

General file

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD KARACHI

DB-1

APPEAL NO. AT-29/2019

M/s Heinz Pakistan (Private) Limited,
Karachi.....Appellant

Versus

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

Date of filing of Appeal | 21.03.2019

Date of hearing: | 23.01.2020

Date of Order: | 31.01.2020

Mr. Fahad Faruqi, Manager Tax for appellant.

Ms. Umi Rabbab, AC-DR and Ms. Nida Noor, AC, SRB for respondent

ORDER



Justice (R) Nadeem Azhar Siddiqi. This appeal has been filed by the appellant challenging the Order in Appeal (OIA) No.68/2019 dated 16.03.2019 passed by the Commissioner (Appeals-II) in Appeal No. 140/2014 filed by the appellant against the Order-in-Original (OIO) No. 526/2014 dated 10.10.2014 passed by the Assistant Commissioner (Ms. Rafia Urooj), SRB, Karachi.

02. The facts as stated in order in original (OIO) were that the appellant holding NTN-3949717-8, had received taxable services of advertisement for the tax periods from April, 2012 to July, 2012, October, 2012 to December, 2012, January, 2013 to April, 2013, August, 2013 to December, 2013, January & February, 2014. The said services were chargeable to Sindh Sales

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Tax (SST) at 16% of their value under Tariff Heading 98.02 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act). It was also stated that the appellant being a withholding agent under Rule 2(8) of the Sindh Sales Tax Special Procedure (Withholding) Rules, 2011 (hereinafter referred to as the Withholding Rules), was liable to deduct and deposit SST amount equal to 16% of the value of taxable services as required under Rule 3(4) of the Withholding Rules with the SRB.

03. The allegations in the OIO are that from perusal of the "Annexure-C" filed by SRB-registered persons engaged in providing or rendering advertisement services along with their Returns (Form SST-03) for the tax periods April, 2012 to July, 2012, October, 2012 to December, 2012, January, 2013 to April, 2013, August, 2013 to December, 2-13, January & February, 2014 revealed that M/s Heinz Pakistan (Pvt.) Ltd, had deducted SST amounting to Rs. 17,085,977/- (Annexure-I). However, the appellant had failed to deposit the withheld tax amounting to Rs. 6,609,034/- out of Rs. 17,085,977/- consequently it had withheld but failed to deposit Rs. 10,476,943/-. Nor the required withholding statement was filed with the SRB.

04. A show-cause-notice (SCN) dated 09.04.2014 was served upon the appellant whereby it was called upon to show-cause as to why the SST withheld amounting to Rs.10,476,943/- may not be recovered from it under section 47(1A) (a) of the Act alongwith default surcharge under section 44 and penalties under clauses 3, 6(d), 11 & 13 of section 43 of the Act.

05. As per the OIO Mr. Arsalan A. Siddiqui, Manager Tax from M/s Ernst & Young Ford Rhodes Sidhat Hyder, Chartered Accountants, appeared for hearing on 21-04-2014 instead of 25-04-2014 and submitted that the appellant ^{would} ~~were~~ deposit an amount of Rs. 4m (approx.) in 2 to 3 days. Moreover, the appellant requested for time to reconcile the remaining amount confronted in SCN. The appellant had already deposited an amount of Rs.4,463,738/- vide CPR dated 23-05-2014 for the tax period of March,

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2014. Finally the Assessing Officer passed OIO determining the SST amounting to Rs. 17,085,977/- alongwith default surcharge and penalties of Rs.3,075,476/= under clause 3, 11 and 13 of section 43 of the Act.

06. The appellant has challenged the OIO before Commissioner (Appeals) who vide OIA dismissed the appeal for non-prosecution. Hence, the appellant has challenged the said OIA before this forum.

07. Mr. Fahad Faruqui the learned representative of the appellant submitted that it was stated in the SCN that the appellant deducted SST amounting to Rs.17,085,977/- but had deposited only Rs. 6,609,034/- of the withheld amount of tax. Thus it had withheld but failed to deposit Rs.10,476,943/-. However, the OIO was erroneously passed for the sum of Rs.17,085,977/=.

08. Mr. Fahad Faruqui further submitted that the withholding pertained to two periods i.e. one before registration and another after registration. He mentioned that the appellant was registered on 08.02.2013 with SRB and thus was not liable to withhold for the tax periods April, 2012 to January, 2013. However the appellant was registered for income tax purposes on 06.03.2012 and only those income tax payers could act as withholding agent who, were registered with Large Tax Payer Unit of Income Tax Department. .

09. The appellant filed its own Reconciliation Statement dated 12.11.2019 which showed a balance amounting of Rs.829,305/=. Out of this amount the appellant had deposited Rs.562,082/= leaving the balance of Rs.267,223/=.

10. The AC also furnished a Reconciliation Statement dated 08.01.2010 as under:-

SSTW confronted vide show cause notice:	Rs.17,085,977/-
SSTW paid, by the Appellant:	Rs.15,290,627/-
Less: SSTW not included in the show cause notice but paid by Appellant during tax period Aug, 13, Mar, 14 and Nov, 14:	<u>Rs. 562,085/-</u>

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Balance payable:		Rs.2,357,435/-
Less SSTW paid during pendency of Appeal in Tribunal, SRB	Rs. 829,305/-	
Less SSTW paid by ARY Communication Ltd:	Rs. 783, 915/-	Rs.1,613,220/-

Balance Payable		Rs. 744,215/-
<u>Paid during pendency of appeal before Tribunal</u>		<u>Rs. 562,082/-</u>
Remaining Balance		Rs. 182,133/-

11. Mr. Fahad Faruqi agreed with the above Reconciliation Statement and submitted that the above balance pertained to two parties viz. M/s Turner Broadcasting at Rs.148,533/= and M/s Airwaves (Pvt.) Ltd. at Rs.33,600/-. He submitted that the consultant of the former company had claimed that it had received payment after withholding of SST and obtained adjustment for the month of June and July, 2012. The learned representative of the appellant also submitted that it had paid to its advertising agent full amount without any withholding and the advertising agent paid the amount in lump sum to M/s Turner Broadcasting. However, the department has not provided any evidence of withholding in respect of M/s Airways (Pvt) Ltd.

12. In reply Ms. Nida Noor, AC referred to Email received from the consultant of M/s Brain Child, Advertising Agent and submitted that it was apparent from the e-mail that the withholding was made by the appellant. She also submitted that these figures of withholding were taken from monthly tax returns of July, 2012 of M/s Turner Broadcasting, which was sufficient proof to establish that withholding amount was not deposited with SRB. She also submitted that correspondence had been exchanged with M/s Airwaves Media (Pvt.) Ltd., but this Company was repeatedly seeking time and no positive response was further^{forth} coming. She further submitted that M/s Airwaves Media (Pvt) Ltd. had disclosed this amount in its monthly tax return for the month of June, 2012.

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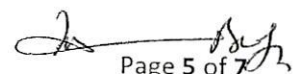
13. We have heard the learned representatives of the parties and perused the record made available before us.

14. The controversy with regard to quantum of payment of tax payable by the appellant was resolved in view of Reconciliation Report dated 08.01.2020 and the balance SST work out at Rs.182,133/-. However the controversy that remained was with regard to withholding of tax for the tax periods before the registration of the appellant with the SRB and FBR. Undisputedly the appellant was enrolled with SRB on 13.02.2013. It was registered with FBR (RTO) for the purpose of Income Tax on 06.03.2012 and for Sales Tax on 18.07.2012. In view of the Withholding Rules, 2011 (which were enforced at that time) only the recipients of services of advertisement, who were registered for the Federal Sales Tax on goods or for Sindh Sales Tax on Services can act as withholding agent. It is established from the documents produced by the appellant that it was registered with FBR for Federal Sales Tax on goods on 18.07.2012 and it was enrolled with SRB on 13.02.2013. Therefore, the appellant was not liable to act as withholding agent for the tax periods from April, 2012 to 17th July, 2012.

15. The appellant in its reconciliation dated 12.11.2019 has claimed an amount of Rs.966,048/= on account of tax pertaining to the period prior to registration, out of which an amount Rs. 562,082/- was paid during pendency of this appeal, leaving balance of Rs. 182,133/-. However, the learned AC has failed to establish that this amount was withheld by the appellant and was thus liable to pay the same to SRB under section 16 of the Act.

16. The AC and Commissioner (Appeals) have failed to establish mensrea on the part of the appellant as far as default surcharge and penalties were concerned. Moreover the appellant has also deposited tax amounting to Rs.1,291,387/= with SRB during the pendency of appeal before this Tribunal which shows the compliant attitude of the appellant. The default surcharge




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and penalties are therefore, waived for want of establishing mensrea relying upon the following reported cases:-

(a) 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".

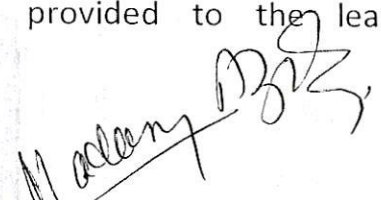
(b) Commissioner of Income Tax versus Habib Bank Limited [(2007) 95 Tax 336 (H.C. Kar.)] a learned DB of Sindh High Court has held that "the penal provisions under the Income Tax Act are quasi criminal in nature and mandatory condition required for the levy of penalty u/s 111 is the existence of mens rea and therefore, it is necessary for the department to establish mens rea before levying penalty u/s 111".

(c) Collector Customs versus Nizam Impex 2014 PTD 498 a learned DB of Sindh High Court has held that "If the party did not act malafidely 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".

17. In view of the above discussions the appeal is partly allowed. The OIO and OIA are setaside to the extent of Rs.182,133/= only. The appellant is not liable to pay default surcharge and penalties.

18. The 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: 31.01.2020

Certified to be True Copy


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

11/02/2020

11/02/2020

Order Dispatched on

Order issued on


Registrar


Registrar

Copy 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.

