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BEFORE THE APPELATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-1

APPEAL NO. AT-12/2019

M/s Systech Engineering Solutions (Pvt) LimitedAppellant

Versus

Assistant Commissioner SRB, and another.....Respondent

Mr. Adnan Siddiqui, Advocate and Ms. Sidratul Muntaha, Advocate for Appellant

Mr. Liaqat Ali Bajeeer, AC SRB for Respondent

Date of filing of Appeal: 29.01.2019

Date of hearing: 12.03.2019

Date of Order: 29.03.2019

ORDER

Justice ® Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order-in-Appeal No.100/2018 dated 08.06.2018 passed by the Commissioner (Appeals) in Appeal No. 178/2016 filed by the Appellant against the Order-in-Original No. 354/2016 dated 11.05.2016 passed by the Assistant Commissioner (Ms. Ambreen Fatima), SRB, Karachi.



01. The facts as stated in the order-in-original are that the appellant is registered with SRB under the category of Workshops for industrial machinery, construction and earth moving machinery or other special purpose machinery, etc. tariff heading 9820.2000 of the Second

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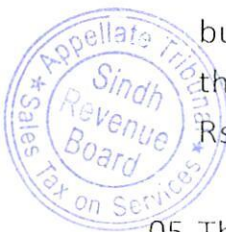
Schedule of Sindh Sales Tax on Services Act, 2011 (herein after referred to as the Act) subject to levy of Sindh sales tax with effect from 01.07.2013.

02. The allegations against the appellant in the order in original are that during scrutiny of the tax profile of the appellant it was observed that M/s Warid Telecom (Pvt) Limited have claimed and adjusted input tax amounting to Rs.1,425,184/= against the services received from appellant during the tax periods from March, 2014 to July, 2014, September to October, 2014 and January, 2015 to March, 2015. It was also alleged that Sindh sales tax was found unpaid/short paid and the registered person also failed to e-file sales tax returns for the periods from July, 2013 to January, 2014, March, 2014 to April, 2014, June, 2014, July, 2014, October to November, 2014, January, 2015 to April, 2015, June, 2015 and October, 2015. It was further alleged that the appellant has failed to submit the copy of Annual Audited Accounts for the year 2013-2014.

03. It was further alleged in the order in original that a show-cause notice dated 10.12.2015 was issued to the appellant to explain as to why tax liability of Rs.1,425,184/= may not be assessed along with default surcharge and penalties.

04. The appellant filed written response dated 11.01.2016 and submitted that the appellant got voluntary registration and is engaged in the business of cellular communication maintenance services and started business w.e.f. December, 2013. It was further stated in the reply that the appellant is liable to pay sales tax of Rs.1,366,090/= and not Rs.1,425,184/= and requested for payment within 12 months.

05. The Assessing Officer passed assessment order calculating the sales tax of Rs.1,565,933/= as due and after deducting an amount of Rs.675,573/= determined the payable sales tax as Rs.890,360/= along with default surcharge. The Assessing Officer also imposed default surcharge of Rs.53,258/= on late payment of sales tax of Rs.540,458/=.



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The Assessing Officer also imposed penalty of Rs.3,317,231/= under Serial No.2, 3 and 12 of Table under section 43 of the Act. Rs.2,026,899/= for non-filing of returns, Rs.1,280,332/= for non-payment of tax and Rs.10,000/= for non-providing copy of annual audited accounts. (From the Order it appears that the penalty for non-filing of returns was imposed amounting to Rs.2,026,899/= besides Rs.333.333/= per day default till filing of the returns.)

06. The appellant has challenged the order in original before Commissioner (Appeals) who dismissed the appeal for non-prosecution, hence this appeal.

07. The appellant has also filed an application for condonation of delay in filing the appeal on the ground that the previous counsel had not communicated receiving the impugned order to the appellant.

08. Mr. Adnan Siddiqi the learned advocate for the appellant submitted that order in appeal is time barred and illegal and no limitation run against illegal orders, hence appeal may be treated within time. He then submitted that the appeal before Commissioner was filed on 07.06.2016 and order in appeal was passed on 08.06.2018 almost after two years of the filing of appeal whereas the order in appeal can be passed within 180 days from the date of filing of appeal as provided under sub-section (5) of section 59 of the Act.

09. He also submitted that the delay in disposal of appeal was falsely attributed towards appellant, whereas the Commissioner (Appeals) as well as the dealing officer were equally responsible for delay and the Commissioner (Appeals) has wrongly treated all adjournments on account of appellant which is factually not correct.

10. He also submitted that order in original is illegal for want of imposing illegal penalties under Serial No.2, 3 and 12 of Table of section 43 of the Act which was not warranted in law and that the same was also against the earlier orders of the Tribunal. He submitted that the penalty



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provided under Serial No.2 of Table of section 43 of the Act is Rs.10,000/= per tax return, whereas the Assessing Officer imposed compound penalty of Rs.2,026,899/= and Rs.333.333 till filing of the returns.

11.He further submitted that the penalty provided under Serial No.3 of Table of section 43 of the Act is Rs.10,000/= per month or five percent of the total tax payable for the period of default whichever is higher, whereas the Assessing Officer imposed penalty of Rs.1,280,332/= without providing any details of default amount and calculations.

12.Ms. Sidra submitted that as per the calculation of tax in the order in original the tax liability was determined to Rs.890,360/- without considering the tax deposited by the appellant. She submitted that some amount was also paid on account of tax after passing of order in original and the remaining balance of Rs.44,365/- was paid today.

13.Mr. Liaqat has prepared a reconciliation and submitted that total tax liability was determined to Rs.1,565,933/- out of which amount paid by appellant amounting to Rs.675,573/- was deducted and the balance liability comes to Rs.845,360/- out of which a sum of Rs.845,995/- was paid after passing order in original leaving a balance of Rs.44,365/- which was paid today.

14.Ms. Sidra also challenged the imposition of default surcharge and penalties under Serial No.2, 3 and 12 of the Table under Section 43 of the Act and submitted that penalties and default surcharge were imposed without first establishing mensrea and that it is not understandable as to that how calculation of penalties were made by the then AC.

15.She also pointed out from the order in original that double penalty under Sr. No.2 of Section 43 has been imposed which is legally not correct as for one offence two types of penalties cannot be imposed. Ms. Sidra further referred to last 4 lines of para 6 of order in original and



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submitted that penalty subject to mensrea if imposed is Rs.10,000/- per month and same cannot be compounded.

16. Mr. Liaqat Bajeer, AC-SRB has supported the order in original and submitted that since the tax has not been deposited as provided and the returns were also not filed as prescribed the penalties and default surcharge was rightly imposed. He then submitted that penalty under Table 12 of Section 43 was rightly imposed as appellant has failed to comply the provisions of sub-section (5) of Section 26 as provided.

17. Ms. Sidra submitted that no notice or letter was addressed to the appellant in this regard and no penalty can be imposed.

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

18. There is no dispute with regard to payment of sales tax and default surcharge. The dispute is with regard to imposition of penalties for non-filing monthly tax returns, non-payment of due tax and non-providing of audited accounts.

19. First we will take the application for condonation of delay. The ground taken for condonation was that both order in original and order in appeal are illegal and void and no limitation runs against illegal and void order. The imposition of penalties which are not warranted in law and are against the earlier orders of the Tribunal made the order in original without jurisdiction and void. Sr. No. 2 of section 43 of the Act provides that penalty amounting to Rs.10,000/= per month for non-filing of return can be imposed. In the section per month means per tax return as the tax period defined in sub-section (95) of section 2 provides that tax period means a period of one month or such other period as the Board may, by notification in the Official Gazette, specify. Secondly the Assessing Officer has calculated penalty in fraction which is not correct. Regarding imposition of penalty under Sr. No.2 of section 43 this Tribunal in its earlier order in Appeal No. 92/16 SLINGSHOT VS AC dated 25.01.2017 a DB of this Tribunal has held as under:



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"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".

In view of the above observations we conclude as under:

- a)
- b)
- c) As regards penalty of Rs.1,206,000/- in view of our above observation we reduce it to Rs.130,000 only.

The impugned order is modified and appeal is allowed to that extent.

20. This Tribunal in another Appeal No. 47/2018 M/s Fumicon Vs AC-SRB has 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 07 returns and Penalty @ Rs.10,000/- for each not filed return works out to Rs.70,000/- 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.647,994/- which is too harsh and excessive and is not tenable. The operative part of the order of Tribunal 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)



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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 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".

21. Both the above orders of the Tribunal are still holding the field and have not been set aside by the Honorable High Court in referential jurisdiction and are 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.

22. As far as the penalties under Sr. 3 of section 43 are concerned it is apparent from the order in original that neither default amount was mentioned nor calculation has been provided. Sr. No. 3 provides a penalty of Rs.10,000/= per month or 5% of the total tax payable for that period, whichever is higher. Two types of penalties were provided. It is not known which type of penalty was imposed. From the amount of penalty it appears that the penalty at the rate of 5% of the total tax payable for that period was imposed. For calculating the penalty it is mandatory to provide the default amount of each month (total tax for that period) and then to calculate the penalty. The Assessing Officer has



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not provided default amount of each month, without which the penalty cannot be calculated/workout.

23. This Tribunal in its various Orders relying upon the various pronouncements of Superior Courts, held that penalty cannot be imposed without first establishing mensrea and malafide on the part of the tax payer. The Assessing Officer has failed to establish mensrea and malafide on the part of the appellant, which is a necessary ingredient for imposing penalty. Reference can be made to Pakistan through Secretary Ministry of Finance and others versus Hard Castle Waud, PLD 1967 SC 1, Commissioner Income Tax versus Habib Bank Limited 2007 PTD 901 and D.G. Khan Cement versus Federation of Pakistan 2004 SCMR 456.

24. The Commissioner (Appeals) by not noticing the illegalities committed by the Assessing Officer has not properly exercised the jurisdiction vested in him. Instead of dismissing the appeal in non-prosecution he should have decided the appeal on merits.

25. In view of above, the delay in filing of appeal is condoned. The appeal is allowed and the penalties imposed by the Assessing Officer under Table 2, 3 and 12 of section 43 of the Act are set aside. The copy of this order be provided to the learned representatives of the parties

(Agha Kafeel Barik)
TECHNICAL MEMBER

Karachi

Dated: 29.03.2019

Copies supplied for compliance:-

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

Copy for information to:-

(Justice[®] Nadeem Azhar Siddiqi)
CHAIRMAN

Certified to be True Copy

REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on 02/04/2019

Order Dispatched on 02/04/2019

Registrar

Registrar

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

