

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD AT

KARACHI

DB-1

APPEAL NO. AT-17/2019

M/s MCB Arif Habib Savings & Investments (Pvt.) LtdAppellant

Versus

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

Date of Filing of Appeal: 15.02.2019

Date of hearing of Appeal: 10.06.2010

Date of Order: 15.06.2020

Mr. Ghazanfar Siddiqui Advocate, Mr. Nasir Altaf ACMA and Mr. Faisal Nawaz

for appellant.

Ms. Uzma Ghory, AC-DR and Mr. Tariq Ali, AC 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.38/2019 dated 12.02.2019 passed by the Commissioner (Appeals), SRB in Appeal NO. 78/2017 confirming the Order in Original (hereinafter referred to as the OIO) No. 150/2017 dated 26.05.2017 passed by the Assistant Commissioner-Unit-3, (Ms. Anbreen Fatima) SRB, Karachi.

02. The facts of the case as stated briefly in the OIO are that the Appellant was engaged in providing or rendering management services including fund and asset management services and non-banking finance companies classified under Tariff Heading 9825.0000 and 9813.8100 respectively of the Second Schedule to the Sindh Sales Tax on Services

Act, 2011 (hereinafter referred to as the Act) which are subject to levy of Sindh Sales Tax (SST) with effect from 01.07.2011.

03. It was alleged in the OIO that from the scrutiny of financial statements of the appellant for the years ended June-2012, June-2013, June, 2014 and June, 2015 it was observed that the appellant had made short payment of SST amounting to Rs.88,446,876/- during the tax periods from July-2011 to June-2015. Besides, short-payment of Sindh Sales Tax amounting to Rs.13,433/- was deducted during the tax period January-2012. Furthermore, scrutiny of the Sales Tax returns e-filed by the appellant with SRB and their annual audited accounts revealed that the registered person had claimed and adjusted input tax of Rs.10,155,250/- being inadmissible in terms of Rule 21, 22 and 22A of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as Rules).

04. A Show Cause Notice (SCN) dated 30th May, 2016 was served upon the appellant calling upon it to show cause under section 23 of the Act as to why the Sindh Sales Tax amounting to Rs.98,615,559/- (Rs.88,446,876/ + Rs.13,433 + Rs.1,721,364 + Rs.4,314,903 + Rs.4,052,053 + Rs.66,930) pertaining to tax periods from July-2011 to June, 2015 may not be assessed under section 23(1) of the Act along with default surcharge under section 44 of the Act. The appellant was further required to explain as to why the penalties prescribed under serial number 3 and 6(d) of the table in section 43 of the Act should not be imposed on it.

05. The appellant filed written replies dated 02.08.2016, 30.08.2016, and 20.10.2016 stating their point of view and refuting the allegations contained in the SCN against it. These are summarized as under:-

(i) In relation to the non-payment of Sales tax on the services provided against the Fund Management/Investment Advisory Services, it was stated that the working of Sales tax as contorted in the SCN was made on the gross value of the taxable services which were inclusive of Sindh sales tax and Federal Excise Duty.

(iii) In relation to non-payment of Sindh sales tax against the

revenue booked under the head of 'Processing & Other related income and Other Income', it was explained that the appellant had already discharged its due sales tax liabilities under the aforesaid head in government of Sindh treasury.

(iiii) In relation to the allegation for short-payment of sales tax of Rs.13,433/= for the tax period January-2017, it was explained that the same was deposited during the month of February, 2012.

(iv) In relation to the adjustment of input tax of Rs.1,721,364/= it was explained that appellant was a Fund Management Company having its registered office in Sindh, therefore, it was paying all of its sales tax to SRB. However, since the funds were raised from all over Pakistan, therefore the input tax of other provinces which was used or consumed in providing of services were claimed in Sindh.

(v) In relation to input tax of Rs.4,314,903/= claimed and adjusted during the tax periods from July-2011 to June-2015 it was explained that the input tax was exclusively used or consumed in providing or rendering of taxable services thus the same was admissible.

(vi) In relation to input tax of Rs.33,767,106/= claimed and adjusted during the tax periods from July-2011 to June-2015 it was explained that the input tax claimed was admissible as all the services provided by the company were subject to SST and the Company was properly discharging its sales tax liability in terms of the Act. It was also stated that income from government securities, capital gains from investments, dividends and unrealized appreciation on re-measurement of investments were not related to the provision of services.

06. The Assessing Officer after hearing passed OIO directing the appellant to deposit tax of Rs.10,621,484/= alongwith default surcharge. The AC also imposed penalty of Rs225,914/= under Serial No. 3 of Table under

section 43 of the Act and Rs.6,103,197/= under Serial No. 6(d) of Table under section 43 of the Act.

07. The said OIO of the Assessing Officer (AO) was challenged by the appellant by way of filing appeal before the Commissioner (Appeals), who dismissed the appeal for non-prosecution, resulting in filing of appeal before this Tribunal.

08. The learned representative for the appellant submitted as under:-

- (i) The appeal was heard more than five times whereby issues were discussed in detail particularly on 19th July, 2017, 08th June, 2018 and 18th September, 2018.
- (ii) On many hearings, time was extended by the learned Commissioner Appeals, SRB on his discretion requiring further information.
- (iii) The order for non-prosecution can only be passed where no hearing was attended by the Appellant. The superior judiciary has always preferred that cases should be decided on merits instead of on technical grounds. Moreover, the technicalities should be avoided since these undermine the advancement of justice. Reliance was placed on case law reported as Manager, Jammu & Kashmir State Properties versus Khudayar, PLD 1975 SC 678, wherein the Honorable Supreme Court of Pakistan held that mere "technicalities should not defeat the ends of justice and a departure could justifiably be made if required by the circumstances of the case".

No notice was served upon the appellant or its representative for 12.02.2019 when the appeal was dismissed. The appeal was wrongly dismissed for non-prosecution on 12.02.2019 by incorrectly mentioning that the appellant was not present on 11.02.2019. It was submitted that the representative of appellant was present before the Commissioner (Appeals) in both the appeals and his presence was recorded in other Appeal bearing No.

(iv)

200/2018 of the same appellant which was fixed on the same date. The said appeal bearing No. 200/2018 is still pending, whereas the instant appeal was dismissed for non-prosecution showing absence of the appellant. He produced the copy of notice for 07.01.2019 for hearing of both the appeals to show that hearing was conducted in both the appeals on the same date.

09. The learned representative of the respondent submitted as under:-

(i) The appeal in the instant case was filed on 04th July, 2017, ~~and under~~ Section 60(5) of the Act, 2011 requires Commissioner (Appeals) to decide appeal filed in not later than 120 days from the date of filing of appeal or within such extended period, not exceeding 60 days as Commissioner (Appeals) may for reasons to be recorded in writing fix. Whereas, in the instant case the appellant sought extensions for a period of 530 days. The details are attached as annexures-A. On the first date of hearing the appellant was required to submit reconciliation in order to decide the factual position of the case, however, the appellant took 17 extensions and failed to submit reconciliation before Commissioner (Appeals). Extensions of 530 days clearly showed that appellant was given fair opportunity to defend its case but, it failed to do so within the specified time.

(ii) The attitude of the appellant was a clearly indicating of non-seriousness which has led to dismissal of appeal due to non-prosecution.

(iii) The order of non-prosecution cannot be limited to the reason of non-appearance but, it also includes appellant's failure to provide and clarify the facts as required by Commissioner (Appeals) and same is applicable in the instant case.

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10. Keeping in view of the contention of the learned representative of the appellant a Report was called from Commissioner (Appeals), who submitted the Report on 17.03.2020 which reads as under :-

REPORT REGARDING

Kindly refer to the subject Order dated 05.03.2020.

2. In the captioned order, the Honorable Tribunal has been pleased to pass the following directions:

"The Commissioner (Appeals) is direct to send the copy of diary sheet dated 11.02.2019 in Appeal no. 200/2018 and also the diary sheets dated 11.02.2019 and 12.02.2019 recorded in Appeal No-78/2017 before the next date of hearing."

3. As regards the case-file of Appeal No. 200/2018, copy of the last note-sheet wherein hearing held on 11.02.2019 (and also that held on 25.03.2019) was recorded, is enclosed as **Annexure-A**, the contents of which are self-explanatory.

4. As regards the other Appeal No. 78/2017, it transpires that the relevant case-file does not contain any diary sheet of the said dates 11.02.2019 & 12.02.2019. However, a copy of the last available diary sheet in this file (containing noting-paras dated 06.11.2018 & 05.12.2018) is enclosed as **Annexures-B** for record please

11. Heard the learned representatives of the parties and perused the record made available before us.

12. Appeal was dismissed by Commissioner (Appeals) for non-prosecution with the following observations:-

"2. This appeal was fixed for hearing for 20 times from the date of institution first above mentioned. The AR of the Appellant or the Appellant sought adjournments throughout the period of time for 531 days up to date and so far only 57 statutory days have lapsed. This explicit that this much time of adjournments cannot be a reasonable time for proceedings with the matter. The AR of the appellant appeared on 19.07.2017 on which date the stay was granted to the appellant and certain re-conciliation were directed.

Thereafter, such direction was repeated times and again but no steps towards completion of re-conciliation was taken. Today is 58th day (in total) after filing of the Appeal, during which the Appeal was fixed for hearing 20 times but no avail. The Appellant did not pay any heed towards the notices of hearing served and continuously sent letters or emails seeking adjournment. Today its 5:30 p.m., neither anyone has appeared nor has any information been received so far."

13. It is thus evident from the above that to dismiss the appeal for non-prosecution the past adjournments requested by the appellant and granted by the learned Commissioner (Appeals) were also considered. The previous adjournments which were sought and were granted cannot be considered for dismissal of appeal for non-prosecution for the simple reason that the same were allowed/granted on showing sufficient cause and are thus not material, being a past and closed transaction. Once the appeal was adjourned for sufficient cause such adjournments cannot be considered for taking ~~take~~ punitive action against the party.

14. The other ground was that two Appeals bearing No. 78/2017 and 200/18 of same party (appellant) were proceeding together before Commissioner (Appeals) and were fixed on same dates and a consolidated notice of appearance in both appeals was produced by the appellant. From Diary Sheet of Appeal No. 78/2017 annexed with the Report of Commissioner (Appeals) it appeared that the last Diary recorded in that Appeal was 05.12.2018. Such appeal was adjourned to 20.12.2018 and thereafter, no Diary was recorded meaning thereby that either the appeal was not fixed for hearing or that Diary recorded in other Appeal NO.200/2018 was considered as Diary in other appeal also.

15. In the consolidated notice dated 28.12.2018 issued for 07.01.2019 it was stated that "Please refer to your presence on 05.12.2018, wherein the next date of hearing was fixed on 20.12.2018. However, no one

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appeared for hearing and no any request for adjournment received timely". From this notice it is apparent that both the appeals are proceeding together.

16. The other Appeal No.200/18 was fixed on 11.02.2019 and the diary recorded was "The AR appeared on due date of hearing and seeks time. Accordingly, the next hearing is fixed on 20.02.19 at 12.00 pm". From this Diary it is apparent that the representative of the appellant was present before the Commissioner (Appeals) on 11.02.2019. It is strange that when two appeals were proceeded together, the presence of AR (Appellant Representative) was recorded in one appeal only whereas the other appeal was dismissed for non-prosecution.

17. In the case law reported as Manager, Jammu & Kashmir State Properties versus Khuda Yar and another, PLD 1975 SC 678 relied upon by the learned representative of the appellant it was held as under:-

"The proposition could hardly be disputed that the principal object behind all legal formalities is to safeguard paramount interest of justice. In fact while considering the importance of legal technicalities and rules of procedure in the administration of justice it is inevitable to recall the various evolutionary stages in the transition from justice without law of primitive society to justice in accordance with law in modern society and the conflict between equity in law in judicial history. It cannot be denied that legal precepts were devised with a view to impart certainty, consistency, and uniformity to administration of justice and to secure it against arbitrariness, errors of individual judgment and malafides".

18. In the case law reported as Imtiaz Ahmed versus Ghulam Ali, PLD 1963 SC 382 it was held as under:-

".....the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to

be avoided unless it be essential to comply with them on grounds of public policy.... Any system which by giving effect to the form and not the substance defeats substantive rights is defective to that extent".

19. On the date when the appeal was dismissed for non-prosecution out of 180 statutory days for deciding the appeal as per OIO only 57 days had lapsed and sufficient time was at the disposal of the learned Commissioner (Appeals) to decide the appeal on merit. The law favours adjudication on merits and dismissal of appeal for non-prosecution should be an exception and not a rule. It was held in the reported case of Inamur Rehman versus Jalal Din, 1992 SCMR, 1895 that "Normally Courts should adjudicate the matters placed before them on merits and deviate from this course only if they find that the process of the Court is being abused. The dismissal of cases for non-prosecution should normally be the exception and not rule".

20. The learned Commissioner (Appeals) while dismissing the appeal relied on the reported case of Abdul Wahid versus Haji Abdul Wadood, 1997 SCMR 1338, although the facts of which are not applicable to the instant case. The Honorable Supreme Court in the referred case had dismissed the appeal for the reason that despite notification in the cause list the adjournment was sought by an application through fax which was not permissible.

21. A duty is cast upon every public functionary to act fairly, justly and without arbitrariness. Article 4 of the Constitution provides that right of individuals to be dealt with in accordance with law and to enjoy protection of law and it is the inalienable right of every citizen to be treated in accordance with law. This article provides for due process of law which includes right of hearing before any action. The principles of natural justice, procedural propriety and reasonableness should be kept in mind while passing orders which were lacking in the instant case.

22. In view of the above discussions the Appeal is allowed. The OIA is set aside and remanded to Commissioner (Appeals) who is directed to pass fresh OIA on merits after providing proper opportunity of hearing to the learned representatives of the parties. Out of time provided for appeal as per the OIO fifty seven (57) days for deciding appeals have already lapsed. In view of sub-section (5) of section 59 of the Act the Commissioner (Appeals) without allowing unnecessary adjournments should decide the appeal within the remaining period. However, during the pendency of appeal before the Commissioner (Appeals) no coercive action for recovery of tax dues on the basis of OIO should be initiated against the respondent.

23. The copy of order may be provided to the learned representatives of the parties.

Imtiaz Ahmed Barakat
Member Technical

Nadeem Azhar Siddiqi
Justice (R) Nadeem Azhar Siddiqi
Chairman

Karachi, Dated: 15.06.2020

Copy for compliance:

- 01. The appellant through authorized Representative.
- 02. The Commissioner (Appeals), SRB, Karachi

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REGISTERED
APPELLATE TRIBUNAL
SINDH REVENUE BOARD
Certified to be True Copy

Copy for information to:-

- 03. The Assistant Commissioner (Unit-), SRB, Karachi.
- 04. Office Copy.
- 05. Guard File.

26/06/2020
Order issued on
[Signature]

26/06/2020
Order Dispatched on
[Signature]