

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-1

APPEAL NO. AT-54/2018

M/s Pakistan Water and Power

Development Authority.....Appellant

Versus

Assistant Commissioner,

SRB, Karachi.....Respondent

Date of filing of Appeal: 15.08.2018

Date of hearing: 10.03.2020

Date of Order: 21.03.2020

Mr. Bader Alam and Kashif Bader, Advocates alongwith Mr. Ahmed Bux, Senior Engineer and Mr. M. Ramzan, Deputy Manager Finance for appellant.

Ms. Umi Rabbab, AC-DR, Mr. Shoaib Iqbal, AC and Mr. Muhammad Yasir, AC-SRB for respondent.

ORDER

Justice ® Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.132/2018 dated 07.07.2018 passed by the Commissioner (Appeals-I) in Appeal No. 304/2016 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 815/2016 dated 24.10.2016 passed by the Deputy Commissioner (Mr. Abdul Rauf) SRB, Karachi.

02. The facts as stated in OIO are that a notice dated 08.02.2016 was issued under Section 66 and 66 (b) of the Sindh Sales Tax on Services Act, 2011 (herein after referred to as the Act) to Project Director, Nai Gaj Dam a project of WAPDA (hereinafter referred to as the Project) a project of WAPDA on account recovery of tax liability of Rs.1,169,307,666/=

established against M/s NEIE-SMADB-LILLEY RMS (JV) (hereinafter referred to as the Contractor) vide order-in-original No. 82/2016.

03. The allegation against the appellant as stated in the OIO was that instead of making compliance of the above stated notice dated 08.02.2016 the Project Director made payment of Rs.456,500,000/= to the Contractor through cheque No. 082030458 dated 01.04.2016 . It was further alleged that the above payment by Project Director to the Contractor was in violation of section 66 and 66(b) of the Act.

04. A show-cause notice (SCN) dated 17.05.2016 was served on the Project Director to show cause as to why penalties under serial No. 9 and 12 of the Table of section 43 of the Act for contravention/violation of section 66 of the Act may not be imposed.

05. The representative of the appellant filed written reply dated 25.05.2016 and took the plea that the government buildings which were not meant for commercial purpose or for commercial letting out on rent were exempted from Sindh Sales Tax (SST). And that the Contractor had submitted a stay order granted by the High Court of Sindh in Suit No. 574/2015 dated 07.04.2015 filed by Karachi Construction Association including M/s SMADB. It was also stated that the Contractor had also filed Suit No. 1013/2016 in the High Court of Sindh and obtained stay order dated 27.04.2016.

06. The Assessing Officer (AO) passed OIO and imposed penalty of Rs.22,825,000/= under serial No. 12 of Table under section 43 of the Act for violating section 66 of the Act.

07. The appellant challenged the OIO before Commissioner (Appeals) who maintained the OIO and directed the appellant to pay balance amount of penalty of Rs.15,041,160/=, hence this appeal by the appellant.

08. Mr. Kashif Bader, the learned Advocate for the appellant submitted as under:-

Kashif Bader

Kashif Bader
Page 2 of 11

- (i) This case related to imposition of penalty for violation of clause (b) of sub-section (1) of Section 66 of the Act.
- (ii) The WAPDA is constructing a Dam under a joint venture for Government of Sindh and such construction was exempted from payment of sales tax under item No. 9 (iii) of Notification dated 09.07.2011 updated on 08th March, 2012.
- (iii) The respondent served recovery notice dated 08.02.2016 in haste without waiting for the determination of the matter by an independent forum. It called the appellant to pay SST amounting to Rs.1,169,307,666/- which was actually recoverable from Contractor.
- (iv) The Notice of recovery dated 08.02.2016 and SCN dated 17.05.2016 were issued by Mr. Abdul Rauf, Deputy Commissioner (DC), Unit-13, SRB. The DC had no jurisdiction to issue such notices as the case related to withholding of Sindh Sales Tax and at the relevant time this jurisdiction was vested in Unit-22 of Commissioner-IV, SRB and Notification dated 06.07.2015 was referred in this regard. He submitted that this appeal related to imposition of penalty of Rs.22,825,000/- out of which the respondent had already recovered an amount of Rs.7,783,832/- by way of attachment of Bank Account.
- (v) The Commissioner (Appeals) had set aside OIO No. 360/2016 dated 14/05/2016 vide OIA in Appeal No. 27/2017 on the point of jurisdiction.
- (vi) The AC & Commissioner (Appeals) had no jurisdiction to impose penalty under serial No. 12 of Table under section 43 of the Act.
- (vii) The contractor had also filed appeal which was heard by the DB-II of this Tribunal and conditional exemption was granted to the Contractor.

09. Mr. Sanjay Kumar, the learned AC-SRB submitted as under:-

- (i) The appellant after the receipt of recovery notice dated 08.02.2016 did not comply with the Notice under section 66 of the Act and instead made payment of Rs.456,500,000/- to the

Contractor on 01.04.2016 in utter violation of section 66 (b) of the Act thus the penalty was rightly imposed.

- (ii) No exemption was available to service provider of appellant on construction of Dam either under Notification dated 08.03.2012 or any other subsequent notification.
- (iii) The violation of section 66 of the Act was an offence punishable under clause 12 of section 43 of the Act. He further submitted that the Act does not provide any period of limitation for issuing Recovery Notice under section 66 of the Act. Moreover on the date when the Recovery Notice was served upon the appellant it was holding the amount of the Contractor and was bound to pay the due tax to the SRB.
- (iv) The appellant has not paid the amount mentioned in the Recovery Notice till to date thus the penalty was rightly imposed and the appellant was not entitled to claim refund of the amount.

10. Mr. Bader Alam, advocate appeared for the appellant and submitted further arguments as under:-

- (i) All public works and projects financed under ADP and PSDP are exempted from payment of SST. The Dam was being constructed for the benefit and welfare of the general public of Sindh from public funds and was thus exempt from payment of SST as the ultimate burden of tax fell upon Government of Sindh on whose behalf the Dam was being constructed.
- (ii) WAPDA being part of Federal Government was not bound by the Notice issued under section 66 of the Act since immunity under Article 165 of the Constitution was available to it.
- (iii) The WAPDA was claiming exemption under Notification dated 06.02.2018 since the Government of Sindh had informed vide letter dated 09.02.1028 that Executive Engineer/Project Director being Implementing Agency was responsible for issuance of certificate as per notification, and such certificate was already placed on record.

- (iv) Notice under section 66 of the Act was issued to the appellant in haste without the determination tax liability of the Contractor from an independent forum. Moreover OIO No. 82/2016 was passed against the Contractor on 08.02.2016, whereas the notice under section 66 of the Act was also issued to the appellant on same date.
- (v) The amount of tax was not recoverable from the Contractor and the appellant was wrongly penalized. However, subsequent to attachment of bank account the attachment order was withdrawn by letter dated 24.11.2016, but the amount was not refunded.

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

11. This appeal relates to imposition of penalty on the appellant under Serial No 12 of Table under Section 43 of the Act for violation of clause (b) of sub-section (1) of section 66 of the Act. The penalty was imposed at Rs.22,825,000/- out of which an amount of Rs. Rs.7,783,832/- was recovered by way of attachment of Bank Account of the appellant. The plea raised by the appellant was that the project was funded through the Federal PSDP of the Government of the Pakistan and the services received by it (WAPDA) were exempted from payment of Sindh Sales Tax under Notifications dated 08.03.2012 and 06.02.2018 respectively.

12. A SCN dated 20.01.20156 was issued in the instant case to the Contractor for payment of Tax amounting to Rs.753,517,293/= and imposition of default surcharge and penalties under the various clauses of section 43 of the Act. As per the OIO No. 82/2016 dated 08.02.2016 two dates of hearing were fixed on 28.01.2016 and 04.02.2016 but no one appeared on behalf of the Contractor and exparte assessment order was passed for the sum of Rs.753,517,293/= alongwith default surcharge and penalties of Rs.37,675,864/=. The Contractor challenged the OIO No. 82/16 before the Commissioner (Appeals) by way of filing of appeal No. 70/2016 which was dismissed vide OIO No. 116/2016 dated 08.08.2016. This OIA was challenged before this Tribunal, which after hearing the

105

payment of tax and on the same date without waiting for the expiry of period for filing appeal, Recovery Notice was served on the appellant under section 66 (b) of the Act instead of Notice under clause (b) of sub-section (1) of section 66 of the Act. In all fairness the department had to allow reasonable time to the Contractor to file appeal against the assessment order. It was incumbent upon the department that before issuance of Recovery Notice and SCN, it should had first tried to recover the amount from the Contractor. Forcing recovery of tax without determination of the same by an independent forum was neither legal nor proper. Our Superior Courts had deprecated such practice. The Honorable Supreme Court of Pakistan had laid down that access to justice was a fundamental right. In the case of Mehram Ali and others versus Federation of Pakistan and others, PLD 1998 SC 1445, it has been held that an essential feature of such right is the determination of any grievance or dispute by an independent Tribunal. In the reported case of S.S. Tanneries versus Assistant Collector (Audit and Enforcement) Sales Tax, 2006 PTD 2721 the Lahore High Court relying upon the case of Mehram Ali and other cases had held that:-

"Learned counsel for the petitioner has referred to the judgment of this Court in the case of Z.N. Exports versus Collector Sales Tax (2003 PTCL 1363. In that case it has been held by this Court, that an assessee is entitled to adjudication in respect of his disputed tax liability by at least one independent forum outside the hierarchy of the respondent-department. Admittedly in this case the impugned liability has been determined by the officers of the respondent-department and remedy of the petitioner before the learned appellate Tribunal provides, the independent adjudication of his challenge to the impugned tax liability".

15. It is true that the Recovery Notice was issued in haste without allowing time to the Contractor to prove its plea before the independent forum. However, such Recovery Notice cannot be quashed merely on this basis. Moreover since section 66 of the Act did not provide any time period for issuance of Recovery Notice thus such ^{action} activity could not be taken.

16. The next plea of the appellant was that the Notice of recovery dated 08.02.2016 and SCN dated 17.05.2016 were issued by Mr. Abdul Rauf,

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Abdul Rauf
Page 7 of 11

Deputy Commissioner, SRB Unit-13, who had no jurisdiction to issue such notices as the case related to withholding of Sindh Sales Tax. This argument has no force. The matter does not relate to the withholding of tax. The appellant was not asked to pay the amount of tax from its own resources and instead the appellant was asked to pay the amount of tax it was holding on behalf of the Contractor. Moreover the Officer who had passed the assessment order against the Contractor had rightly issued the Recovery Notice. Clause (b) of sub-section (1) of section 66 of the Act provides as under:-

"require by a notice in writing any person who holds or may subsequently hold any money for or on account of the person from whom tax may be recoverable to pay such officer the amount specified in the notice".

17. The appellant after receiving the Recovery Notice instead of complying with the same released payment of Rs.456,500,000/- to the Contractor on 01.04.2016. The Department then served SCN dated 17.05.2016 calling the appellant to explain as to why penalty under section 43 (9) and 43 (12) of the Act may not be recovered. Finally the penalty was imposed under Serial No. 12 of the Table under section 12 of the Act, which read as under:-

"12. Where any person, who contravenes any provision of this Act or the rules made thereunder for which no penalty has, specifically, been provided in this section: Such person shall be liable to pay a penalty of 10,000/= rupees or five per cent of the tax payable for the tax period(s) to which the offence relates, whichever is higher.

18. The appellant despite receiving the SCN dated 17.05.2016 did not comply with the contents of the same. The appellant has not disputed it was not holding the amount of the Contractor on the date of receiving the Recovery Notice. The appellant by paying the amount to the Contractor after receiving SCN has violated clause (b) of sub-section (1) of section 66 of the Act and could be penalized under Serial No. 12 of Section 43 of the Act subject to fulfillment of ^{certain} following conditions and presence of mensrea.

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19. Now the question arises whether the appellant was compelled to pay the tax on behalf of the Contractor without final determination of the tax liability by an independent forum. We are of the opinion that unless the tax is finally determined in accordance with the provisions of the Act the issuance of Recovery Notice to appellant was not warranted. Sub-Section (1) of section 66 provides that subject to sub-section (2), whereby and amount of "tax is due" (emphasis supplied) from any person, the officer of the SRB may require by a notice in writing any person who holds or may subsequently hold any money for or on account of the person from whom tax may be recoverable to pay such officer the amount specified in the notice".

20. In the provision the words "tax is due" have been used which means the tax which was found due after final determination. The Assessment Order passed under section 23 (1) of the Act was subjected to Appeal before Commissioner (Appeals) under section 57 (1) of the Act, and the order passed by Commissioner (Appeals) in appeal is further subjected to appeal before the Appellate Tribunal under section 61 (1) of the Act. Furthermore sub-section (8) of section 62 of the Act provides that "save as provided in section 63, the decision of the Appellate Tribunal on an appeal shall be final". This provision of finality of decision is not appearing in Section 23 and section 56 of the Act, which means that the order passed under section 23 and 57 of the Act are not final. The word "due" is defined in the Black's Law Dictionary, Tenth Edition as "just, proper, regular and reasonable". The word "due" is also defined in Encyclopedia of Law Terms and Phrases by Ijaz A. Chughati as "an existing obligation, an indebtedness, a simple indebtedness without reference to the time of payment, a debt ascertained and fixed though payable in future". The meaning of word "due" was also considered in the reported case of Attaullah Malik versus Rashid and another, PLD 1972 Karachi 273 as under:-

"The word due has the connotation of something legally demandable as was held by their lordships of the Supreme Court in Ashfaqur Rahman versus Chaudary Muhammad Afzal, PLD 1968 SC 230, the word "due would carry a connotation of due in law or recoverable in action at law".

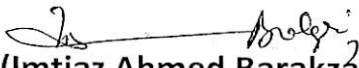
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21. The word due means due after final determination in accordance with the provisions of the Act and not just after passing of mere assessment order. The tax becomes due and payable only after it has been determined from an independent forum. The Recovery Notice thus issued without final determination by an independent forum has no value.

22. In view of the above we are satisfied that the Recovery Notice was issued without first determination of tax from an independent forum. At this stage order for refund of penalty or recovery of further penalty is not warranted as the proceeding against the Contractor is pending before the assessing officer whereby the fate of exemption is to be decided. The issue of further recovery of penalty from the appellant and/or refund of penalty already recovered from the appellant is subject to decision against the Contractor in the pending assessment proceedings.

23. In case the assessment proceeding are decided against the Contractor the Department would be at liberty to issue fresh recovery notice to WAPDA under clause (b) of sub-section (1) of section 66 of the Act. In case the assessment proceedings are decided in favour of the Contractor by allowing exemption than it shall be incumbent upon the Department to refund the amount to the Contractor.

24. The appeal is disposed of ^{accordingly}. The copy of this order may be provided to the learned authorized representatives of the parties.


(Imtiaz Ahmed Barakzai)
Member Technical


(Justice[®] Nadeem Azhar Siddiqi)
Chairman

Karachi
Dated: 21.03.2020

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REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order Dispatched on 13/04/2021

Order issued on 13/04/2021

Page 10 of 11


Registrar


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Copy 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.
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