

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD AT KARACHI

DB-1

APPEAL NO. AT-19/2019

M/s Foundation Security (Pvt) Ltd.Appellant

Versus

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

Date of Filing of Appeal: 25.02.2019

Date of hearing of Appeal: 05.03.2020

Date of Order: 21.04.2020

Mr. Nooruddin, Advocate, Mr. Mazhar Saleem Shah, FCMA, and Mr. Anum Ahmad, Assistant Manager for Appellant

Mrs. Uzma Ghory, AC-DR and Mr. Ameet Kumar, AC-SRB 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.091/2019 dated 01.01.2019 passed by the Commissioner (Appeals), SRB in Appeal NO. 59/2017 confirming the Order in Original (hereinafter referred to as the OIO) No. 488/2014 dated 18.09.2014 passed by the Assistant Commissioner-Unit IV, (Mr. Vickey Dhingra) SRB, Karachi.

02. The facts of the case as mentioned in the OIO are that the Appellant was engaged in providing or rendering taxable services in respect of Stockbrokers that was chargeable to Sindh Sales Tax (SST) at the standard rate as specified under Tariff Heading of the Second Schedule of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act).

03. The allegation against the appellant was that during the perusal of financial statements for the year ended 2013 and 2014 it was revealed that it had

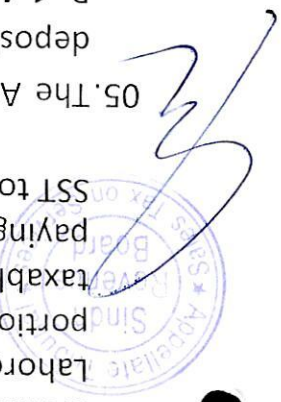
received consideration under brokerage commission and consultancy services amounting to Rs.201,557,947/= and Rs.244,759,2709/= respectively. Whereas it had declared/paid SST amounting to Rs.12,427,841/= and 26,304,223/= resulting in short payment of SST amounting to Rs.32,678,691/-.

04. A Show-Cause Notice (SCN) dated 15.08.2016 was served upon the appellant under section 23 (2) of the Act calling upon it to explain as to why SST of Rs.32,678,691/= pertaining to tax periods for the years July, 2012 to June, 2014 may not be assessed alongwith default surcharge and imposition of penalties under Serial No. 3 and 6 (d) of the Table under section 43 of the Act. The appellant in reply submitted that it was providing brokerage service and its ancillary services outside Sindh i.e. Islamabad and Lahore regions wherein they were paying Federal Excise Duty (FED) on such portion of service. The services that were rendered outside Sindh were not taxable under the Act. It was also submitted by the appellant that it was paying tax to FBR and PRA, but from January, 2014 it had started paying SST to SRB.

05. The Assessing Officer after hearing passed OIO directing the appellant to deposit tax of Rs.28,376,294/= against stock brokerage service, Rs.1,441,679/= against commodity service and Rs.2,860,714/= against consultancy service. The AC also imposed penalty of Rs.1,545,916/= under Serial No. 3 of Table under section 43 of the Act.

06. 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 and upheld the OIO resulting in filing of appeal before this Tribunal.

07. The learned representative for the appellant submitted as under:-
(i) The tax periods involved in the assessment were from July, 2012 to June, 2014 and while determining the value of service the services rendered in Lahore and Islamabad was also included. The appellant had its offices in three (3) provinces and was paying sales tax on services according to



the value of services provided in Sindh at well as Punjab and Islamabad.

(ii) The due tax of Sindh had already been deposited in Sindh and the AC as well as Commissioner (Appeals) while determining the value of service and tax had ignored the order of the Tribunal in the earlier appeal filed by the appellant.

(iii) For the tax periods from July, 2012 to June, 2013 there was no tax on consultancy services of Stock Brokers and tax was wrongly charged without mentioning the same in the SCN. The deviation of the department from the earlier OIO (Foundation Securities) was not proper and department could not change the view already taken.

(iv) The penalty was unjustly imposed without considering that there was no deliberate or willful default on the part of the appellant and without first establishing the mensrea. Both (OIO) and (OIA) were erroneous and not sustainable in law.

08. The learned AC for the respondent submitted as under:-

(i) The appellant was registered with SRB under service category of 'Stockbrokers and Commodity Brokers' covered under Tariff Heading 9819.1000 of the Second Schedule to the Act.

(ii) The appellant had its head office at Karachi and was providing services in Sindh from its head office and liable to pay tax in Sindh.

(iii) All the services in respect of stock brokerage fell under the jurisdiction of the province of Sindh regardless of the location of the service provider and the service recipient. The subject has already been decided by the Appellate Tribunal, SRB in case of M/s Elixir Securities Pakistan (Private) Limited versus SRB in Appeal No.AT-2016/2015 dated 12th May, 2017.



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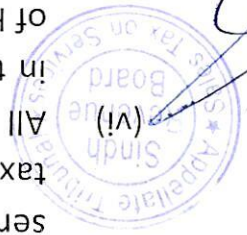
12. The appellant contended that it had its offices at Lahore and Islamabad and since it had provided or rendered services in other jurisdictions it was liable to pay tax in other jurisdiction i.e. PRA and FBR. The issue relating to the

11. The dispute is in respect of payment of SST on stock brokerage service, commodity brokerage service and consultancy service. The appellant has three offices situated at Karachi (Sindh), Lahore (Punjab) and Islamabad, Federal Capital Territory. However, the appellant contended that it had discharged its tax liability by depositing due tax with the authorities in whose jurisdiction the services were provided or rendered.

10. The appellant was registered with SRB for providing the services of stock broker Tariff Heading 9819.1000 of the Second Schedule to the Act. The tax periods involved were from July, 2012 to 31st December, 2013. The SCN was given for short payment of tax on account of brokerage income equity, consultancy services and brokerage income commodity. The SST was charged on the entire value of services provided or rendered by the appellant without considering the services provided or rendered by the appellant in other jurisdiction/provinces.

09. We have heard the learned representative of the parties and perused the record of the case.

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various OIO and OIA confirmed by the Tribunal and the
The issue of brokerage income is settled through the
servers was payable in Sindh.

(iv) The appellant is a brokerage house that provides services through servers of the Karachi Stock Exchange (KSE) located at Karachi, in the Province of Sindh thus tax on all such services were initiated and terminated through those servers was payable in Sindh.
(v) The issue of brokerage income is settled through the various OIO and OIA confirmed by the Tribunal and the services of brokerage irrespective of its place of service is taxable in Sindh.
All services provided by the Stock Brokers were taxable and in this context reliance was placed upon the reported case of Haji Muhammad Sadiq (PLD 2007 SC 133).
09. We have heard the learned representative of the parties and perused the record of the case.

SST on brokerage commission was a decided issue by this Tribunal. A learned Single Bench of this Tribunal in its earlier decision dated 27.01.2016 in the case of M/s IGI Finex Securities Limited versus SRB, Appeal No. AT-185/2015 had decided the issue relating to brokerage income as under:-

"8. In the case the registered person is a stock broker, holding corporate membership of the Karachi Stock Exchange. The members of the Karachi Stock Exchange, utilize in line mechanism for trading of shares, and process the stock of buy/sell request through the Karachi Automated Trading System (KATS). As a result, all the transactions i.e. buying and selling irrespective of its origination are executed or processed through KATS. That the definition section 2 (68) of "provision of services" includes e-servicers where the context so requires.

9. Evidently all the share/stock trading transactions pertaining to Karachi Stock Exchange are executed/terminated at the Karachi Stock Exchange, which is in the province of Sindh. Thus, the brokerage service of appellant originated from offices other than Karachi, they ultimately are executed and/or terminated at the Karachi Stock Exchange. In view of the said explanation the argument forwarded by the appellant does not hold ground".

13. The learned Single Bench of this Tribunal in the case of Summit Capital (Private Limited) versus SRB, Appeal No. AT-115/2015 dated 06.05.2016 also confirmed its earlier decision holding as under:-

"15. As far as the service of stock brokers is concerned even if the appellant has a separate office at Lahore, Punjab from where it is providing and rendering on line service of sale and purchase of shares listed at Karachi Stock Exchange to its clients based at Punjab it is actually providing services from Sindh, Karachi, as the transaction of sale and purchase of share is not complete without the involvement of Karachi Stock Exchange located at Karachi, Sindh. The Stock Brokers mediate between the Stock Exchange and sellers/buyers of the shares. The buyers/sellers of shares interact with Stock Exchange through Stock Brokers and not directly. The appellant is also a Trading Right Entitlement Certificate (TRC) holder of KSE without which the appellant is not able to provide the service of Stock Broker to its clients and no sale and purchase of shares is possible without the involvement of Karachi Stock Exchange. The members of Stock Exchange utilized on line KATS system of KSE in providing or rendering service of Stock Broker as

a result the transaction of purchase and sales of shares irrespective of its origination processed, executed and terminated at Karachi Stock Exchange, located in Karachi, Sindh. The transaction is not complete unless shares are transferred by using the mechanism provided by Karachi Stock Exchange. Since the service of Stock Broker is essentially provided from the system of Karachi Stock Exchange located at Karachi, Sindh the appellant is liable to pay Sindh sales tax on the entire amount and the tax has been rightly levied".

14. After the above two decisions of the Single Bench the DB of this Tribunal pronounced decision in Foundation Security Limited versus Commissioner (Appeals), Appeal No. AT- 66/2014 dated 05.05.2017. The relevant portion is reproduced for ready reference as under:-

"12. After going through the orders of the officers below and arguments of both sides our observations are as under:-

Legally the jurisdiction of all services generating from the Province of Sindh lies with the SRB and any tax payable on any taxable services enumerated in 2nd Schedule should be deposited with SRB.

The appellant has argued and it is also recorded in both the orders of the officers of SRB that after the period under reference the appellant is depositing total amount of payable Sales Tax with SRB. As far as payment of FED with FBR is concerned that has itself become redundant after 18th Amendment. It was the earlier period i.e. 2011-12 that tax was being paid at different levels under different laws due to confusion.

In para 20.1.2 of the order-in-original the AC-SRB has laid down the names of places from where services were rendered raising the question as to whether same were chargeable to SST or not; arriving at the conclusion that services rendered from head office, Karachi, KSE Branch and F.S. Live (only those customers who belong to Sindh as well as international customers) were liable to SST, meaning thereby that SST was not chargeable to services originating from Lahore & Lahore Defence Branch and Islamabad.

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However the above decision was not in line with the two decisions of Single Bench in Appeals No. AT-185/2015 dated 27.01.2016 and AT-115/2015 dated 06.05.2016 reproduced supra.

15. The subsequent decision of the DB of this Tribunal in case of Elixir Securities (Pvt) Limited versus Commissioner (Appeals), SRB, Appeal No. AT-206/2015 dated 12.05.2017 followed the two decisions of Single Bench in Appeal No. AT-105/2015 dated 27.01.2016 and AT-115/2015 dated 06.05.2016 and was not in line with the decision of Foundation Security Limited versus Commissioner (Appeals), Appeal No. AT-66/2014 dated 05.05.2017. The relevant portion of the decision is reproduced below:-

"11. On the issue of securities transactions rendered outside Sindh the AC-III, SRB did not accept the argument of the AR regarding jurisdiction and held that all shares traded were registered with KSE, Karachi, and all trading was done through KATS (Karachi Automated Trading System) which is KSE software. Here trading all over Pakistan is routed through KATS at Karachi / Sindh and the services were practically provided or rendered at Karachi; hence taxable under SST 2011. This has been agreed by the AT in principle in some cases including in the case of IGI FINEX Securities Limited (Appeal No. AT-185/2015) confirmed in Appeal No. AT-66/14 (Foundation Securities versus SRB), the relevant portion is reproduced as under:

"The appellant failed to appreciate that when the broker visits KATS which is an automated online system of 'KSE' the shares are either received / sold to and from in the name of the services recipient by the services provider / Appellant through KATS.

The entire process of execution of the service from buying and selling cannot be completed without execution and termination at KSE. The principal activity in the whole process of brokerage services takes place at KSE, through the appellant's software which in term is connected to the terminal located at their registered office in Karachi. Thus whole of the business activity commences and terminates at KSE.

The appellant being a stockbroker has undertaken transaction on behalf of others at the stock exchange which is in the instant case is Karachi Stock Exchange, thereby undertaking brokerage services at Karachi Stock Exchange which is located in the

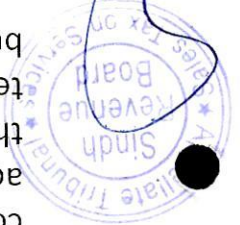


Province of Sindh and consequently attracted Sindh Sales Tax on Services under the provision of SSToS, 2011." From above discussion it is apparent the Stock Brokerage income earned from branches outside Sindh is chargeable to tax under tariff heading 9819.1000 of Second Schedule of SSToS Act, 2011." 12. On this issue the sales tax was correctly levied".

16. In view of the above discussion and following the latest decision of the DB of this Tribunal in the case of Elixir Securities where in it was held that the brokerage services rendered or provided by the appellant were liable to SST payable to SRB in Sindh for the reason that the entire process of execution of the service for buying and selling cannot be completed without execution and termination at KSE. The principal activity in the whole process of brokerage services took place at KSE, through the appellant's software which in term was connected to the terminal located at their registered office in Karachi. Thus it whole business activity commenced and terminated at KSE, Karachi.

17. The Assessing Officer had imposed penalty and default surcharge. The Commissioner (Appeals) waived the penalty and default surcharge on the services of stock broker and upheld the same on consultancy services and commodity brokerage services. We have considered the facts of the case and come to the conclusion that the department has failed to establish mensrea which is a mandatory condition to impose penalty and default surcharge. The default surcharge and penalty can only be imposed if non-payment of tax on the part of appellant is proved as mala fide, willful and having an element of mens rea, which is lacking in this case. The word "default" necessarily imports of an element of negligence or fault and means something more than mere non-compliance of statutory provisions. To establish default the Department must establish that the non-compliance of statutory provisions has been due to some avoidable cause. Mere non-deposit of tax without element of willfulness and mala fide cannot entail default surcharge and penalty. The following case laws are relevant on the point of waiver of penalty and default surcharge.

(i) 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 that "Even in the case of a statutory offence the presumption is that mens rea is an essential ingredient



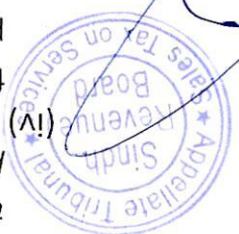
unless the statute creating the offence by express terms or by necessary implication rules it out".

(ii) 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 that "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".

(iii) In the reported case of Collector Customs versus Nizam Impex (PTCL 2014 CL 426 (SHC) (2014 PTD 498)) a learned DB of Sindh High Court has held that "If the party did not act mala fide with intention to evade the tax, the imposition of penalty and additional tax and surcharge is not justified. In such circumstances the Tribunal has discretion to waive/remmit additional tax and penalty".

(iv) In the reported case of D.G.Khan Cement 2004 SCMR 456 the facts were that the sales tax in full has been deposited by the tax payer but the same having not been paid within tax period, the question before the Honorable Supreme Court was whether the tax payer was liable to pay additional tax by way of penalty under section 34 of the Act of 1990. In para 28 of the judgment the Honorable Supreme Court has held that "Each and every case has to be decided on its own merits as to whether the evasion or non-payment of tax was willful or mala fide, decision of which would depend upon the question of recovery of additional tax. In the facts and circumstances of the case, we find that non-payment of the sales tax within tax period was neither willful nor it could be construed to be mala fide evasion or payment of duty, therefore, the recovery of additional tax as penalty or otherwise was not justified in law".

(v) In the reported case of Gharibal Cement limited versus Income Tax Appellate Tribunal (2005 PTD 1) A learned Bench of Lahore High Court has held that "imposition of penalty was un justified, firstly the revenue never succeeded in establishing the existence of mens rea in the case, secondly the penalty should not be imposed only for the reason that it is legal to do so, particularly where the statute vest the discretion in the Revenue Authority and thirdly where the imposition of penalty is discretionary, the power so



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vested may not be exercised unless the defaulter is found contumacious".

The facts of the instant case are identical and the department has failed to establish mens rea, malafides, willfulness and contumacious default on the part of appellant, which are necessary elements for imposing penalty and default surcharge.

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

In view of the above we are satisfied that the default surcharge and penalty was imposed without any just cause.

19. The appeal is dismissed to the extent of payment of tax as determined by the Commissioner (Appeals) and is allowed to the extent of payment of penalties and default surcharge. The copy of the order may be provided to the learned representatives of the parties.

(Imtiaz Ahmed Barakzai)
Member Technical

(Justice® Nadeem Azhar Siddiqi)
Chairman

Karachi
Dated: 21.04.2020

Copy for compliance:

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

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SINDH REVENUE BOARD

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Order Dispatched on 11/05/2020

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