

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

SB-1

APPEAL NO. AT-09/2019

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

Versus

● s Powerteck Switchgear ServicesRespondent

Ms. Ambreen Fatima, AC-SRB for Appellant

Mr. Khawaja Mazharuddin, Advocate for the Respondent

Date of filing of Appeal: 28.01.2019

Date of hearing: 11.02.2019

Date of Order: 22.03.2019

ORDER

Justice ® Nadeem Azhar Siddiqi: This appeal has been filed by the appellant/department challenging the Order-in-Appeal No.221/2018 dated 29.11.2018 passed by the Commissioner (Appeals) in Appeal No. 175/2018 filed by the respondent/taxpayer against the Order-in-Original No. 675/2018 dated 25.06.2018 passed by the Assistant Commissioner (Ms. Nida Noor), SRB,

Karachi

01. The facts as stated in the order-in-original are that the respondent is registered with SRB under the category of Technical, Scientific and Engineering Consultants Services, tariff heading 9815.5000 of the

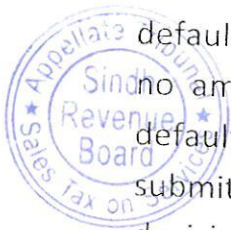


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Second Schedule of Sindh Sales Tax on Services Act, 2011 (herein after referred to as the Act) subject to levy Sindh sales tax.

02. The allegations against the respondent in the order in original are that it had not e-filed monthly sales tax returns for the tax periods from July, 2014 to June, 2015.
03. A show-cause notice dated 12.01.2018, was issued to the appellant wherein penal provision of Serial No. 2 of Table of Section 43 of the Act was confronted. As per the Order in original the appellant has not filed any written reply and has also failed to appear on the date of hearing fixed on 06.02.2018.
04. The Assessing Officer passed an ex parte order dated 25.06.2018 imposing penalty of Rs.4,980,000/= under serial No. 2 of Table under section 43 of the Act for non-filing of monthly sales tax returns.
05. The appellant has challenged the ex parte order in original before Commissioner (Appeals) who reduced the penalty, hence this appeal.
06. Ms. Ambreen Fatima the learned AC submitted that the learned Commissioner (Appeals) has wrongly interpreted clause 2 of Section 43 of the Act, and without justification has reduced the penalties for non-filing of returns for the periods from July, 2014 to June, 2015 from Rs.4,980,000/- to Rs.60,000/=. She referred to Para 4 of the grounds of appeal and submitted that default of every month is to be counted and default cannot be taken as default for one tax period only and there is no ambiguity in the provision i.e. section 43 (2) of the Act and the default is to be treated every month till filing of the returns. She then submitted that the interpretation advanced by the Tribunal in its earlier decisions is helpful to the defaulters to continue default and imposition of heavy penalties are necessary to create deterrence.
07. Mr. Khawaja Mazharuddin, learned advocate for the respondent supported the order of learned Commissioner (Appeals) and submitted



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that he has rightly passed order in consonance with the earlier orders of the Tribunal which is binding upon the SRB and its officials. He relied upon the earlier decision of the Tribunal in the case of AC V/s Target TMC (Pvt.) Ltd, (Appeal No. AT-09/2016). He placed on record photocopy CPRS of Rs.60,000/- and submitted that all returns will be e-filed within next fifteen days and the remaining amount of penalty if any will also be paid within that period.

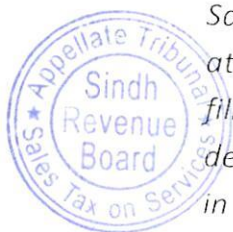
08. I have heard the learned representative of the parties and perused the record made available before us.

09. The charge against the respondent is that it has not e-filed monthly tax returns for the tax periods from July, 2014 to June, 2015 and the Assessing Officer imposed penalty of Rs.4,980,000/-, which Commissioner (Appeals) 1 has reduced to Rs.60,000/= relying upon the earlier decision of this Tribunal.

10. The learned Assessing Officer in the concluding para of order in original held as under:

"6. The registered person did not submit sales tax return for the tax periods July, 2014 to June, 2015. Furthermore, the registered person has not submitted any cogent/plausible reason for the non-submission of sales tax returns with SRB, hence, penalty of Rs.4,980,000/- is hereby imposed for the contravention of section 30 (1) of the Act, 2011, read with rule 14 of the Sindh Sales Tax on Services Rules, 2011. The said penalty may further be calculated at Rs.10,000/- per calendar month per return from 1st July, 2018 till the date of filing of sales tax return. However, taking lenient view, if the registered person deposited 50% of the penalty amount, as provided under Sr. No. 2 of the Table in section 43 of the Act, 2011 within five days, no adverse inference may be drawn for the remaining 50% of the amount of penalty.

7. For payment of penalty, attention is invited to the Relief Notification No. SRB-3-4/11/2018 date 18th May 2018 (available at SRB website www.srb.qos.pk). The registered person is encouraged to avail the benefits of the said notification".



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11. From reading the above passage from the order in original it is apparent that heavy penalty has been imposed without giving proper calculation and it is not known that at what rate the penalty was imposed. The Assessing Officer before imposing heavy penalty has failed to establish mensrea on the part of the respondent. In many decisions this Tribunal relying upon the various judgments of superior courts has held that penalty cannot be imposed without first establishing mensrea. The Officials/Assessing Officers malafidely for the purpose of imposing heavy penalties are ignoring the orders/decisions of the Tribunal, which is not a good practice.

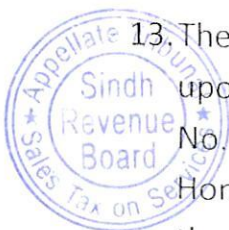
12. The Commissioner (Appeals) I in the order in appeal held as under:

"5.....However, regarding the quantum of the penalty of offence No 2, I am aware of a Judgment of the Honorable Appellate Tribunal of the SRB in the case titled as M/s Slingshot (Pvt.) Ltd. versus the Assistant Commissioner, SRB in this Judgment the Honorable Appellate Tribunal of the SRB discussed in detail the language of the Offence No. 2 and language of the penalty thereon and held that such person in default shall be liable to pay a penalty of Rs.10,000/- per return only and that same is not recurring in nature".

"7. In view of the above reasons the Order in Original is hereby altered. Accordingly the Appellant shall be liable to pay the penalty to extent of Rs: 60,000/- (i.e. 50%) in case the Appellant files sales tax returns for periods in question within a period of 15 days of receipt of this Order. In the event of failure to file the returns the Appellant shall be liable to pay the 100% penalty (i.e. 10,000 x 12). Order Accordingly".

13. The Commissioner (Appeals) while recording the above findings relied upon the earlier decision of the Tribunal in the case of Sling Shot, Appeal No. AT-92/2016, which is still in field and has not been setaside by the Honorable High Court in referential jurisdiction. The relevant portion of the order is read 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



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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 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".

14. In another decision in the case of *Fumican Services*, Appeal No. AT-48/2018 this Tribunal held as under:

"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".

15. Furthermore discretion vests in the Officers of SRB to impose or not to impose penalty. In the reported case of **Malt-79 Manufacturers vs. Collector 1995 PTD 345** Honorable Lahore High Court has held that expression "shall be liable" in contradistinction to "shall pay" clearly vests discretion in the Adjudicating Officer to levy or not to levy additional sales tax even in the event of failure of a person to pay the sales tax keeping in view the facts and circumstances of the case and reason for non-payment".

16. In the reported case of **Assistant Collector Customs, C.E. Karachi versus M/s Mari Gas Company Limited 2003 PTD 818** a learned DB of High Court of Sindh has held that "The use of phrase "shall pay" makes it



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mandatory on the person to pay the amount while the use of the words "he shall be liable to pay" gives a discretion to the concerned officer of the Excise Department to impose additional tax or waive it totally if, in his opinion, the circumstances so require". In the Table, Column (2) of Section 43 of the Act the phrase "Such person shall be liable to pay penalty" was used which gives discretion to the officer to impose or not to impose penalty. In our view the Commissioner (Appeals) has rightly exercised discretion in favour of the respondent. The above judgment of the Sindh High Court is not only binding on the Commissioner (Appeals) but is also binding on the Assessing Officer/Department.

17. To establish default the Department must establish that the non-compliance of statutory provisions has been due to some avoidable cause. Mere non-compliance without element of willfulness and malafide cannot entail imposition of heavy penalty. 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 mensrea 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 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 u/s 111 is the existence of mensrea and therefore, it is necessary for the department to establish mensrea before levying penalty u/s 111".

18. From reading the order in original it is apparent that the learned Assessing Officer has failed to establish mensrea for the purpose of imposing heavy penalty.

19. Before parting with this order I want to draw the attention of the learned Chairman, Sindh Revenue Board towards the latest decision of the Honorable Supreme Court of Pakistan in the case of **Pakistan through Chairman FBR Versus Hazrat Hussain and others (2018 SCMR 939)** in which it was held that ".....It is to be noted that appeals should not be filed, as a matter of routine or because a decision has been rendered against the Department. Decisions should be taken on a



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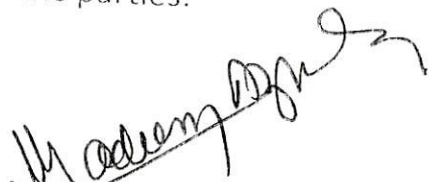
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reasonable basis. It is not advisable for government departments to waste public time and money by filing appeals routinely....."

20. The above judgment in view of Article 189 of the Constitution becomes binding precedent for all forums in the country (2014 SCMR 1557). The Board or the learned Chairman, SRB should take notice of filing of appeals by the Departmental Representative having no merits, and this way the department is wasting public time and money. I am sanguine that the Board/Chairman will look into the matter and take necessary steps to avoid repetition of the same.

21. A copy of this order may be provided to the Learned Chairman, SRB for placing the same before the Board for perusal and necessary action in this regard. I am also hopeful that the Learned Chairman will let us know about the progress in the matter.

22. In view of the above discussions I do not find any merits in this appeal, which is accordingly dismissed in limine. The copy of the Order may be provided to the learned representative of the parties.



(Justice[®] Nadeem Azhar Siddiqi)

CHAIRMAN

Certified to be True Copy

Karachi

Dated: 22.03.2019


BY REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on 26-03-2019


R Registrar

Copies supplied for compliance:-

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

Copy for information to:-

Order Dispatched on-----

Registrar

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

