

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-I

APPEAL NO. AT-38/2019

M/s Shaheen Foundation (PAF).....Appellant

Versus

Commissioner-III, SRB, Karachi.....Respondent

Date of filing of Appeal: 10.04.2019

Date of hearing: 22.04.2019

Date of Order: 15.05.2019

Mr. Imran Hussain, Advocate for appellant.

Mr. Zaheer Hussain AC-SRB and Mr. Syed Waqas Zaidi AC-SRB for respondent.

ORDER

Justice ® Nadeem Azhar Siddiqi, Chairman: This appeal has been filed by the appellant challenging the Order passed by Commissioner-III on a Revision filed by the appellant rejecting the Revision on the ground that the Revision is incomplete.

01. The Facts of the case are that the appellant is registered with SRB under service category of "Airport Services", Tariff Heading 9826.0000, of the Second Schedule of Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act).

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02. The allegation against the appellant is that it has claimed and adjusted inadmissible input tax amounting to Rs.17,460,762/=. After issuing Show cause notice order-in-original No. 21/2018 was passed against the appellant determining the tax liability of Rs.17,460,762/= along with default surcharge and penalties under Serial No. 3, 6 (d) and 11 of the Table under section 43 of the Act.
03. The appellant challenged the order in original before Commissioner (Appeals), SRB by way of filing of Revision under section 55 of the Act who determined the tax liability of Rs.10,734,538/=. The said order in revision was challenged before the Tribunal by way of filing of Appeal No. AT-42/2018. After hearing the Tribunal remanded the case to the AC to re-examine the admissibility of input tax claimed on vehicles and related expenses with reference to section 15A (1) (g) (i) of the Act.
04. After remand the Assessing Officer after hearing passed fresh order in original determining the tax liability of Rs.7,691,986/= along with default surcharge under section 44 of the Act.
05. The appellant challenged the said order in original by way of filing Revision before the Commissioner-III, who rejected the same for the reason that copy of order in original was not attached with the Revision, hence this appeal by the appellant/taxpayer.
06. Mr. Imran Hussain the learned representative of the appellant submitted that after the remand order from the Tribunal the AC has passed fresh order-in-original and raised demand of Rs.7,691,686/- which amount was paid in compliance of the order in original. He submitted that the AC has also ordered the appellant to pay default surcharge which order is against the earlier order of the Tribunal dated 28.09.2018, which only directed the AC to examine the admissibility of input tax claimed on vehicles and related expenses. This order of AC was challenged before the Commissioner who without notice and without asking the appellant to submit the copy of order-in-original has rejected the revision filed under Section 55 of the Act. He also submitted that from the order it appears that the order was not passed by the Commissioner-III himself but his Staff Officer who is not authorized to do



so. He also submitted that before rejecting the Revision no right of hearing was provided.

07. Mr. Zaheer submitted that the impugned order was not passed under section 55 of the Act, and instead of objection memo the said order-in-original mistakenly issued by the Staff Officer of Commissioner-III with the approval of Commissioner-III. He submitted that other requirements as mentioned in para 3.2 of his Report Dated 22.04.2019 has also not complied with. Mr. Zaheer requested that the appellant may be directed to file proper Revision application along with required documents and the case may be remanded to Commissioner-III for proper hearing and disposal in accordance with law.
08. Mr. Imran Hussain submitted that no requirement of filing documents is provided in Section-55 of the Act or the rules. He then submitted that the remand order of Tribunal does not provide for imposing of default surcharge and the issue was determination of admissibility of input tax adjusted on vehicles and related expenses. He submitted that since the department has failed to establish mensrea the default surcharge cannot be imposed. He also submitted that appellant has not committed willful default and no mala fide on the part of appellant was appearing on record. He relied upon 2004 SCMR 456 (DG Khan Cement).
09. Mr. Zaheer, AC further submitted that the appellant also applied to Board under section 45 of the Act, for waiver of default surcharge which was declined vide Board Agenda dated 04.03.2019 and placed on record the relevant documents.
10. Mr. Imran in reply submitted that the request of National Bank of Pakistan for waiver of default surcharge was allowed vide SRB Notification No. SRB-3-4/TP/32/2015 dated 2nd July, 2015, copy produced, but refused the request of the appellant and the Board has discriminated with the appellant. He then submitted that no purpose will be served in remanding the case to Commissioner-III as after the orders of the Board under section 45 the Commissioner-III will not be able to pass any order under section 55 in violation and breach of the order of the SRB, Board.
11. We have heard the learned representative of the parties and perused the record made available before us.



12. The appellant filed Revision under section 55 of the Act before Commissioner-III, against the order in original No. 73/2019 dated 30.01.2019. The Revision was filed on the Letter Head of the Advocate for Appellant signed by the Advocate. Along with the Revision necessary documents including the order in original were not filed. The Revision was rejected vide dated 20.03.2019 signed by the Staff Officer of Commissioner-III. Mr. Zaheer Hussain, AC filed Report and submitted that the Revision was not properly filed and suffered from various defects mentioned in the Report. On the foot of the Revision the remarks available are "**Application rejected being incomplete**". **Pls put up draft**" (emphasis supplied). The remark was signed on 06.03. From the signature under remark it is not known who has signed the remark as neither the name nor the designation is mentioned. From the remark it is apparent that before rejecting the Revision the appellant was not called upon to remove the defects if any in the Revision. The grounds for rejection of Revision mentioned in the Report and now explained by Mr. Zaheer Hussain, AC appears to be after thought as the same were not mentioned in the rejection letter. Mr. Zaheer, AC referred to section 57 of the Act and submitted that the same provides procedure for filing of appeal and equally applied to filing of Revision. The procedure mentioned in section 57 is for filing of appeal and is not applicable to filing of Revision under section 55 of the Act. The power under section 55 of the Act can be exercised by the Commissioner of his own motion or on an application made in writing by a registered person. The Commissioner for exercising such power is required to call for and examine the record of any proceeding under the Act or rules. Even if the copy of order in original was not filed the same will not make any difference as on calling the record the order in original was also part of the same and can be perused.
13. The manner in which the Revision was rejected without providing opportunity to the appellant to cure the defect if any and without providing right of hearing is highly objectionable and cannot be said to be a speaking order and is not tenable in law.
14. As far as the contention of the appellant that after the Order of the Board under section 45 of the Act the AC was unable to provide relief is concerned, suffice to say that the appellant itself invoked two remedies available to it under law and cannot now complain the same. The

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powers under section 45 and 55 are independent and not depending upon each other and it is expected that the Commissioner-III will exercise his powers in accordance with law without influencing with the order of the Board.

15. As far as the contention of the appellant that the Board has discriminated with the appellant in not waiving the default surcharge as done in the case of National Bank of Pakistan. Full facts of both the cases are not before us and we cannot comment on the same. However from both the decisions it appears that the same are without reasons. In the reported judgment in the case of Pakistan versus Hazrat Hussain, 2018 SCMR 939, Para 32 the Supreme Court It has been held that "32.....It does not require any argument to establish that the policies in relation to grant of exemptions should be applied on a uniform and non-discriminatory basis. While it is perfectly true that the power of granting exemptions is discretionary, it is equally true that the said power cannot be exercised in a discriminatory manner. Exemptions are to be granted and regulated in terms of consistent policies for sound reasons. There is no justification for granting or refusing exemptions arbitrarily or on the ipse dixit of the concerned officials. The power to grant an exemption or to decline to grant an exemption, must be exercised in accordance with the general principles relating to good governance"..... In the same judgment a passage has been quoted from the reported judgment in the case of Amanullah Khan versus Federal Government of Pakistan in which it was held that "The seven instruments that are most useful in the structuring of discretionary power are open plans, open policy statements, open rules, open findings, open reasons, open precedents and fair informal procedure.....". In the same judgment a passage has been quoted from the reported judgment in the case of Abid Hussain versus PHC, 2005 SCMR 25 or 35 to the effect that "The judicial consensus seems to be that the functionaries of any organization or establishment cannot be allowed to exercise discretion at their whims, sweet-will or in an arbitrary manner; rather they are bound to act fairly, evenly, and justly". This is the guide line provided by the Supreme Court of Pakistan for exercise of discretionary power.


16. In view of the above discussions the appeal is allowed. The so called rejection letter dated 20.03.2019 is set aside. The Revision filed by the appellant is deemed to be pending before the Commissioner-III, who will decide the same on merit after providing proper right of hearing to the parties. The appellant is also required to file the Revision application in proper manner along with relevant and necessary documents.

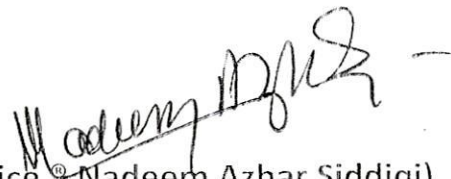
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17. Before parting with this order it appears necessary to comment on the manner the decision was taken on the Revision filed by the appellant before the Commissioner-III, SRB (we are not commenting on the merits of the Revision for the reason that the said Revision is pending before the Commissioner-III). Firstly from the decision it appears that the same was taken without notice and without providing any right of hearing to the appellant or its representative in violation of principle of natural justice and "*audi alteram partem* (no one can be condemned unheard). This principle applies to judicial, quasi-judicial and administrative bodies (PLD 1997 Karachi 1). The right of hearing has to be read in every statute even if the said statute does not provide for right of hearing (PLD 1981 Karachi 311). Secondly the decision was communicated to the appellant in the form of a letter signed by Mr. Zuhaib Hussain, Staff Officer of Commissioner-SRB and not in the form of an order. After insertion of Article 10A in the Constitution a person shall be entitled to a fair trial and due process of law. Due process of law includes the right to be treated according to law and right of hearing is also the part of due process of law.
18. In another Appeal No.109/2018 (AC versus Wateen) decided by the Tribunal on 11.12.2018 an application for revision of returns filed by tax payer was dismissed without hearing. The copy of the order was sent to the learned Chairman, SRB for necessary action, but no information regarding any action was intimated to the Tribunal.
19. The powers vested in the Commissioner-SRB under section 55 are in the nature of quasi-judicial and has to be exercised judicially and not arbitrarily. It appears to us that the officers who are vested with quasi-judicial powers are not aware about the basic principles of law and they need proper training and guidance with regard to exercise of quasi-judicial powers before entrustment of such power.
20. A copy of this order may be provided to the Learned Chairman, SRB for placing the same before the Board for its perusal and necessary action in this regard. We are also sanguine that the Learned Chairman will let us know about the progress in the matter.



21. The appeal is disposed of in terms of para 16 above. The copy of this order may be provided to the learned Representatives of the Parties as well as to the learned Chairman, SRB.


(Agha Kafeel Barik)
TECHNICAL MEMBER


(Justice Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi

Dated: 16.05.2019

Copies supplied for compliance:-

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

Copy for information to:-

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