

(Guard file)

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT
KARACHI

DB-I

APPEAL NO. AT- 15 /2019

M/s Hotel Faran, Karachi.....Appellant

Versus

Assistant Commissioner, SRB, Karachi.....Respondent

Date of filing of Appeal: 06.02.2019

Date of hearing: 09.12.2019

Date of Order: 13.01.2020

Mr. Kumail Badami, FCCA, Mr. Mustufa Zakir, ITP for appellant along with Mr. Evangel, Sales Tax Manager of appellant.

Mr. Shoaib Iqbal, AC and Mr. Kaleemullah AC-DR for Respondent

ORDER

Justice ® Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.234/2018 dated 11.12.2018 passed by the Commissioner (Appeals) in Appeals No. 195/2018 filed by the Appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 795/2018 dated 18.09.2018 passed by the Assistant Commissioner (Mr. Junaid Hyder), SRB, Karachi.

02. In short the facts of the case as stated in the OIO are that appellant was engaged in services provided or rendered by hotels {motels and guest



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houses], Tariff Heading 9801.1000 of Second Schedule to the Sindh Sales Tax on Services Act, 2011 (herein after referred to as the Act) and is liable to charge, collect and deposit Sindh Sales Tax (SST) at the rate of 13%.

03. The allegations against the appellant in the OIO were that it was subjected to Audit for the tax periods from July, 2016 to June, 2018. It has transpired from the Audit Report that appellant was involved in understatement of service revenue, inadmissible input tax adjustment and concealment of SST amount.

04. The appellant was served with a show-cause notice (SCN) dated 11.05.2018 to explain as to why the evaded amount of (SST) at Rs.3,501,899/= may not be assessed and recovered from it along with penalties and default surcharge under section 43 and 44 of the Act. The appellant through M/s H. A. Badami & Company vide letter dated 18.05.2018 stated that the reply to the audit contravention proceedings conducted by Audit Wing has already been submitted. The representative of the appellant Mr. Hasan Ali Badami appeared before the Assessing Officer (AO) on 09.08.2018 and obtained the photo copy of SCN and requested time to file detailed reply but no compliance was made on due date nor any intimation was received.

05. The AO passed the OIO assessing the value of service at Rs.3,501,899/= along with default surcharge and penalty of Rs.175,095/= under serial No. 3 of the Table and Rs.2,825,433/= under serial No. 6 (d) of the Table of section 43 of the Act.

06. The Appellant challenged the OIO by way of filing appeal before the Commissioner (Appeals) who on the basis of reconciliation came to the conclusion that the appellant was liable to pay SST amounting to Rs.2,073,144/= including penalties under serial No. 3 and 6 (d) of the Table of section 43 of the Act along with default surcharge of Rs.87,550/=. The tax and penalties calculated by the Commissioner (Appeals) in OIA are as under:-



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S.No	Description	Amount in Rs
1	Inadmissible input tax adjustment in excess of 13%	664,807
	100% penalty of offence No. 6(d)	664,807/-
3	Other inadmissible input tax adjustment	79,943/-
4	Tax on Undeclared sales	17,690/-
5	Tax on Concealment of revenue	578,833/-
6	5% of the penalty under Offence No. 3 on the above amounts	67,064/-
	Total	2,073,144/-

07. The appellant being dissatisfied has now challenged the said OIA before this Tribunal. In his arguments Mr. Kumail Badami the learned representative for the appellant submitted as under:-

- (i) The case of M/s Hotel Faran was originally registered with SRB as private limited company. However an individual namely Mr. Abdul Majid got another registration from SRB for the same Hotel Faran as proprietor.
- (ii) The SCN was issued to Hotel Faran without mentioning the status of the tax payer but both SNTN were mentioned in the show cause notice. Thereafter, the OIO was passed considering both SNTN. The Assessing Officer determined tax liability on account of both SNTN at Rs. 3,501,899/- along with default surcharge and penalties of Rs.6,502,427/-. The Commissioner (Appeals) has curtailed and determined the value of tax along with penalties at Rs. 2,073,144/-.
- (iii) The claim of the appellant is that it has paid total tax amounting to Rs.2,073,144/- and the CPRS were pertained to both SNTN. The appellant while filing reconciliation statement has claimed that it had made an excess payment of Rs.578,833/-. The appellant also claimed refund on account of penalty of Rs. 731,871/- relating to offence under serial No. 3 and 6 (d) of the Table of section 43 of the Act

08. The respondent disputed the arguments of the appellant and submitted his own reconciliation which shows balance amount of Rs. 1,016,254/-. The learned AC was directed to prepare reconciliation after clubbing the value of sales tax deposited and penalties paid on account of both SNTN.

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Both the learned representatives have prepared a reconciliation statement under the direction of the Tribunal reflecting the position of both SNTN in the name of Hotel Faran. According to this statement the Commissioner (Appeals) had calculated the SST amounting to Rs.2,073,144/= including penalties under serial No. 3 and 6 (d) of the Table of section 43 of the Act along with default surcharge of Rs.87,550/= which was fully deposited by the appellant.

09. Mr. Badami on behalf of the appellant submitted that there was no concealment of revenue of Rs.578,833/- as mentioned by the Commissioner (Appeals) in the chart at Para 3 of OIA and submitted that this amount was included in the various tax returns of the appellant. However the same amount was reflected by M/s Dalda and others in their various tax returns at of Rs. 139,622/-. The department taking the amount of Rs. 139,622/- as 20% of the withholding tax has calculated 100% tax as Rs. 704,587/- and after deducting Rs. 139,622/- calculated 80% of the tax as Rs. 578,833/-. He then referred to Para 4 of Para wise Comments and submitted that the AC has accepted that Rs. 133,950/- was paid as tax against dummy tax numbers. However the AC had rejected the invoices which were against rule 29 of the Sindh Sales Tax on Services Rules, 2011, (herein after referred to as the Rules) on flimsy grounds.

10. Mr. Badami further submitted that penalties imposed under clause 3 and 6(d) of Table of Section 43 of the Act were imposed without establishing mensrea on the part of the appellant. He contended that there was contest between the parties and the tax was determined in the OIO at Rs. 3,501,899/- along with penalties of Rs.3,000,528/= The Commissioner (Appeals) however, reduced the tax to Rs.1,341,273/= and penalties to Rs.731,871/= and this way the Assessing Officer has unnecessarily harassed the tax payer. He submitted that the claim of excess input tax of 4% was already rectified even before issuance of SCN. He further submitted that the appellant discharged its tax liabilities and penalties imposed by the Commissioner (Appeals) much before the



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passing of such order thus displaying compliance of the provisions of law.

11. Mr. Shoaib the learned AC on behalf of the respondent disputed the contention of Mr. Badami that the department had taken the amount of Rs. 139,622/- as 20% of the withholding has calculated 100% tax as Rs. 704,587/- and after deducting Rs. 139,622/- calculated 80% of the tax as Rs. 578,833/-. The AC also disputed the refund of claim of penalties and submitted that the appellant was also liable to pay default surcharge at Rs. 87,550/- for causing financial loss to the Sindh exchequer.

12. Both the learned representatives have filed the following Reconciliation Statement under their signatures.

Reconciliation Statement

Tax calculated By Commissioner Appeal

Against both SNTN	
SNTN No. 0710645	762,440
SNTN No. 2309438	<u>578,833</u>
Sub Total	1,341,273
Add: Penalty (6d) of Table of S-43	664,807
Add: Penalty 5% (3) of Table of S43	<u>67,064</u>
Total	Rs. <u>2,073,144</u>
<u>Tax deposited by appellant in both SNTN</u>	
SNTN No. 0710645	60,719
SNTN No. 0710645	402,957
SNTN No. 2309438-9	411,798
SNTN No. 2309438-9	750,132
SNTN No. 2309438-9	<u>447,538</u>
Total tax deposited	Rs. <u>2,073,144</u>
Balance Tax	NIL

13. After hearing the learned representatives of the parties and perusing the above reconciliation statement it appears that the controversy remain to the extent of Rs. 578,833/= as mentioned by Commissioner (Appeals) under the head "Tax on concealment of income". However, the appellant has claimed that it had paid an amount of Rs. 133,950/- as

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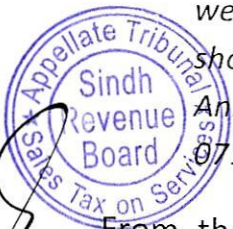
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SST against dummy tax numbers and its clients had also declared said amount in their monthly tax returns and imposition of penalty by Commissioner (Appeals) under serial No. 3 and 6 (d) of the Table of section 43 of the Act and default surcharge under section 44 of the Act was not proper and justified.

14. The appellant referred to para 4 of Para Wise Comments of the AC filed on 21.05.2019 regarding the payment of tax under dummy tax numbers which read as under :-

“Without prejudice to above, the Appellant before your august court contended that the amount of Rs. 578,833/- has been paid by them in their sales tax return with dummy NTN. In this regard, honorable Tribunal, SRB has directed to reconcile the matter in this regard. The exercise was made and the Appellant vide letter No BLA/03/2019 dated May, 9, 2019 submitted copy of invoices against amount of Rs. 133,950 issued to employees of Dalda Foods, as per the description mentioned in the invoices, however, no documents pertaining to balance amount of Rs. 444,883/- (Rs. 578,833 – Rs. 133,950) was submitted by Appellant. Furthermore, the Appellant also submitted that invoice wise breakup of the revenue declared with dummy NTN during the tax periods July, 2016 to June, 2017, copy of CNIC of visitors. It is submitted that the invoices, as submitted by Appellant, are not acceptable on the ground that the same are neither signed by the company nor by the service recipient. Also, the original invoice number, as printed on the invoices, were hide with the new number. Furthermore, the Dalda food has showed purchased under the NTN of 3209438-9 (copy enclosed as Annexure B) whereas, the invoices were issued with both NTN: 0710645-9 and 2309438-9.

From the above passage it is clear that the appellant has failed to establish that the amount was deposited twice. The respondent has rightly pointed out the defects and rejected the invoices which were tempered and cannot be relied upon for giving benefit to the appellant. Even if the amount was deposited twice the appellant is not entitled to take the benefit of the same as he had already passed on the burden of tax to the service recipient who had shown the same in its monthly tax returns.



15. As far as imposition of penalty is concerned the same can only be imposed if the department has established mensrea, malafide and willfulness on the part of the tax payer. The OIO is silent in this regard. No attempt has been made by the department to establish mensrea, malafide and willfulness on the part of the respondent. In the SCN the AC has not confronted the appellant with the amount of penalty and the specific provisions of section 43 of the Act under which the penalty/penalties were required to be imposed. A position not taken in the SCN cannot be adjudicated in the OIO.

16. To establish willfulness, malafide and mensrea the Department must establish that the non-compliance of statutory provisions were due to some avoidable cause. Mere non-deposit of tax without element of willfulness, mensrea and malafide cannot entail 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 as under:-

“Even in the case of a statutory offence the presumption is that mensrea is an essential ingredient unless the statute creating the offence by expresses terms or by necessary implication rules it out”.

In the instant case also there is no independent determination in this regard and it was taken for granted by the AO and the Commissioner (Appeals) that the liability to pay default surcharge and penalty was a necessary consequence or corollary of non-payment of sales tax within stipulated period.

17. It is thus clear from the language of section 43 6(d) of the Act that this provision can only be invoked if the offences mentioned in the provision have been committed knowingly or fraudulently and not otherwise. The order has nowhere said or discussed the words “knowingly or fraudulently” nor has discussed the definition of the “tax fraud” as defined at clause (94) of section 2 of the Act to construe that the acts or omissions of the appellant fell within tax fraud and to read them with Offence under 6(d) of Table of section 43 of the Act. The imposition of penalties without establishing mens rea, willfulness and malafides on the part of the tax payer is illegal and cannot be sustained. The



department while imposing penalty under serial No. 6(d) of Table of section 43 of the Act has to establish beyond shadow of doubt that the non-payment of tax was made knowingly or fraudulently. In the reported case of Commissioner of Income Tax versus Habib Bank Limited [(2007) 95 Tax 336 (H.C. Kar.) a learned DB of Sindh High Court has held as under:-

"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 mens rea and therefore, it is necessary for the department to establish mens rea before levying penalty u/s 111".

18. In the reported case of Deputy Collector, Central Excise and Sales Tax, Lahore versus ICI Pakistan Limited, Lahore, PTD 2006 1132 the Honorable Supreme Court 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 penalty under section 33 of the Act. However, it does not necessarily follow that in every case such levy was automatic requiring no determination at all."

19. In the instant case there was no determination in this regard at the stage of OIO and OIA and the penalties were imposed without any discussion and without establishing mensrea, willfulness and malafide on the part of the appellant.

20. We therefore hold that the penalties in the OIO and OIA under serial No. 3 and 6 (d) of Table of section 43 of the Act were imposed without any legal justification. Thus the said penalties of Rs.67,064/= under serial No. 3 and Rs.664,807/= under serial No. 6 (d) of section 43 of the Act are hereby deleted.

21. The appeal is partly allowed and OIO and OIA are annulled to the extent of imposition of penalties under serial No. 3 and 6 (d) of Table of section 43 of the Act. The amount of Rs.731,871/= is therefore required to be refunded to the appellant within thirty days from the date of this order, failing which the appellant may adjust the same in its future liabilities. The appellant is required to pay default surcharge of Rs.87,550/= and if



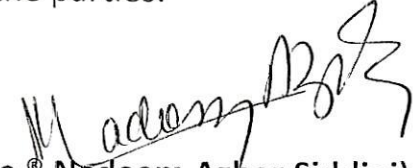
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the same is not paid it may be adjusted from the amount of Rs.731,871/=.

22. The appeal is disposed of in the above terms. Copy of this order may be provided to the learned representatives of the parties.


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER


(Justice Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi. Dated: 13.01.2020

Copies supplied for compliance:-

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

Copy for information to:-

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

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REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on 15/01/2020

Registrar

Order Dispatched on 15/01/2020

Registrar