

(Guard file)

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD
KARACHI

SB-I

APPEAL NO. AT-68/2019

Assistant Commissioner (Unit-14)
SRB, Karachi.....Appellant

Versus

M/s Burq Engineering Services.....Respondent

Date of Filing of Appeal: 23.08.2019
Date of hearing: 26.09.2019
Date of Order 21.10.2019

Mr. Kaleemullah, AC-DR and Mr. Naeemullah Bhutto, AC for appellant.

None present for the respondent for hearing, though on 16.09.2019 Mr. Asif Khaliq, Advocate appeared and undertook to file his Vakalatnama on behalf of respondent.

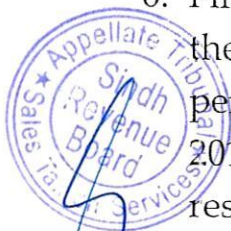
ORDER

Justice ® Nadeem Azhar Siddiqi: This appeal has been filed by the appellant (department) challenging the Order in Appeal No.119/2019 dated 27.06.2019 passed by the Commissioner (Appeals-I) in Appeal No. 78/2019 filed by the respondent against the Order-in-Original No. 242/2019 dated 29.03.2019 passed by the Assistant Commissioner (Ms. Rafia Urooj), SRB, Karachi.



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1. In short the facts of the case as mentioned in the order in original are that the Appellant is registered with SRB and engaged in providing Labour and Man Power Supply Service (Tariff heading No. 9829.0000) of the Second Schedule of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to the Act of 2011).
2. It was alleged in the order-in-original that during the scrutiny of tax profile of the respondent it was revealed that the respondent has failed to make payment of sales tax and e-file Sindh sales tax returns for the tax periods April, 2018 to November, 2018.
3. A show-cause notice dated 14.01.2019 was sent to the respondent to explain as to why penalties under serial No.2 and 3 of the Table under section 43 of the Act should not be imposed.
4. The appellant has submitted Reply through e-mail dated 08.02.2019 and submitted that due to financial constraint sales tax could not be paid from June, 2018 till December, 2018. The respondent also stated that outstanding amount will be paid in instalments of Rs.200,000/= each till outstanding amount is cleared.
5. It was stated in the order-in-original that no one appeared for respondent for hearing. It was also stated that after issuance of show-cause notice the respondent deposited Rs.400,000/= in instalment of Rs.200,000/= each.
6. Finally the Assessing Officer passed assessment order directing the respondent to discharge Sindh sales tax liability for the tax periods from April, 2018 to May, 2018 and July, 2018 to September, 2018 and November, 2018 along with default surcharge. The respondent was also directed to e-file monthly sales tax returns for the tax periods April, 2018 to September, 2018 and November, 2018. The Assessing Officer also imposed penalty of Rs.517,492/= under clause No. 2 (non-filing of returns) of section 43 of the Act



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and penalty of Rs.492,860/= under clause No.3 (non-payment of tax) of section 43 of the Act. The Assessing Officer also directed the respondent to pay default surcharge of Rs.21,604/= under section 44 of the Act for the tax period June, 2018.

7. The respondent challenged the order-in-original by way of filing appeal before Commissioner (Appeals-I), SRB, who allowed the appeal by invoking Amnesty Notification dated 18.05.2019 (hereinafter referred to as Amnesty) and discharged the respondent from the payment of penalties imposed by the Assessing Officer. The department dissatisfied with the order-in-appeal has now filed this appeal.

8. The learned AC submitted that this case pertains to non-payment of tax and non-filing of monthly tax returns. He then submitted that the respondent got voluntarily registration on 01.11.2016 for service category of Labor and Manpower supply, tariff heading 9829.0000 which category was brought to tax net effective from 1st July, 2013 chargeable to Sindh Sales Tax on Services @ 15%. He then submitted that despite registration the respondent has not filed Sindh Sales Tax returns from the month of November 2016 and filed first tax return for the month of December 2016 on 24.01.2017 (late filed). He then submitted that appellant has never filed the tax returns as provided by law and the Assessing Officer has rightly imposed penalty under clause 2 and 3 of section 43 of the Act.

9. The learned AC also submitted that at the assessment stage the Assessing Officer has not determined/assessed the actual tax amount and has only imposed penalty for non-payment of principal amount of tax. He then submitted that at the relevant time when Amnesty was introduced the respondent was in arrears of tax amount and without proper determination and depositing of such amount of tax and default surcharge as provided in the Amnesty the respondent cannot avail the benefits of Amnesty and



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the Commissioner (Appeals-I) has erroneously invoke Amnesty in favour of the respondent and discharge the respondent from the payment of tax and other liabilities. He further submitted that the respondent cannot avail the benefit of Amnesty unless all the tax returns are filed. He further submitted that the Commissioner (Appeals-I) fell in error in reducing the penalty to the extent of Rs.10,000/= per tax return as the offence of non-filing of returns is a recurring offence.

10. The learned AC further submitted that after the issuance of show-cause notice and before passing of the order in original the respondent deposited a sum of Rs.400,000/= in February, 2019 and further deposited a sum of Rs.200,000/= on 24.05.2019 and after passing of the order-in-original deposited Rs.53,759/= on 27.05.2019. It was also stated that the Commissioner (Appeals-I) like the Assessing Officer has failed to determine the sales tax amount before invoking the Amnesty. It was also stated that during pendency of appeal before Commissioner (Appeals-I) the respondent filed tax returns for the tax periods April 2018, May 2018 on 20.05.2019 and October, 2018 on 29.01.2019 (late filed). He also submitted that the respondent has failed to fulfil the requirement of Amnesty scheme dated 18.05.2019, which provides that the principal amount of tax and default surcharge thereon are to be deposited in the prescribed manner.

11. The learned AC then submitted that since the tax for the tax periods April 2018 to November 2018 was not properly assessed/determined and paid the department reserved its right to issue proper show cause notice to the respondent in this regard.

12. On 16.09.2019 Mr. Asif Khaliq, advocate appeared for respondent and under took to file Vakalatnama on behalf of the respondent. However on subsequent dates i.e. 24.09.2019 and 26.09.2019 he failed to appear and argue the appeal. The order was reserved on 26.09.2019 and the right was given to the learned advocate for the



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respondent to argue the appeal in the meanwhile, but till this date none appeared for the respondent to argue the appeal.

I have heard the learned representative of the appellant and perused the record made available before me.

13. The Show cause notice was issued for non-payment of tax and non-filing of monthly tax returns. The arrear of tax amount was not confronted to the respondent either in the show-cause notice or in the order in original.

14. The Commissioner (Appeals-I) has discharged the respondent from payment of tax on the following consideration:-

"3. The appellant submitted before me that it has availed amnesty announced under Notification No.SRB-3-4/8/2019 dated 18th May, 2019, and has accordingly made payments of default surcharge as well as the penalty. The Respondent pursued such CFR's of payment and the record and filed a working paper (on file). At the outset the Respondent admitted that the Amnesty applies. After such submission the Respondent came up with an objection that the penalties of Offence No.2 & 3 were recurring till filling up returns / payments and are re-calculable. The Appellant's advocate rebutted to the position and submitted that the payments made are far above if the penalties are calculated in term of findings of the Honorable Tribunal where the penalties in such types of the cases were reduced to Rs.10,000/- per return. The Respondent admitted such position that on such basis the penalties paid are at on higher side.

4. The Respondent has conceded the Application of the amnesty at one hand and on the other hand objected on the question of penalty for being recurring. In this regards, while deciding the issue of the penalties of Offence No.2 and 3 the Honorable Tribunal has several times reduced the penalties to Rs.10,000/- per return in plethora of the Judgments. There were (08) eight tax periods involved in this Appeal and both, for the penalty of the Offence No.2 and 3 the penalty accordingly calculated to the tune of Rs:160,000/- (80,000*2 i.e.Rs:10,000*87 in each penal case). The Appellant has made a payment of Rs:50,517/- at 5% of the total penalty on 27.05.2019 and also paid Rs.3,240/- as default surcharge at 15%. Whereas, the payments based on the Honorable



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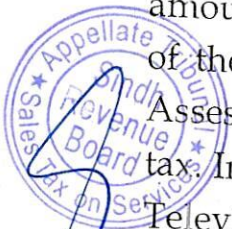
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Tribunal's finding would have been Rs:16,000/- (@10% of 160,000). And as per such findings the payment is over and above and the same is required be accepted as the full and final payment as per the amnesty. The Notification at Clause 3 says that "the benefit of this notification to the extent specified below, shall also be available in the cases where a person has later paid the principal amount of tax prior to the date of this notification and / or has not yet discharged the liability of penalty (.....) and default surcharge on such late payment, provided that he pays an amount equal to :- (a) 5% of penalty and 15% of such amount of default surcharge (as outstanding on 21st May-2019 upto 3rd June-2019)". The Appellant has paid the amount on 27.05.2019; therefore the same comes within such bracket. In terms of such clear language of the Notification the amnesty has to apply. And the amount so paid is required to be accepted as the payment under the amnesty.

5. In view of the above reasons the amnesty applies and the Appellant is hereby discharged from remaining liability created under the OIO, order accordingly".

14. From the perusal of record it appears that the respondent got voluntary registration on 01.11.2016 and was irregular in payment of tax and filing of monthly sales tax returns. The show-cause notice dated 14.01.2019 was issued to the respondent for non-filing of monthly tax returns for the tax periods April, 2018 to November, 2018 and for non-payment of tax. In the show-cause notice the respondent was not confronted with the tax amount and no sales tax was assessed in the order in original and without assessing and determining the tax amount the penalty under clause 3 (non-payment of tax) of section 43 has been imposed. The penalty under clause 3 of section 43 can only be imposed if the amount of tax has been determined and assessed under section 23 of the Act. From the order in original it is very much clear that Assessing Officer has not determined and assessed the amount of tax. In the reported judgment of Sindh Revenue Board versus M/s Television Media Network (Pvt) Ltd., (2017 PTD 1225) it has been held as under:-

"6. We may observe that, in the absence of determination of any sales tax liability through Assessment under Section 23 of the Sindh Sales Tax on Services Act, 2011, which may become due towards taxable services, such



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penalty in terms of Table 3 of Section 43 cannot be imposed. We do not find any error in the impugned order passed by the Appellate Tribunal, Sindh Revenue Board to this effect as it depicts correct legal position nor the learned counsel for the applicant could controvert the above legal position. Accordingly, we are of the opinion that instant, reference filed by the applicant department under Section 63 of Sindh Tax on Services Act, 2011 is misconceived which is dismissed in limine, whereas, the amended question as proposed hereinabove answered in affirmative against the applicant department".

In view of the above discussion, in the absence of determination of sales tax liability through assessment under Section 23 of the Sindh Sales Tax on Services Act, 2011, penalty in terms of clause 3 of Section 43 cannot be imposed.

15. That as far the argument of the learned AC that the respondent has failed to fulfil the requirement of Amnesty, which provides that "the principal amount of tax and default surcharge thereon are deposited in the prescribed manner" is concerned the same has force. The Amnesty was available to those tax payers, who pay principal amount of tax and default surcharge as provided in the Amnesty. In this matter neither the Assessing Officer nor the Commissioner (Appeals-I) assessed and determined the principal amount of tax. The respondent has also not determined the arrears of tax through self-detection and self-assessment as provided in sub-clause (v) of clause 2 of the Amnesty. The conditions of the Amnesty are to be strictly construed in favour of the taxing power and against the taxpayer and Amnesty/exemption can only be allowed if the tax payer fulfilled all the conditions laid down in the Amnesty Notification. In the reported judgment of Supreme Court of Pakistan in the case of Commissioner of Income Tax/Wealth Tax, Companies Zone Peshawar versus M/s River Side Chemicals (Pvt), Limited, Gadoon it has been held that:-

"7. There is no cavil to the proposition that the grant of concession in the nature of exemption from payment of duties must be given strict interpretation and the person getting such benefit must satisfy all



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conditions for such exemption but once the required conditions are complied with, the exemption available to a person under the law cannot be taken away by the concerned authorities in their discretion.

8. We having considered the matter in the light of relevant provisions and the questions raised before the Tribunal as well the High Court, have not been able to find out any justification for interference in the impugned judgments and consequently, for the reasons given above, find that the High Court has not committed any illegality or irregularity in answering the questions raised before in in the impugned judgment, therefore, these petitions being without any substance are accordingly dismissed".

The Commissioner (Appeals-I) wrongly allowed the benefit of Amnesty to the respondent without first assessing and determining the amount of tax and default surcharge and its deposits as provided in the amnesty.

16. As far as the argument of the learned AC that the respondent cannot avail the benefit of Amnesty unless all the tax returns are filed is concerned, I have carefully gone through the Amnesty, but no such condition is available in the Amnesty.

17. As far as the argument of the learned AC that the Commissioner (Appeals-I) fell in error in reducing the penalty to the extent of Rs.10,000/= per tax return as the same is recurring offence is concerned, the penalty was reduced keeping in view the various orders of this Tribunal and while relying upon the orders which were not set aside by the Honorable High Court in the referential Jurisdiction and are holding field the Commissioner (Appeals-I) has not committed any error.

18. In view of the above discussion it is held that the Amnesty was not available to the respondent for the reason that neither the principal amount of tax has been determined and assessed nor the same was deposited in terms of Amnesty.

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19. The appeal is allowed and the case is remanded to the Commissioner (Appeals-I) to decide the same afresh after hearing both the parties. The department is at liberty to issue fresh show-cause notice to the respondent under section 23 of the Act subject to limitation for the purpose of assessment of tax amount.

20. The appeal is disposed of. The copy of the order may be provided to the learned representatives of the parties.

Madeem Azhar Siddiqi

(Justice® Nadeem Azhar Siddiqi)

CHAIRMAN

Karachi: Dated: 21.10.2019

Certified to be True Copy

Copies supplied to:-

- 1) The Assistant Commissioner, SRB, (Unit No.), Karachi.
- 2) The Respondent through Authorized Representative.

Copy for information to:-

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

REGISTER
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on

23/10/19

Registrar

Order Dispatched on

23/10/19

Registrar