

Guard file

**BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD AT
KARACHI**

DB-I

APPEAL NO. AT-51/2019

APPEAL NO. AT-216/2019

●/s Chen One Stores Ltd.....Appellant

Versus

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

Date of filing of appeals: 06.05.2019 & 19.03.2019

Date of hearing: 22.09.2020

Date of Order 22.09.2020

●
Mr. Sardar Faisal Advocate, for appellant along with Mr. Jehanzaib Bhatti,
Deputy General Manager, Retail for appellant.

M/s. Nida Noor, Ac and Ms. Uzma Ghory AC- DR for SRB.



ORDER

Justice[®] Nadeem Azhar Siddiqi: The appeal No. 51/2019 was filed by the appellant/tax payer challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.24/2019 dated 24.01.2019 passed by the Commissioner (Appeals)

in Appeal NO. 91/2016 filed by the appellant against the Order in Original (hereinafter referred to as the OIO) No. 110/2016 dated 22.02.2016 passed by the Deputy Commissioner (Mr. Rahil Anwar Soomro) SRB, Karachi. The same order was challenged by the department/SRB by filing appeal No. 26/2019.

02. The facts as stated in the OIO are that from the scrutiny of record of the appellant available with SRB for the period from March, 2012 to October, 2015 has revealed that it had acquired taxable services of Advertisement Tariff Heading 98.02 and the sub-headings thereof), Advertising Agent (Tariff Heading 9805.7000), Maintenance and Cleaning (Tariff Heading 9822.2000), Contractual Execution of work and furnishing supplies (Tariff Heading 9809.0000) and Custom Agents (Tariff Heading 9827.1000) etc. which were chargeable to Sindh Sales Tax (SST).

03. It was alleged that from perusal of payment schedule of appellant with SRB for the tax period from March, 2012 to October, 2015 revealed that it had withheld SST amounting to Rs.9,733,069/= but has failed to deposit the same with SRB.

04. The Assessing Officer (AO) after serving SCN dated 01.12.2015 and after hearing the appellant passed OIO directing the appellant to deposit the principal withheld amount of Rs.9,733,060/- alongwith levy of default surcharge and penalties.

04. The said OIO was challenged by the appellant before the Commissioner (Appeals) by way of filing of appeal, who partly confirmed the OIO, hence this appeal.

05. The Department/ Respondent also filed separate appeal challenging the OIA by which the AC was directed to apply to FBR for transfer of amount and waiver of penalty under serial No. 5 (d) of Table under section 43 of the Act.

06. Since both the appeals are interconnected the same are disposed of by this common order.

M. J.S.

[Signature]

07. During pendency of appeal before this Tribunal Sardar Faisal Zafar, Advocate for appellant filed a Statement along with photocopy of police report and submitted that due to the fire in the head office of the appellant at Lahore all the record was burned and the appellant was unable to produce the record.

08. Sardar Faisal Zafar Advocate filed another Statement stating therein that the appellant had agreed to pay a sum of Rs.6,435,063/- to the SRB as full and financial discharge of its liabilities under OIO No. 110/2016 dated 22nd February, 2016 in six equal monthly installments of Rs.1,090,510/- each. He submitted that out of the amount of Rs.9,733,069/= determined in OIO the appellant had deposited a sum of Rs. 2,909,648/= with FBR and an amount of Rs.412,366/= was not withheld by the appellant and the allegation leveled in the SCN in this regard was false.

09. Sardar Faisal also requested to waive the default surcharge and penalties as according to him the same were imposed without establishing mensrea and relied upon the reported judgments on the subject.

10. Ms. Nida Noor AC, SRB submitted that the SRB has no objection for payment of Rs.6,543,063/= in six monthly installments of Rs. 1,090,510/= each but requested that appellant may be directed to deposit Rs.412,366/= which was withheld by the appellant according to the record available with SRB. Moreover, the three service recipients of the appellant have confirmed that the said amount was withheld by appellant. She further submitted that the appellant may be directed to approach the FBR for transfer of tax amounting to Rs.2,909,648/- from FBR to SRB. She however pointed out that in the OIA the amount deposited with FBR was incorrectly mentioned as Rs.2,943,164/-.

11. Since the appellant has accepted the liability of payment of Rs.6,543,063/= in six monthly installments of Rs.1,090,510/= each its request for payment in installments is allowed on the following condition:-

- (i) The appellant will deposit the 1st installment of Rs.1,090,510/= on or before 10th October, 2020 without fail and continue to deposit monthly installments on or before 10th of each English calendar month till 10th March, 2021.

(ii) In case the appellant failed to deposit two consecutive monthly installments the whole balance amount will become due and payable at once and the SRB may initiate recovery proceedings under section 66 of the Act.

(iii) In case of default of two consecutive monthly installments the appellant will also be liable to pay default surcharge on the full amount from the date SST became due and payable, which was to be calculated by the concerned AC.

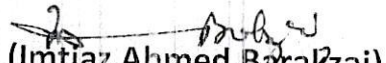
12. We have noticed that the penalties were imposed without establishing mensrea on the part of the appellant. The penalty can be imposed under Serial No. 6(d) of Section 43 of the Act if the offence was committed knowingly or fraudulently, subject to presence of mensrea. Word "knowingly" means with knowledge which, signifies knowledge of facts on which the non-payment of tax take place. The word "fraudulently" means an intention to deceive or defraud, which signifies that a person does an act with intention to defraud. From the contents of section 43 of the Act as mentioned in Table 6(d) it is clear that such provisions could only be invoked if the offences mentioned in the provision had been committed knowingly or fraudulently and not otherwise and department has to prove the same. The learned Commissioner (Appeals) has rightly waived the penalty imposed by AO under serial No. 6 (d) of the table under section 43 of the Act. Moreover in view of the gesture of the appellant to voluntarily deposit the SST and the view of the reported cases on the subject the penalty and default surcharge imposed through OIA are waived subject to condition No. (iii) of Para 11 above.

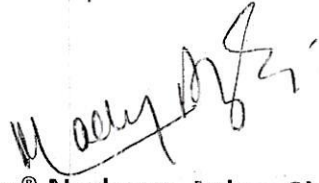
13. As far as Rs.412,366/- is concerned since the record was burned and it is not possible to verify the same it appears appropriate to refer the matter to the Sindh Revenue Board to consider waiver of the amount under section 66(2) of the Act.

14. The appellant is directed to file proper application within fifteen days from the date of receipt of this order with the FBR for transfer of an amount of Rs. Rs.2,909,648/= to SRB and to properly and adequately pursue the said

application for transfer of amount. In case the amount is not transferred to SRB within next six months the SRB may take up the matter with FBR for adjustment of amount.

15. The appeals are disposed of in the above terms. The copy of the order may be provided to the learned representative of the parties.


(Imtiaz Ahmed Barakzai)
Technical Member


(Justice® Nadeem Azhar Siddiqi)
Chairman

Karachi
Dated: 22.09.2020

Certified to be True Copy


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

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.

Order issued on

24/09/2020

Registrar

Order Dispatched on

24/09/2020

Registrar