

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-I

APPEAL NO. AT- 73 /2019

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

Versus

M/s Burshane Petroleum Private Limited,
Karachi.....Respondent

Date of Filing of Appeal: 11.10.2019.

Date of hearing: 23.09.2019 & 07.11.2019.

Date of Order 11.11.2019.

Mr. Muhammad Danish Khan, AC and Mr. Kaleemullah AC-DR, SRB



ORDER

Justice © Nadeem Azhar Siddiqi: This appeal has been filed by the appellant/department challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.133/2019 dated 20.08.2019 passed by the Commissioner (Appeals-II) in Appeal No. 202/2018 filed by the respondent against the Order-in-Original (hereinafter referred to as the OIO) No. 59/2018 dated 12.02.2018 passed by the Assistant Commissioner (Mr. Muhammad Yousuf, Bukhari) SRB, Karachi.

01. The facts of the case as mentioned in the OIO are that the respondent is registered with SRB as service provider in the category of Inter-City Transportation, Tariff Heading 9830.0000 of the Second Schedule of the

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Sindh Sales Tax on Services Act, 2011 (herein after referred as the Act) chargeable to Sindh sales tax at normal rate.

02. It was alleged in the OIO that the respondent did not declare any output tax with SRB, however it had claimed input tax amounting to Rs.5,176,085/= in the various tax periods from June, 2016 to November, 2017 as per the Table appearing in para (2) of OIO.

03. The SRB vide e-mail dated 19.10.2017 asked the respondent to explain the reason of claiming input tax. The respondent vide e-mail dated 23.10.2017 submitted that it had shown no sales therefore, no output tax was declared and that since the respondent had incurred capital expenditure input tax was claimed. It was also alleged in the OIO that the respondent was required vide numerous e-mails to produce summary of all sales and purchase invoices along with copies of bank statements and income tax returns to justify input tax claim. However the respondent failed to submit the required information.

04. A show-cause notice dated 10.01.2018 was served upon the respondent to explain as to why penalty under Serial No. 6 (d) and 15 of the Table under section 43 of the Act may not be imposed for violation of section 15A read with section 2 (94) of the Act and Rule 22 and 22A of the Sindh Sales Tax on services Rules, 2011 (hereinafter referred to as the Rules). The representative of the respondent appeared before the Assessing Officer and submitted the required information but, failed to justify the input tax claimed by it.

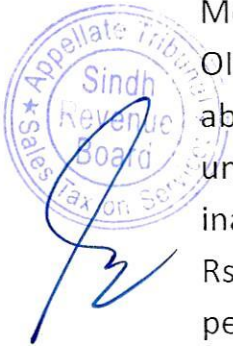
05. The Assessing Officer in the OIO stated that the sales tax on the services of inter-city transport was subject to reduced rate and for that reason input tax was not admissible. The Assessing Officer imposed penalty under serial No. 6(d) of table under section 43 of the Act amounting to Rs.5,176,085/= for claiming inadmissible tax. The Assessing Officer also directed the respondent to revise all monthly tax returns wherein inadmissible input tax was claimed.



06. The respondent challenged the said order of the Assessing Officer by way of filing appeal before the Commissioner (Appeals), who allowed the appeal and waived the penalty imposed under clause 6 (d) of the Act.

07. The learned AC in his written submissions stated that: (a) Although the respondent had revised the returns subsequently but the fact remains that non permissible input tax adjustment was claimed to the tune of Rs.5,176,260/- .Thus prima facie the respondent tried to take benefit of such huge amount of input tax adjustment which was not permissible. Mere fact that respondent could not take benefit and subsequent to the OIO, revised the returns does not mean that the respondent was absolved from its wrong doing. Penalty under serial No. 6(d) of the Table under section 43 of the Act, 2011 provides that any person claiming inadmissible tax credit or adjustment shall be liable to pay a penalty of Rs.50,000/- or one hundred percent of the tax payable for the tax periods to which the offence relates, whichever is higher. (b) Once the Commissioner (Appeals) was convinced that the Respondent had wrongly claimed input tax, then the defaulter had to be penalized according to relevant provisions of the Act. (Arguments at Para: 10-11). The law had thus been violated by claiming inadmissible input tax and the element of *mens rea* was embedded in the claim of respondent and it was liable to be penalized as envisaged under the Act. (c) The Commissioner (Appeals-II), despite being aware of the fact that the taxpayer had wrongly claimed input tax and violated the law and deleted the penalty which was not a good precedent. This would boost the violators of law to go willfully against the law and get relief without any adverse inference. The decision will encourage non-compliance of law and discourage those who abide by the law from the very first day.

08. Mr. Muhammad Danish Khan the learned AC for SRB In addition to the written submissions submitted that Para (11) of OIO was very clear and penalty under clause 6 (d) of section 43 of the Act was rightly imposed since the respondent had tried to take benefit of inadmissible input tax. He further submitted that the respondent by claiming inadmissible input



tax has tried to cause loss to the Sindh exchequer and the issue was covered under clause 6 (d) of section 43 of the Act. He also submitted that the respondent by merely reviving the returns during the pendency of first appeal cannot be absolved from the consequence of offence committed by it. He then submitted that Commissioner (Appeals had exceeded his jurisdiction in waiving the penalty under clause 6 (d) of section 43 of the Act. The learned AC relied upon the Order of the Tribunal in the case of TPL Properties Limited versus Commissioner (Appeals), SRB, and Appeal No. At-11/2013.

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

09. The penalty has been imposed under clause 6 (d) of section 43 of the Act which provides that any person who knowingly or fraudulently failed to pay, recover or deposit the actual amount of tax, or claims inadmissible tax credit or adjustment or deduction or refund shall be liable to pay a penalty of Rs.50,000/= or one hundred percent of the tax payable for the tax period (s) to which the offence relates, whichever is higher. The imposition of maximum penalty provided in the instant provision is applicable only when firstly, the Department has established and proved that the offence was committed knowingly and fraudulently with an element of mens rea and secondly, since imposition of 100% penalty is linked with the tax payable. However, in the instant case no tax was payable at the time of imposition of penalty and therefore, for the very reason no tax was assessed by the department. Since the respondent has not declared output tax there was ^{no} ~~an~~ occasion of adjustment of input tax as no loss had been caused to the Sindh exchequer. Furthermore the respondent during the pendency of appeal before the Commissioner (Appeals) had revised the monthly tax returns and corrected its mistake. The penalty under clause (3) of section 43 is similar to the penalty provided under clause 6 (d) of section 43 of the Act. In the reported judgment of Sindh Revenue Board versus M/s Television Media Network (Pvt) Ltd., 2017 PTD 1225 it has been mentioned that the imposition of penalty under clause 3 of section 43

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was considered by the Honorable High Court and 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 Act, 2011, which may become due towards taxable services, such penalty in terms of Table 3 of section 43 cannot be imposed".

10. In its several orders this Tribunal relying upon the various judgments of the superior court had held that the penalty cannot be imposed without first establishing mens rea on the part of the tax payer, and in addition the Department has to prove that claiming of input tax was dishonest and malafide. In this regard reference is made to the judgments reported as: (a) Pakistan through Ministry of Finance versus Hard Castle Waud, PLD 1967 SC 1, (b) D.G. Khan Cement versus federation of Pakistan, 2004 SCMR 456 and (c) Dy. Collector Central Excise versus ICI Pakistan Limited, 2006 SCMR 626.

11. The words in column (2) of the Table under section 43 of the Act are "such person shall be liable" thus giving discretion to the Officers to impose or not to impose penalty. Reference is made to case reported ^{AS} AC Customs versus Mari Gas Company, 2003 PTD 818 in which the phrase "shall pay" and "shall be liable" has been considered and it has been held by the Honorable High Court that "shall be liable" to pay gives the discretion to the functionary to impose or waive the penalty if in his opinion, the circumstances so required.

12. In this case the penalty was imposed merely on the alleged intention of the respondent to take benefit of inadmissible input tax. The Commissioner (Appeals) waived the penalty due to the following reasons, and the operative part of the OIA is reproduced below:-

"11....In view of the crystal clear position of law, Appellants had no legal right to 'claim input tax' while they were under a 'reduced tax rate tariff heading', whether by option or by compulsion. Appellant's claim that they merely declared such input claim in there impugned Sales Tax Returns and did not 'adjust' the same (against their output tax) nor did

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they 'claim any refund' etc. is also a feeble argument. Had their unlawful input claim not been nabbed by the respondent AC in good time, they would have easily availed of its benefits".


".....13, In view of the foregoing position, I cannot support the penalties imposed by the learned Assistant Commissioner-23, under section 43 of the Act, 2011. Appellant's action of removing his illegal input claim on voluntary basis clearly indicates the absence of malafide on his part. I therefore, remit the entire penalty imposed upon the instant Appellant vide the impugned Order-in-Original. This Appeal stands disposed off accordingly. However, I direct the Appellant to be extremely vigilant in future and to ensure meticulous compliance and procedures henceforth".

13. The Commissioner (Appeals) for valid reason has waived the penalty in exercise of discretion vested in him and has thus not committed any illegality.

14. It is therefore abundantly clear that for imposition of penalty under serial No. 6(d) of Section 43 of the Act the Department has to establish that tax was not paid knowingly or fraudulently. The department in this context has failed to produce material evidence and the assessing officer has imposed penalty on mere ascertain without even using the words "knowingly and fraudulently" in the OIO. It is further clarified that the liability to pay penalty is not a necessary consequence or corollary of every default but is subject to prove that the act has been knowingly or fraudulently committed with malafide intention. The penalty could only be imposed when the department establishes a case of fraud with knowledge. However, the Department in this case has totally failed to establish the necessary ingredients for imposition of penalty.

15. In view of the above discussions the appeal is dismissed in limine. The copy of the order may be provided to the parties.


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER


(Justice Nadeem Azhar Siddiqi)
CHAIRMAN

Certified to be True Copy


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order Dispatched on

15/11/19

Registrar

Order issued on

15/11/19

Registrar

Karachi. Dated: 11.11.2019

Copies supplied for compliance:-

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

Copy for information to:-

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

