.11.201. As such the period provided for assessment under section 23 should be reckoned from 28.03.2017 and thus the order-in-original passed on 11.07.2017 in 105 days is well in time.

14.3 Although the appellant was not liable to file Sindh Sales Tax returns under section 30 for the period prior to date of registration he was very much liable to deposit Sindh Sales Tax on his taxable receipts for the earlier period of his economic activity which was liable to Sales Tax. He cannot avoid to pay Sales Tax on the pretext of his not getting registered despite being liable to be registered as per definition under section 2 (71), "registered person means a person who is registered or is liable to be registered under this Act....."

14.4 This Tribunal has already decided this issue in various judgments, some of which are cited by the AC SRB in support of her arguments. One such decision of



AT.SRB is in AT 32/2018 decided on 04.07.2018, in the case of MAB Services (Pvt.) Ltd. This was cited by AC SRB and is reproduced in Para 12 above.

15. In view of above findings we hold that assessment of Sindh Sales Tax at Rs. 373,500/- under section 23 on the basis of information with the AC Unit-24 was fully justified and is confirmed.

16. After the above conclusion about taxability of gym's receipts, I have examined the order of penalty under section 43 (3) imposing penalty of Rs.35,70,330/- which is not a speaking order. The basic flaw in this order is that specific show cause notice confronting the registered person with the offence as well as the amount of penalty intended to be imposed was not given. Secondly, the calculation of penalty under section 43 (3) is made in a very faulty manner and against the provisions and spirit of law. The order of penalty under section 43 (3) is therefore set aside following several decisions of the High Court and also a Judgment of this Tribunal in this case of Optimus Capital Management, reported as 2017 PTD (SRB Tribunal) 2018, the relevant part of which is reproduced above with the arguments of the learned AR on the issue.

(17) Appeal is disposed of as above.

  
(Agha Kafeel Barik)  
TECHNICAL MEMBER

Karachi

Dated: 28.09.2018

Copies supplied for compliance:-

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

Copy for information to:-

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