

(Edward Jite)

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-1

APPEAL NO. AT13/2019

M/s Sanco Technologies.....Appellant

**Versus**

Commissioner (Appeals) II, SRB, Karachi.....Respondent

Mr. Aga Faquir Muhammad, Advocate for Appellant

Mr. Shoaib Iqbal, AC SRB for Respondent

Date of filing of Appeal: 04.02.2019

Date of hearing: 18.03.2019

Date of Order: 20.03.2019

ORDER

Justice<sup>®</sup> Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order-in-Appeal No.31/2019 dated 30.01.2019 passed by the Commissioner (Appeals) in Appeal No. 158/2018 filed by the Appellant against the Order-in-Original No. 669/2018 dated 25.06.2018 passed by the Assistant Commissioner (Mr. Allah Rakhio Jogi), SRB, Karachi.



01. The facts as stated in the order-in-original are that the appellant is registered with SRB under the category of Construction Services tariff heading 9824.0000 of the Second Schedule of Sindh Sales Tax on Services Act, 2011 (herein after referred to as the Act) subject to levy Sindh sales tax.

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02. The allegations against the appellant in the order in original are that it was observed from the profile of the appellant that it has provided taxable services to M/s Sindh Solid Waste Management Board (hereinafter referred to SSWMB) to the tune of Rs.173,714,538/= involving Sindh sales tax of Rs.22,582,890/= out of which an amount of Rs.4,516,578/= was withheld by SSWMB and paid to SRB. It was also alleged in the order in original that during the tax periods from October, 2017 to March, 2018 the appellant neither paid sales tax amount of Rs.18,066,312/= nor e-filed monthly tax returns.
03. It was further alleged in the order in original that a show-cause notice dated 14.06.2018 was issued to the appellant to explain as to why tax liability of Rs.18,066,312/= may not be assessed along with default surcharge and penalties. The appellant before us submitted an affidavit that it has not received the show cause notice. The department despite directions failed to produce the evidence of delivery of show-cause notice to the appellant.
04. The Assessing Officer passed an exparte assessment order dated 25.06.2018 determining the sales tax of Rs.18,066,312/= along with default surcharge and penalty of Rs.440,000/= under serial No. 2 of Table under section 43 of the Act for non-filing of monthly sales tax returns and Rs.903,316/= under serial No. 3 of Table under section 43 of the Act for non-deposit of sales tax.
05. The appellant has challenged the exparte order in original before Commissioner (Appeals) who dismissed the appeal for non-prosecution, hence this appeal.
06. Mr. Aga Faquir Muhammad the learned advocate for the appellant submitted that an exparte assessment order was passed in haste as the alleged show cause notice was issued on 14.06.2018 fixing the date of hearing on 20.06.2018 and without considering whether the show cause notice was served upon the appellant or not the order-in-original was passed on 25.06.2018. He further submitted that the appellant vide its



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letter dated 04.06.2018 in response to respondent's letter dated 26.05.2018 informed the respondent that the appellant was not engaged in construction services (9824.0000) but is providing services of transportation of garbage for dumping at land fill site, which letter was ignored rather suppressed by the Assessing Officer. He then submitted that neither appellant received show-cause notice dated 14.06.2018 nor received notice under section 52 of the Act. He then submitted that the representative of appellant regularly appeared before Commissioner (Appeals) who has malafidely shown the appellant absent and referred to copies of various diary sheets in which the presence of appellant was marked by the Commissioner (Appeals). He then submitted that order-in-appeal was passed beyond 180 days and is time bared.

07. The learned advocate for the appellant also filed written arguments in which it was stated that though the appellant is registered with the Sindh Revenue Board (SRB) under tariff heading "construction services-9824.000" but is not engaged in business activity of providing services of construction and that the appellant is engaged in providing the services of transportation of garbage from GTS and other areas of District East, Karachi to landfill sites which does not fall under any category of taxable services under Second Schedule of SST Act, 2011.

08. Mr. Aga then submitted that in terms of section 59 (5) of the SST Act, 2011, on completion of 120 days from the date of filing of appeal the learned Commissioner (Appeals)/Respondent No; 1 did not record the reasons for continuing the proceedings for further 50 days and on completion of 180 days from the date of filing of appeal, the Learned Commissioner was required to transfer the undecided appeal to the Appellate Tribunal, which was not done.

09. The learned AC in his written arguments submitted that the appellant was provided opportunities to plead/defend its case but had failed to provide any justification that It has providing transportation services. Further the appellant got voluntarily registered with SRB in the category of Construction Services and nature of services provided by the



*M. Os* *for*

appellant do not fall in the category of Transportation Services as per available facts. He further submitted that on 06-08-2018, 29-11-2018 and also some other dates the AR failed to appear before Commissioner (Appeals) for hearing and only a person who was not duly authorized appeared before Commissioner (Appeal). He then submitted that there is no issue of limitation and the order in appeal is not time barred. He also submitted that since the order in appeal was passed within stipulated time no question to transfer of appeal to the Appellate Tribunal arises.

10. He also submitted that the Commissioner (Appeal) provided reasonable opportunities of hearing to the appellant but most of the time AR did not appear. The AC also submitted that the services provided by the appellant are not covered under Transportation Services and it is covered under Contractual Execution of Work because the appellant is not only providing transportation services but signed a contract of removal of Garbage from the city to the landfill sites through machinery or manual labour force.

11. We have heard the learned representative of the parties and perused the record made available before us and also perused the written arguments filed by the representatives of the parties.

12. While admitting the appeal the Assessing Officer was directed to produce the copy of show-cause notice dated 14.06.2018 along with evidence of service of show cause notice on appellant and the copy of notice under section 52 of the Act along with evidence of service of notice upon the appellant. The AC has submitted the copy of the show-cause notice dated 14.06.2019 but failed to produce the evidence of service of notice. The AC also failed to produce the copy of the Notice under section 52 of the Act along with the evidence of service of notice.

13. The Commissioner (Appeals) was also directed to submit report regarding the time consumed in finalizing the appeal. The Commissioner (Appeals) submitted his report in which it was stated that total numbers



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of days consumed in finalizing of appeal were 213 days out of which 109 days were excluded on account of adjournments and the order was passed on 104<sup>th</sup> day.

14. Apart from other contentions of the learned advocate for the appellant he pressed that without service of show-cause notice the proceedings cannot be maintained and that the tax was charged on the service which the appellant has not provided. As far as the service of notice is concerned the learned advocate for the appellant filed written statement in which it was categorically stated that show-cause notice dated 14.06.2018 on the basis of which the assessment order was passed was never served upon the appellant. To rebut this contention the AC has failed to produce the evidence of delivery of notice upon the appellant.

15. Mr. Aga is correct in saying that the order in original was passed in haste. The show-cause notice was allegedly issued on 14.06.2018 fixing date of hearing on 20.06.2018 and the order in original was passed on 25.06.2018. Before passing the order in original the Assessing Officer has not considered whether the notice was served upon the appellant or not. The Assessing Officer has also not followed the procedure for service provided under section 75 of the Act. Even in the order in original no definite finding was recorded by the Assessing officer regarding service of notice on the appellant. Sub-section (2) of section 23 of the Act provides that no order under sub-sections (1) or (1A) shall be made by an officer of the SRB unless a notice to show-cause is given to the person in default. The issuance of show-cause before passing the order under sub-section (1) is mandatory. In this case no evidence is available on record to show that show-cause notice was served upon the appellant. In the absence of evidence of delivery of show-cause notice the assessment order cannot be maintained.

16. Furthermore the appellant through its letter dated 04.06.2018 written in response to Department's letter dated 26.05.2018 clearly informed that it is not providing construction services but is providing services



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transportation of garbage for dumping at landfill site. The learned counsel for the appellant also produced acknowledgement having round rubber seal of SRB to show that the letter was duly delivered to SRB. The AC for passing the order in original in haste has failed to consider the said letter and has not held any inquiry in this regard. It is not necessary that if the tax payer is registered/enrolled in one activity it cannot perform other activity. Before taxing it is necessary to first determine the nature of service, value of service and then to pass assessment order. Since the order in original was passed without issuance of show-cause notice the order in original is not sustainable in law.

17. The Commissioner (Appeals) has dismissed the appeal in non-prosecution. In his report submitted on the directions of the Tribunal the Commissioner (Appeals) submitted as under:

*"3. It is respectfully submitted that the Appeal was fixed for hearing 11 times from the date of filing. The Appellant or an authorized person on behalf of the Appellant remained absent for (01) time and unauthorized person on behalf of the Appellant appeared for (05) times. During last (03) consecutive hearings date 29.11.2018, 20.12.2018 and 29.01.2019, no authorized person on behalf of the Appellant appeared before me. As the hearing proceedings adjourned on account of non-appearance of authorized person on behalf of the Appellant were 109, hence it would be deducted from total number of days (i.e. 213 – 109 = 104) which makes the Order in Appeal within the time limit prescribed by the Act.*

*4. With respect, it may be submitted that before the honorable Tribunal that during the course of Appeal hearings dated 06.08.2018, 06.09.2018, 29.11.2018 and 20.12.2018, no authorized persons on behalf of the Appellant appeared before the undersigned. The un-authorized persons appearing on behalf of the Appellant were warned in writing, during the hearing dated 24.09.2018, that in case the counsel of the Appellant continues violation provisions of the law in repeated manner, the matter may not be decided on merits. A copy of diary sheet dated 24.09.2018 is enclosed as (Annexure-A) for perusal and ready reference".*

18. The Commissioner (Appeals) has dismissed the appeal for the reason that un-authorized person was appearing on behalf of the appellant. It is



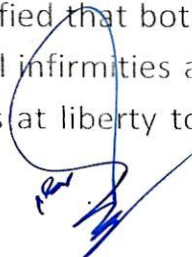
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always not necessary that advocates who were authorized to appear may always appear. The advocates may nominate their assistants, associates or juniors to appear before the concerned offices and those assistants, associates and juniors cannot be termed as un-authorized person as they represent the advocate who was authorized by the party/taxpayer. The dismissal of appeal for non-prosecution only for this reason is not warranted.

19. Furthermore from the contents of the Application for Disposal of Appeal filed by the appellant before the Commissioner (Appeals) it appears that on 16.07.2018, 06.09.2018 and 16.11.2018 the Respondent was not present. It also appears that the appeal was adjourned due to transfer of appeal from Commissioner (Appeals) I to Commissioner (Appeals) II on 11.07.2018 and on 06.08.2018 the appellant filed written arguments and he was directed to file invoices and contracts. On the next date 06.09.2018 the appellant submitted required documents but the respondent was absent. On 25.09.2018 the respondent was directed to contact SSWMB to obtain invoices and cheques. On 09.10.2018 both the parties were present and the respondent was directed to file comments. On 09.11.2018, 29.11.2018 and 20.10.2018 the appeal was adjourned and the order in appeal was passed on 30.01.2019. Under sub-section (4) of section 23 only those adjournments can be excluded which were taken/obtained by the person and the officers of SRB are not included in the definition of person provided under sub section (63) of section 2 of the Act. From the Report of the Commissioner (Appeals) II it appears that all adjournments were treated as adjournments due to appellant and were excluded, which is not correct and only those adjournments can be excluded which were on a count of tax payer.

20. In view of the above we are satisfied that both the order in original and order in appeal suffers from legal infirmities and sustainable in law and are set aside. However the SRB is at liberty to issue fresh notice to the appellant.



21. The appeal is allowed. The copy of the Order may be provided to the learned representative of the parties.

(Agha Kafeel Barik)  
TECHNICAL MEMBER

Karachi

Dated: 20.03.2019

(Justice<sup>®</sup> Nadeem Azhar Siddiqi)  
CHAIRMAN

Certified to be True Copy

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

*Nadeem Azhar Siddiqi*  
per REGISTRAR  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD

Order issued on-----

20-03-2019

*Nadeem Azhar Siddiqi*  
per Registrar

Order Dispatched on-----

21-03-2019

*Nadeem Azhar Siddiqi*  
per Registrar