

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-1

APPEAL NO. AT-35/2019

Assistant Commissioner, SRB, Karachi.....Appellant

Versus

M/s Logon Broadband (Pvt) Ltd.....Respondent

Mr. Javed Ali, AC-SRB for Appellant

Date of filing of Appeal: 27.03.2019

Date of hearing: 10.04.2019

Date of Order: 15.04.2019

ORDER

Justice ® Nadeem Azhar Siddiqi: This appeal has been filed by the appellant/department challenging the Order-in-Appeal No.32/2019 dated 31.01.2019 passed by the Commissioner (Appeals) in Appeal No. 461/2018 filed by the respondent/taxpayer against the Order-in-Original No. 980/2018 dated 01.12.2018 passed by the Assistant Commissioner (Mr. Vickey Dhingra) SRB, Karachi.



01. The facts as stated in the order-in-original are that the respondent is voluntarily registered with SRB under the category of Bandwidth Services, tariff heading 9812.2000 of the Second Schedule of Sindh Sales

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Tax on Services Act, 2011 (herein after referred to as the Act) subject to levy of Sindh sales tax.

02. The allegations against the respondent in the order in original are that scrutiny of its annual audited financial accounts for the years 2013-14, 2014-15, 2015-16 and 2016-17 revealed that the respondent received consideration of Rs.25,006,705/= involving Sindh sales tax of Rs.4,732,595/=, which amount was not deposited and tax returns were also not e-filed.
03. A show-cause notice dated 29.10.2018 (as mentioned in the title page of (OIO)/ 26.06.2018 (as mentioned in para 4 of OIO) was issued to the respondent to explain as to why Sindh sales tax of Rs.4,732,595/= may not be assessed and recovered along with default surcharge and penalties. (The effect of difference in date of show-cause notice will be considered in the connected appeal filed by the respondent).
04. The respondent filed written reply dated 24.07.2018 and claimed exemption under SRB Notifications No. SRB-3-4/7/2013 dated 18.06.2013 and SRB-3-4/10/2016 dated 28.06.2018 and provided details and breakup of such exemptions and also claimed input tax adjustment of Rs.2,014,818/= and consequently claimed refund of Rs.89,195/=.
05. The Assessing Officer passed order in original determining the tax liability of Rs.4,732,595/= along with default surcharge and imposing penalty of Rs.236,630/= and 420,000/= under serial No. 3 and 2 of Table under section 43 of the Act for non-payment of tax and non-filing of monthly sales tax returns.
06. The respondent has challenged the order in original before Commissioner (Appeals) who conditionally waived the penalty, hence this appeal by the department.
07. Mr. Javed Ali the learned AC submitted that this appeal has been filed against that part of order in appeal by which the learned Commissioner



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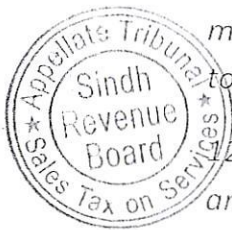
(Appeals) waived the above mentioned penalties imposed by the Assessing Officer. He submitted that penalties were rightly imposed for violation of various provisions of law and rules as mentioned in the order in original. He also submitted that learned Commissioner (Appeals) has erroneously and wrongly exercised his jurisdiction in waiving the penalties without considering that default in payment of tax and non-filing of returns were established on the record. He also submitted that waiver of penalties without any justification will encourage the defaulter tax payers not to pay tax and file tax returns as provided.

08. We have heard the learned AC for the department and perused the record made available before us.

09. The charge against the respondent is that it has not paid the tax amounting to Rs.4,7832,595/= and the Assessing Officer imposed penalty of Rs.236,630/= and 420,000/= under serial No. 3 and 2 of Table under section 43 of the Act for non-payment of tax and non-filing of monthly sales tax returns.

10. The Commissioner (Appeals) in order in appeal has concluded as under:

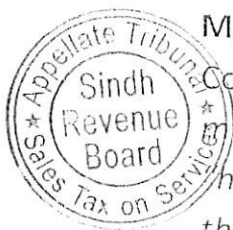
"11. As far as the penalties are concerned it will be seen that factually there existed a Judgment of the Federal Appellate Tribunal and there was also a little clarification in terms of the interpretation taken in the Judgment of the SRB's Appellate Tribunal in the referred matter. Therefore, the element of malafides cannot be established with a reasonable certainty. In view whereof, to the extent of the penalty the matter of the Appellant warranted indulgence.



12. For the given reasons the OIO is upheld to the extent of principle amount of tax and the default surcharge. It is accordingly, also held that the Appellant is liable to pay the tax and to file the sales tax returns accordingly and input tax adjustment shall not be allowed for facing bar of time. However, having paid the amount of tax along-with the default surcharge the Appellant shall not be required to pay the penalties. The appeal is disposed in the above terms. Order accordingly".

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11. From reading the above passage from the order in appeal it appears that the waiver of penalties was conditional subject to payment of tax and filing of returns. The waiver of penalty was based on the earlier orders of the Tribunal which orders unless set aside by the Honorable High Court in the referential jurisdiction is not only binding upon the Commissioner (Appeals) but is also binding upon the Assessing Officer. The waiver of penalty is also in consonance with the various pronouncements of the superior courts which are binding and the waiver of penalty cannot be said to be wrong exercise of jurisdiction.
12. In our earlier orders relying upon the various pronouncements of the superior courts we had held that the Assessing Officer before imposing penalty has to establish mens rea and malafide on the part of the tax payers. The Officials/Assessing Officers malafidely for the purpose of imposing heavy penalties upon the tax payers are ignoring the orders/decisions of the Tribunal, which is not a good practice.
13. Furthermore discretion vests in the Officers of SRB to impose or not to impose penalty. In the reported case of **Malt-79 Manufacturers vs. Collector 1995 PTD 345** Honorable Lahore High Court has held that expression "*shall be liable*" in contradistinction to "*shall pay*" clearly vests discretion in the Adjudicating Officer to levy or not to levy additional sales tax even in the event of failure of a person to pay the sales tax keeping in view the facts and circumstances of the case and reason for non-payment".
14. In the reported case of Assistant Collector Customs, C.E. Karachi versus M/s Mari Gas Company Limited 2003 PTD 818 a learned DB of High Court of Sindh has held that "*The use of phrase 'shall pay' makes it mandatory on the person to pay the amount while the use of the words 'he shall be liable to pay' gives a discretion to the concerned officer of the Excise Department to impose additional tax or waive it totally if, in his opinion, the circumstances so require*". In the Table, Column (2) of Section 43 of the Act the phrase "Such person shall be liable to pay penalty" was used which gives discretion to the officer to impose or not to impose penalty. In our view the Commissioner (Appeals) has rightly



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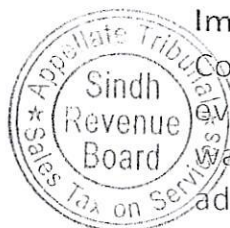
exercised discretion in favour of the respondent. The above judgment of the Sindh High Court is not only binding on the Commissioner (Appeals) but is also binding on the Assessing Officer/Department.

15. To establish ^{the} default the Department must establish that the non-compliance of statutory provisions has been due to some avoidable cause. Mere non-compliance without element of willfulness and malafide cannot entail imposition of heavy 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 that *"Even in the case of a statutory offence the presumption is that mensrea is an essential ingredient unless the statute creating the offence by express terms or by necessary implication rules it out"*. In the reported case of *Commissioner of Income Tax versus Habib Bank Limited 2007 PTD 901* 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 mensrea and therefore, it is necessary for the department to establish mensrea before levying penalty u/s 111"*.

16. The learned AC has submitted that learned Commissioner (Appeals) has erroneously and wrongly exercised his jurisdiction in waiving the penalties without considering that default in payment of tax and non-filing of returns were established on the record. This argument has no force. Apparently the Commissioner (Appeals) has based his findings on the earlier decisions of the Tribunal and superior courts of Pakistan and has not committed any error.

17. Furthermore In the reported case of *Collector Customs versus Nizam Impex, 2014 PTD 498=PTCL 2014 CL 426* 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 or additional tax and surcharge was not justified and the Tribunal has discretion to waive/remit additional tax and penalties.


18. From reading the order in original it is apparent that the learned Assessing Officer has failed to establish mensrea and malafide on the part of the respondent for the purpose of imposing penalties.



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19. Before parting with this order I want to draw the attention of the learned Chairman, Sindh Revenue Board 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....."
20. The above quoted judgments of superior courts in view of Article 189 of the Constitution became binding precedent for all forums in the country (2014 SCMR 1557, **Commissioner Income Tax Versus Habib Bank Limited**). The Board or the learned Chairman, SRB should take notice of filing of appeals by the Departmental Representative having no merits, and this way the department is wasting public time and money. I am sanguine that the Board/Chairman will look into the matter and take necessary steps to avoid repetition of the same.
21. A copy of this order may be provided to the Learned Chairman, SRB for placing the same before the Board for perusal and necessary action in this regard. We are also hopeful that the Learned Chairman will let us know about the progress in the matter.
22. In view of the above discussions we do not find any merits in this appeal, which is accordingly dismissed in limine. The copy of the Order may be provided to the learned representative of the parties.


 (Agha Kafeel Barik)
 Member Technical


 (Justice Nadeem Azhar Siddiqi)
 CHAIRMAN
 Certified to be True Copy

Karachi

Dated: 15.04.2019


 REGISTRAR
 APPELLATE TRIBUNAL
 SINDH REVENUE BOARD

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 Registrar

Copies supplied for compliance:-

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

Copy for information to:-

- 4) The Commissioner (Appeals), SRE Karachi.
- 5) Office copy.
- 6) Guard file.

