

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT
KARACHI

DB-I

APPEAL NO. AT- 42 /2019

Assistant Commissioner, SRB, KarachiAppellant

Versus

D-Tech Waste Solution.....Respondent

Date of filing of Appeal: 22.04.2019.

Date of hearing: 13.11.2019.

Date of Order: 11.12.2019

Mr. Kaleemullah, AC-DR, SRB for Appellant.

Mr. Aga Faquir Mohammad, Advocate for Respondent.

ORDER

Justice (R) Nadeem Azhar Siddiqi. This appeal has been filed by the appellant/department challenging the Order in Appeal (hereinafter referred to as OIA) No.49/2019 dated 25.02.2019 passed by the Commissioner (Appeals-II) in Appeal No. 327/2018 filed by the respondent/taxpayer against the Order in Original ((hereinafter referred to as OIO) No. 705/2018 dated 29.06.2018 passed by the Assistant Commissioner (Mr. Irfan Ahmad Sohu), SRB, Karachi.

02. The facts of the case as mentioned in the OIO are that the respondent is registered with SRB under the Tariff Heading 9822.2000 (Maintenance or Cleaning Services) of the Second Schedule to the Sindh Sales Tax on Service Act, 2011 (herein after referred as the Act) chargeable to Sindh Sales Tax (SST) on Services at reduced rate of 10%. The SRB issued advisory note dated 01.06.2018 to the respondent for voluntarily

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payment and deposit of Sindh Sales Tax (SST) but the respondent failed to comply.

03. It was alleged in OIO that the respondent had provided taxable service of Janitorial/Maintenance or Cleaning amounting to Rs.29,079,450/= to M/s Sindh Solid Waste Management Board (hereinafter referred to as SSWMB) during tax period April-2018, involving SST of Rs.2,907,245/= out of which an amount of Rs.581,589/= was withheld by SSWMB and deposited with SRB as Withholding Agent.

04. That a show-cause notice (SCN) dated 13.06.2018 was served upon the respondent to explain as to why SST amounting to Rs.2,326,336/= may not be assessed under section 23 of the Act and recovered from it. Moreover default surcharge under section 44 of the Act and penalties under serial No. 3, 6 (d), 8 and 12 of the Table of Section 43 of the Act, may not be imposed.

05. It was stated in the OIO that the case was fixed on 20.06.2018 but no one appeared for respondent and next date of hearing was fixed on 23.06.2018. However Mr. Jamshaid appeared for respondent on 21.06.2018 and requested for ten days time and the extension was allowed for 26.06.2018. On due date the respondent did not appear nor any intimation was received thus the Assessing Officer passed exparte OIO invoking Tariff Heading 9822.2000 (maintenance or cleaning services) and 9822.3000 (Janitorial Service) determining the SST of Rs.2,326,356/= along with default surcharge and penalty of Rs.116,317/= under Table No.3, penalty of Rs.2,326,356/= under Table No. 6(d) and penalty of Rs.116,317/= under Table No.8 of Section 43 of the Act.

06. The respondent challenged the said order of the Assessing Officer by way of filing time barred appeal before the Commissioner (Appeals), who while dismissing the appeal as time barred also waived the penalties imposed by the Assessing Officer, hence this appeal by the

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department/appellant. The respondent also filed separate appeal No. AT-44/2019 challenging dismissal of appeal being time barred.

07. Mr. Kaleemullah learned AC-DR for appellant submitted that the respondent was voluntarily registered with SRB under Tariff Heading 9822.2000, (maintenance and cleaning services) of the Second Schedule to the Act and started paying tax. However, after issuance of SCN dated 13.06.2018, it had deposited a sum of Rs.2,310,000/=. The penalties under clause 6(d) and 8 of Section 43 of the Act were rightly imposed by the Officer, SRB and wrongly waived by Commissioner (Appeals), SRB.

08. The AC-DR further submitted that he would rely upon the grounds of appeal and contended that the Commissioner (Appeals) without condoning, the delay in filing of appeal cannot decide the appeal on merits nor he could waive the penalties or provide any relief to the respondent. Thus the OIA was to that extent was illegal and liable to be set aside.

09. Mr. Aga Faquir Muhammad the learned Advocate for respondent submitted that the Assessing Officer imposed two penalties under clause 6 (d) and 8 of section 43 for two different situations and the Commissioner (Appeals) has rightly waived such penalties. It was further submitted that the penalties were imposed without considering the language of the provision and without establishing the element of knowingly and fraudulently. The Department also failed to establish mens rea and malafides on the part of the respondent. He also submitted that no limitation is available for challenging an illegal order.

10. The appellant has taken the following grounds in its appeal.

- (i) *The appeal of the Respondent No. 1 against the OIO No. 705/2018 dated 29th June, 2018 has been dismissed at the Honorable Commissioner Appeal Forum due to time bar. Once the appeal has been dismissed, how can any decision be given on the waiver of penalties.*

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(ii) *The Honorable Commissioner Appeals-II has alleged that the penalties of under serial No. 6(d) and serial 8 of section 43 of the Act cannot be invoked simultaneously, although the SST Act, 2011 does not stop the officer from imposing penalties simultaneously”.*

11. The appellant also filed Brief Facts of the Case and Written Synopsis stating there in that the Commissioner (Appeals-II) in para 11 of OIA declared that the appeal filed by the respondent was time barred and was liable to be dismissed and in para 12 of the same OIA held that the respondent cannot be penalized twice for committing the same offence of non-payment of SST.

12. The respondent filed Reply to the Synopsis filed by the appellant. It was contended that penalty under clause No. 3 of section 43 of the Act can be imposed subject to establishing *mens rea* as held in Pakistan versus Hard Castle Waud, PLD, 1967 Supreme Court 1 and Commissioner Inland Revenue versus Habib Bank Limited, 2007 PTD 901 (Sindh High Court). Penalty under clause 6(d) of section 43 can be imposed if the department through convincing evidence establishes *mensrea* and that the person knowingly and fraudulently Committed acts and omission mentioned in the provision. Penalty under clause 8 of section 43 of the Act can be imposed where any person commits, causes to commit or attempts to commit tax fraud, or abets or connives in the commission of tax fraud of Rs.25,000/= or more and department through convincing evidence establishes that the same has been done knowingly, dishonestly or fraudulently and without any lawful excuse as held in the case of Al-Hilal Motors Stores versus Collector Sales Tax and Central Excise, PTD 2004 868 (DB, Sindh High Court). From the perusal of the OIO it appears that the Assessing Officer while imposing penalty has totally failed to discuss the presence of mensrea (reliance was placed on Order passed by this Tribunal, in Appeal No. 75/2018, M/s Al-Khalid Agencies for Waste Management versus Assistant Commissioner, SRB).

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



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13. The only contention of the appellant was that when the Commissioner (Appeals-II) declined to condone the delay in filing of appeal by the respondent he could not touch upon the merits of the appeal, nor he could waive/delete the penalties imposed by the Assessing Officer.

14. Admittedly the respondent has filed a time barred appeal and had also failed to show sufficient cause to the satisfaction of Commissioner (Appeals) for condonation of delay. Sub-section (5) of section 57 of the Act provides that the Commissioner (Appeals) may, upon application in writing by the appellant, admit an appeal after the expiration of the period specified in sub-section (4) of section 57 of the Act if he is satisfied that the appellant was prevented by sufficient cause from lodging the appeal within that period. The Commissioner (Appeals) at the end of para 11 of his OIA has held as under:-

"The details are lacking and mere statement that the delay was caused due to some personal reasons/ incident, without mentioning the dates when the incident occurred, was not sufficient to condone the delay, therefore, the present appeal being clearly time barred is liable to be dismissed".

15. In the connecting appeal No. 44/2019 filed by the respondent/taxpayer against the same OIA impugned in this appeal we have upheld the above findings of the Commissioner (Appeals) vide our order dated 06.12.2019, but condoned the delay in filing of appeal by the respondent on the consideration that the Assessment Order was without jurisdiction and void and no limitation runs against such void order and allowed the appeal filed by the respondent taxpayer on the consideration that the lifting of garbage and its transportation was not a listed service and was thus not covered by Tariff Heading 9822.2000 (Maintenance or Cleaning Services) of the Second Schedule to the Act.

16. The contention of the appellant has force that since the Commissioner (Appeals-II) had declined to condone the delay in filing of appeal by the respondent he could not touch upon the merits of the appeal and could

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not waive/delete the penalties imposed by the Assessing Officer. The Commissioner (Appeals) could only admit the appeal for hearing on showing sufficient cause. Once the Commissioner (Appeals) has decided not to condone the delay he is not vested with the power to decide the merits of the appeal. Although the findings recorded by Commissioner (Appeals) while waiving/deleting the penalties were correct, but such relief could only be allowed to the respondent after condoning the delay in filing of appeal.

17. It is pertinent to mention that in the connecting appeal we have condoned the delay in filing of appeal and held that the activity of lifting of garbage and its transportation was not a listed taxable service for the relevant tax periods. This point has been ignored by the Commissioner (Appeals). In view of above findings the appellant was not liable to pay any tax. In our earlier order dated 06.09.2019 passed in Appeal No. AT-44/2019 (D. Tech Waste Solution versus SRB) we have held as under.

"It is evident from section 3 read with section 8 of the Act that only those services can be taxed which are part of Second Schedule to the Act. Admittedly the activity of lifting and transportation of garbage is not listed in the Second Schedule to the Act for the relevant tax period i.e. April, 2018. This amendment was inserted in the Second Schedule to the Act effective from July, 2019 vide Tariff Heading 9852.0000 (waste collection, transportation, processing and management services). Assessment Order levying tax on a service not part of Second Schedule to the Act is without jurisdiction and the same is illegal and cannot be maintained or sustained in law".



18. The penalties were imposed without considering that the respondent after receiving the SCN had started depositing the tax and appellant/department had failed to establish mens rea and malafides on the part of the respondent. We have held in various cases after relying upon the reported judgments of the Superior Courts that the penalties cannot be imposed unless the department had established mens rea and malafides on the part of the tax payer. The Assessing Officer imposed penalty under clause 6 (d) of section 43 of the Act without discussing and establishing the element of "knowingly and fraudulently", which

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was a necessary ingredient for imposing penalty under clause 6 (d) of section 43 of the Act.


19. It is therefore clear from the contents of clause 6 (d) of section 43 of the Act that such provisions could only be invoked if the offences mentioned in the provision have been committed "knowingly or fraudulently" and not otherwise. The Assessing Officer has nowhere discussed in the OIO the presence of element of "knowingly or fraudulently" nor has discussed the definition of the "tax fraud" as defined in clause (94) of section 2 of the Act. The penalty could only be imposed if it was established that the act or omissions of the respondent were in flagrant violation of law and there appeared a fraudulent intent on part of the respondent. The imposition of penalties under clause 6 (d) of section of the Act without establishing mens rea and malafides on the part of the tax payer is illegal and cannot be sustained. Liability to pay penalty is not a necessary consequence or corollary of every non-payment of tax within stipulated period but is subject to prove that the non-payment of tax was knowingly or fraudulently committed with the malafide intention. Furthermore the penalty could only be imposed when the department establishes a case indicating dishonest motives of a tax payer. In this case the department has totally failed to establish the necessary ingredients of imposing penalties under the above two provisions.



20. The Commissioner (Appeals) had rightly waived/deleted the penalties, but in a time barred appeal without condoning the delay in filing of appeal the Commissioner (Appeals) could not touch upon the merits of the case. However since, in the connecting Appeal No. At-44/2019 filed by the respondent against the OIO the delay in filing of appeal was condoned by us and we have held that the lifting of garbage and its transportation was not a listed service for the relevant tax period the OIO levying SST on such unlisted service and imposing penalty cannot be maintained.

21. Moreover since the appellant/department has failed to establish the imposition of penalties thus we have set aside the OIO being without jurisdiction hence no relief is allowed to the appellant/department.

22. In view of the above discussions the appeal is dismissed. The copy of this order may be provided to the learned representative of the parties.


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER


(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi

Dated: 11.12.2019

Certified to be True Copy

Copy for compliance:

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


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Copy for information to:-

3. The Commissioner (Appeals), SRB, Karachi
4. Office Copy.
5. Guard File.

Order issued on

18/12/19

Registrar

Order Dispatched on

18/12/19

Registrar