

(Guard file)

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD KARACHI

DB-1

APPEAL NO. AT-14/2019

Assistant Commissioner, SRB, KarachiAppellant

Versus

M/s Foundation Securities (Pvt) Ltd.....Respondent

Date of Filing of Appeal : 06.02.2019

Date of hearing: : 27.11.2019

Date of Order: : 09.12.2019

Ms. Uzma Ghory, DR-AC, SRB for Appellant

Mr. Mazhar Saleem Shah FCMA for Respondent

ORDER

Justice ® Nadeem Azhar Siddiqi, Chairman: This appeal has been filed by the appellant/department challenging the order-in-appeal (hereinafter referred to as OIA) No. 01/2019 dated 01.01.2019 passed by the Commissioner (Appeals) in Appeal No. No.59/2017 upholding the order-in-original No. 126/2017 dated 15.05.2018 passed by the Assistant Commissioner (Mr. Tarique Ali), SRB, Karachi.

02: It was stated in the OIO that the respondent was engaged in providing services of stockbroker which are chargeable to Sindh Sales Tax (SST) at standard rate as specified under Tariff Heading of Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act). It was maintained that on perusal of the financial statements for the year ended 2013 and 2014 it was revealed that the respondent had received consideration under brokerage commission (equity and commodity) and



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consultancy services amounting to Rs.201,557,947/- and Rs. 244,759,270/- , respectively. Whereas, the respondent declared/paid Sindh Sales Tax (SST) amounting to Rs. 12,427,841/- and 26,304,223/- during the tax year 2013 and 2014, respectively. Resulting in short payment off SST amounting to Rs. 32,678,691/-. It was also alleged that non/short payment of SST was violation of section 8, 9 and 17 of the Act.

03. A show-cause notice dated 15.08.2016 was served upon the respondent calling him to explain why the SST amount of Rs.32,678,691/= pertaining to tax periods from July, 2012 to June, 2014 may not be assessed and under section 23 (1) of the Act and recovered along with default surcharge and penalties under clause 3 and 6 (d) of section 43 of the Act. The respondent filed written reply on 05.10.2016 stating therein that it was also providing services outside Sindh and was paying Federal Excise Duty (FED) on such portion of the service. A written reply was further filed on 20.02.2017 stating therein that the respondent was providing service in multiple jurisdictions and had rightly discharged its liability. It was contended that the services that were ~~x~~ not rendered in Sindh cannot be taxed by SRB.

04. Finally the Assessing Officer passed the Assessment Order determining the tax liability of Rs. 28,376,294/= under Tariff Heading 9819.1000 (services provided or rendered by stock brokers) of the Second Schedule to the Act. The Assessing Officer also imposed penalty amounting to Rs.1,545,916/= under clause 3 of section 43 of the Act.

05. The respondent challenged the said order of the Assessing Officer by way of filing appeal before the Commissioner (Appeals), who upheld the AO to the extent of principal amount of tax but set aside the default surcharge and penalty imposed by the Assessing Officer. Hence this appeal by the department.

06. Ms. Uzma Ghory the learned AC-DR submitted that this appeal has been filed against the order of Commissioner (Appeals) on account of deletion of the penalty imposed by the Assessing Officer under clause No. 3 of



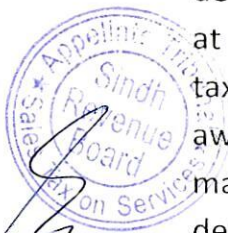
Section 43 of the Act. She in addition to the grounds of appeal submitted that the Commissioner (Appeals) has wrongly deleted the penalty and default surcharge imposed by the Assessing Officer for the reason that the respondent has deposited Sindh Sales Tax with FBR and the payment of Sindh Sales Tax to FBR cannot be treated as legal tender. She further submitted that in view of clear language of Section 44 of the Act the default surcharge cannot be waived even if the default was not willful since loss had been caused to Sindh exchequer.

07. Mr. Mazhar Saleem Shah, the learned representative of the respondent submitted that he had already filed reply to appeal and will rely upon the same. He further submitted that Commissioner (Appeals) relying upon the judgment of High Court of Sindh in reported case of SRB versus Askari Bank, 2017 PTD 2456 had rightly waived the penalty imposed by the Assessing Officer, since such penalty was levied without any cause and justification and without establishing mensrea.

08. The learned Commissioner (Appeals) in ^{para. 22, of} the OIA has held as under:-

"As far as the default surcharge is concerned it will be seen that in fact the Appellant has paid the tax, though it has paid the same at other jurisdiction. The matter needed dig in and interpretation, though there was no implication of any kind whatsoever of the Act, 2012 onto the transaction in hand. Therefore, default as such on part of the Appellant is not present. The Act, 2011 asks a person to pay the tax in either case, if the default is willful or is otherwise. But in the case in hand the default is absent. And when the Appellant has paid the amount of tax at other jurisdictions, there can also not be an intention to evade the tax or to ascertain undue advantage from the same. In this regard I am aware and rely on a Judgment of the Honorable Sindh High Court in the matter of M/s Askari Bank Limited versus the Sindh Revenue Board, delivered in Special Sales Tax Reference Applicant No. 47/2016. The Honorable Sindh High Court held as under:-

"4. From perusal of the hereinabove finding as recorded by the Appellate Tribunal, SRB, it has come on record that the amount of sales tax due was already paid by the respondent in the account of FBR without any delay, whereas, according to SRB, the same was to be paid in the account of SRB in view of



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promulgation of Sindh Sales Tax on Services Act, 2011. A taxpayer cannot be held to be a defaulter towards discharge of his tax liability merely on the account of depositing the same with the Federal Board of Revenue in "X" account instead of depositing the same with the Federal Board of Revenue Board in "Y" due to inadvertence. Nor any malafides or willful act or omission can be attributed to the taxpayer who has admittedly made payment of such amount of tax in public exchequer.

5. In view of hereinafter facts and circumstances of the case, we are of the view that the question proposed in the instant case does not arise from the impugned order passed by the Appellate Tribunal Sindh Revenue Board which is based on peculiar finding on facts, which are entirely distinguishable from the facts of the cases as referred and relied upon by the learned counsel for the applicant. Accordingly, we are of the opinion that the order passed by the Appellate Tribunal Sindh Revenue Board in the instant case does not suffer from any factual or legal error, therefore, instant reference application is hereby dismissed in limine along with listed applications."

09. The Commissioner (Appeals) in para 13 of OIA held as under:-

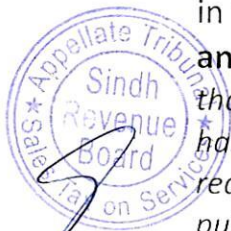
"The study of the judgment shows that the Honorable Court remitted the amount of the default surcharge for the reason that no default was found to be present in the circumstances when the principal amount of tax, which was in fact required to be paid at SRB, was inadvertently but timely paid at Federal Board of Revenue/PRA. The facts and circumstances of the case are sufficient to attract the application of ratio decidendi of the above judgment of the Honorable Court. Having timely paid the amount of tax of brokerage services at the other jurisdictions, there is neither a default as such on part of the appellant nor there exists malafides. But in nature, truly, the matter was of an interpretation and inadvertence, due to which the appellant paid the tax at Punjab Revenue Authority. In View whereof neither the default surcharge nor the penalty could be imposed".

10. This Tribunal in numerous orders has held that default surcharge and penalties cannot be imposed unless the department established mens



rea and malafides on the part of the tax payer. In the reported case of Com I.T. vs. HBL, 2007 PTD 901 (DB SHC) ^{it was} held that "Nature of penal provisions being quasi criminal, existence of mensrea is mandatory for levying penalty". Perusal of OIO revealed that no effort has been made by the Assessing Officer to establish mens rea and malafides on the part of respondent. The Assessing Officers in deliberate and willful ignorance of the Judgments of the Superior Courts as well as the Orders of this Tribunal are continuously imposing default surcharge and penalties without establishing mens rea and in case the Commissioner (Appeals) allowed some relief to the tax payers the Concerned Commissioner without applying their mind with regard to the existence of grounds of appeal instructed their subordinates officers to file appeal before the Tribunal. In this case what to say about establishing mens rea and malafides even the words mens rea and malafides have not been used in the OIO.

11. We have examined the above observation of Commissioner (Appeals) in OIA on the touch stone of the various Judgments of the Superior Courts as well as Orders of this Tribunal and found no error of law or fact. The Commissioner (Appeals) has rightly deleted default surcharge and penalty imposed by the Assessing officer relying upon the above quoted reported Judgment of Askari Bank.
12. It is pertinent to draw the attention of the learned Chairman, SRB 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 reasonable basis. It is not advisable for government departments to waste public time and money by filing appeals routinely."*
13. The above quoted judgment of superior court in view of Article 189 of the Constitution is binding precedent for all forums in the country as held in **Commissioner of Income Tax Versus Habib Bank Limited, 2014 SCMR 1557**. The Board and the learned Chairman, SRB should take notice of filing of frivolous appeals by the Departmental Representatives which have no merits, and in this way the Department is wasting public time and money. Apparently the Commissioners who





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are instructing their subordinates to file appeals are not seriously applying their mind towards the grounds of appeals and are routinely issuing instructions for filing appeals. We are sanguine that the Board/Chairman will look into the matter and take necessary steps to avoid repetition of the same under intimation to this Tribunal.

14. In view of the above discussions we do not find any merits in this appeal, which is accordingly dismissed. The copy of this order may be provided to the learned representative of the parties as well as to the Learned Chairman, SRB for placing the same before the Board for perusal and necessary action in this regard.


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER


(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi

Dated: 09.12.2019

Certified to be True Copy

Copy for compliance:


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


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Copy for information to:-

3. The Chairman, SRB, Karachi.
4. The Commissioner (Appeals-I), SRB, Karachi
5. Office Copy.
6. Guard File.

Order issued on

13/12/19

Registrar

Order Dispatched on

13/12/19

Registrar