(Guard file)

BEFORE THE APPELATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-1

APPEAL NO. AT-76/2018

Assistant Commissioner, SRB, Karachi.....Appellant

Versus

M/s Falcon-I (Pvt) Ltd.....Respondent

Date of filing of Appeal: 27.03.2019

Date of hearing: 10.04.2019

Date of Order: 06.05.2019

Mr. Vickey Dhingra, AC and Mr. Javed Ali, AC-SRB for appellant.

Mr. S. M. Rehan, Chartered Accountant and Mr. Ahsan Iqbal, ITP for respondent

ORDER

Justice ® Nadeem Azhar Siddiqi: This appeal has been filed by the appellant/department challenging the Order-in-Appeal No.164/2018 dated 14.09.2018 passed by the Commissioner (Appeals-1) in Appeal No. 140/2018 filed by the respondent/taxpayer against the Order-in-Original No. 488/2018 dated 15.05.2018 passed by the Assistant Commissioner (Mr. Vickey Dhingra) SRB, Karachi.

Appellate Tribunal Sindh Revenue Board Sales Tax & Services

01. The facts as stated in the order-in-original are that the respondent is engaged in providing and rendering the taxable services of telecommunication including vehicle tracking services registered with SRB since 11.11.2011.

02. The allegations against the respondent in the order in original are that scrutiny of its audited financial statements for the years ended June, 2012, June, 2013 and June, 2014 some discrepancies were observed and it was alleged that during the above tax periods the respondent received consideration of Rs.539,967,232/= involving Sindh sales tax of Rs.105,293,610/= . However, perusal of SST returns revealed that the respondent declared the output tax of Rs.52,138,279/= with SRB, thus short declared the tax amounting to Rs.53,153,331/=.

03. It was also alleged in the order in original that the respondent has claimed inadmissible input tax of Rs.15,082,819/= and the respondent had not filed SST returns for the tax periods May, 2017 to July, 2017.

04. A show-cause notice dated 12.09.2017 was served upon the respondent to show-cause why SST amounting to Rs.53,153,331/= may not be assessed and recovered along with default surcharge and penalty under serial No.3 of Table under section 43 of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act). The Input tax of Rs.15,082,819/= claimed by the respondent was also disallowed to be recovered along with default surcharge and penalty under serial No.3 of Table under section 43 of the Act, further imposing of penalties under serial No.3, 11, 13, and 15 of Table under section 43 of the Act. The respondent filed summary of input tax on 23.10.2017 along with its explanation. The respondent also filed written reply dated 10.05.2018 and submitted that against sale of equipment sales tax was paid to FBR. It was also submitted that transfer fee for removal of any devices from one car and installing to another car was not subject to SST during the tax periods involved in this case. These services are taxable from 01.07.2015 under heading 8939.0000.

05. The Assessing Officer passed order in original determining the tax liability of Rs.79,945,920/= along with default surcharge and imposing penalty of Rs.3.997,296/= and Rs.873,373/= under serial No. 3 of Table under section 43 Act and penalty of Rs.137,000/= under serial No. 2 of Table under section 43of the Act for non-filing of tax returns and default surcharge of Rs.516,408/=.

06. The respondent has challenged the order in original before Commissioner (Appeals-1) who upheld it to the extent of sub-paras a, b, c, d, and f of para 10 of order in appeal along with default surcharge and setaside in respect of sub- para (e) (other income on account of amount amortized at the premature termination of services), (g) (non-mentioning relevant provisions of section 15A of the Act and (or) the Rule 22A of the Sindh Sales Tax on Services Rules, 2011) and (h) (default surcharge and penalties) of para 10 of order in appeal.

07. The learned AC submitted that the department is aggrieved by the findings of the learned Commissioner (Appeals) in para 14, 16 and 18 regarding point No. e. g. and h of para 10 of order in appeal.

08. The learned AC submitted that this appeal has been filed against that part of order in appeal by which the learned Commissioner (Appeals) waived the above mentioned penalties imposed by the Assessing Officer. He submitted that penalties were rightly imposed for violation of various provisions of law and rules as mentioned in the order in original. He also submitted that learned Commissioner (Appeals) has erroneously and wrongly exercised his jurisdiction in waiving the penalties without considering that default in payment of tax and non-filing of returns were established on the record. He also submitted that waiver of penalties without any justification will encourage the defaulter tax payers not to pay tax and file tax returns as provided. The learned AC submitted that mensrea was established on the record. He also submitted that Commissioner (Appeals) was not justified in setting aside the demand on Misc. Income i.e. premature termination due to the reason that in basic accounting system, consideration against single

transaction cannot be recorded twice. He submitted that if the interpretation of respondent is accepted, then it means that the consideration against single transection has been recorded twice i.e. one is gross revenue and another misc. Income. He also submitted that the Commissioner (Appeals) was not justified in setting aside the demand of tax on inadmissible input tax.

09. Mr. S.M. Rehan the learned representative of the respondent supported the order in appeal regarding item No. e, g and h and submitted that penalties were rightly waived as neither the mensrea was discussed in the order in original nor the same was established and in view of various judgments of superior court and this Tribunal the Commissioner (Appeals) has rightly waived the penalties. He also challenged the imposition of default surcharge and submitted that the same is without justification.

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

11. The Commissioner (Appeals) in para 14 of the order in appeal discussing point "e" of para 10 of OIA has held that "*As a matter of fact, when once the sales tax is charged on a total value at the time of sale and service and the services are not fully consumed but terminated prematurely, in that case such amounts of remaining value, when amortized in the accounts, as per the financial accounting standard, cannot be taxed again. But that fact was required to be proved through the cogent and authentic evidence, which has not finally been done. In this regard the appellant (respondent herein) is directed to provide the accounts, the invoices and the agreements with those clients and prove the fact as per the contention raised. If this fact stands proved before the respondent (appellant herein) under intimation to this office to any extent the same shall be excluded from the assessable value and in that case no tax shall be imposable on such reconciled amount. For any other amount(s), if coming out of such value of "other income" upon scrutiny of record and documents the appellant (respondent herein) shall be liable to pay the tax on such value*".

12. From the above quotation it is apparent that the demand has been setaside for the time being subject to further inquiry by the department. The department instead of inquiring into the matter has filed this appeal.

13. The Commissioner (Appeals) in para 16 of the order in appeal discussing point "g" of para 10 of OIA has held that *".....I find that the SCN only mentions section 15. Neither any provision of section 15A has been mentioned in the SCN nor any provision of rule 22A.....It will be seen that as a matter of fact the appellant has not been confronted with the specific restriction of either section 15A or the Rules 22A, under which such input tax adjustment was disallowed.....Setting aside this part of OIA will result in proceedings afresh and the appellant (respondent herein) will be required to undergo a show cause proceedings again. Therefore, in the interest of justice it will be appropriate to issue certain and definite directions and provide the appellant an opportunity to prove as such that the services were used and consumed for providing taxable services. So that a new and fresh proceedings can be avoided.*

14. From the above quotation it is apparent that the demand has been conditionally setaside subject to proof by the respondent. No prejudice has been caused to the revenue in this regard. The tax periods involved in this appeal are from July, 2011 to July, 2014. Section 15A was inserted in the Act of 2011 vide Sindh Finance Act, 2016 and having no retrospective effect is not applicable to the present proceedings. For the relevant tax periods the Rules, 2011 was in field and was applicable. Rule 22A (Input tax credit not allowed) was inserted in the Rules vide SRB Notification Dated 07.09.2011. The said Rule 22A was substituted vide SRB Notification dated 28.06.2016 effective from 01.07.2016. For the relevant tax periods in put tax can be disallowed by invoking specific provisions of Rule 22A as existed before 01.07.2016. In the show-cause instead of providing details of disallowance and the relevant provision of law it was simply mentioned that the *"registered person have claimed or adjusted the input tax amounting to Rs.15,082,819/= (details enclosed at Annex-A) which is inadmissible in terms of section 15 of the said Act-2011 read with Rule 21, 22 and 22A of the Rules-2011"*. The tax payer is required to be

confronted with the specific provision under which the input tax was disallowed. The confrontation of specific provision of Rule 22A is not a technicality but goes to the route of the show cause notice. Rule 22A comprises of nine sub-rules and some sub-rules consist of sub-sub rules also. Unless specific provision of Rule 22A is mentioned in the show-cause notice the taxpayer cannot be able to take a proper defence. In the reported judgment of WAK Limited versus Custom, Central Excise and Land Customs, 2018 PTD 253, Lahore High Court has held that Show-cause notice is a serious business and not a casual correspondence and its purpose is to put the person on notice about the allegation for which the authorities intend to proceed against him. In the reported judgment of Collector Central Excise and Land Customs versus Rahim Din, 1987 SCMR 1840 it has been held that the order of adjudication being ultimately based on a ground which was not mentioned in the show-cause notice, the order was palpably illegal and void on the face of it. From the above quotation from the order in appeal it is apparent that the demand has been setaside for the time being subject to further inquiry on the part of the department. The department instead of inquiring into the matter has filed this appeal.

15. That as far the imposition of penalties under serial No. 2 and 3 of Table under section 43 of the Act, it has to be seen that non-payment of tax was not due to any slackness or malafides on the part of the appellant. It was the due to allegation that the respondent failed to charge and deposit the sales tax and due to disallowance of input tax by the department. The contention of the appellant is that the sale of device and other services are not taxable. There is a contest between the parties and it cannot be said that the respondent willfully and malafidely failed to pay the tax. In the matter of contest and interpretation the Commissioner (Appeals) has rightly set aside the penalties imposed by the Assessing officer. The imposing of penalties in case of committing default in payment of tax or late filing of returns is not automatic and some determination with regard to element of mensrea is required. In the reported judgment of Dy. Collector Central Excise and Sales Tax versus ICI Pak. Ltd Lahore , 2006 SCMR 626 the Supreme Court of

Pakistan 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 the penalty under section 33 of the Act. However, it does not necessarily follow that in every case such levy was automatic.* It was further held that ".....*In case of failure of a registered person to pay the sales tax within time, he shall also be liable to pay additional tax and surcharge. The liability being not automatic would be determined by the appropriate authority as to whether or not there was any reasonable ground for default in payment of Sales Tax which could be considered to be willful and deliberate".*

16. 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 return within stipulated period.

17. The imposition of penalty is quasi criminal and presence of mensrea is mandatory as held in the reported judgment of Commissioner Income Tax versus Habib Bank Limited, 2007 PTD 901 (DB SHC) It has been held that "*13. There can be no cavil to the arguments of the learned counsel for the respondent 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 mensrea and, therefore, it is necessary for the department to establish mensrea before levying penalty under section 111. There is plethora of judgments of the superior courts on India and Pakistan from the very inception of Income Tax Act, 1922, on this point*"..... In the reported judgment of Pakistan through Secretary Ministry of Finance versus Hard Castle Waud (Pakistan) PLD 1967 SC I it has been held that even in statutory offence the presumption is that mensrea is an essential ingredient for imposing penalty.

18. In view of the above we are satisfied that the Commissioner (appeals) has rightly waived the penalties, which was imposed by the Assessing Officer without any just cause.

19. The appeal has no merit and the same is accordingly dismissed.

20. The copy of this order may be provided to the learned representatives of the parties.

(Agha Kafeel Barik)
TECHNICAL MEMBER

(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi
Dated: 06.05.2019

Certified to be True Copy

REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Copies supplied for compliance:-

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

Copy for information to:-

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

Order issued on 09/05/18

Registrar

Order Dispatched on 09/05/18

Registrar