

**BEFORE THE APPELATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI**

**DB-1**

**APPEAL NO. AT-80/2019**

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

Versus

**ORDER**

M/s Millennium Entertainment (Pvt) Ltd.....Respondent

Date of filing of Appeal: 16.12.2019

Date of hearing: 15.01.2020

Date of Order: Karachi 31.01.2020

Mr. Umi Rabbab AC-DR and Mr. Sarmad Ali, AC-SRB for appellant.



**ORDER**

**Justice ® Nadeem Azhar Siddiqi:** This appeal has been filed by the appellant/department challenging the Order-in-Appeal (OIA) No.188/2019 dated 17.10.2019 passed by the Commissioner (Appeals-1) in Appeal No. 184/2018 filed by the respondent/taxpayer against the Order-in-Original (OIO) No. 746/2018 dated 20.08.2018 passed by the Assistant Commissioner (Ms. Nida Noor) SRB, Karachi.

02. In short, the facts of the case as stated in OIO are that the Respondent is engaged in providing or rendering taxable services as a "Club" falling

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02. Respondent was served with a Show Cause Notice (SCN) Dated 08.05.2018 calling upon it to show cause as to the why tax amounting to under Tariff heading No. 9801.4000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act).

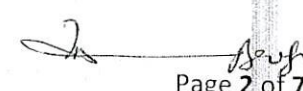
03. The allegations against the respondent in the OIO are that the respondent was subject to audit by the Audit Wing (SRB) for the tax periods from July-2016 to June-2017. Moreover from the Audit Report it has transpired that the appellant was involved in willful under-declaration of the value of taxable services. Besides, the amount of sales tax declared in the financial statements, had not been deposited into the Sindh Government Treasury. Furthermore the respondent also failed to deposit the due sales tax against the taxable services of Advertising Agent, Tariff Heading 9805.7000 of the Second Schedule to the Act.

04. The Respondent was served with a Show Cause Notice (SCN) Dated 30.05.2018 calling upon it to show cause as to the why tax amounting to Rs.43,580,298/= and Rs.12,327,867/= respectively may not be assessed and recovered from it beside levying the default surcharge under section 44 of the Act and penalties in terms of clause No. 2, 3, 6d, and 8 of Section 43 of the Act. The Respondent filed reply dated 08.06.2018 refuting the allegation in the SCN. Finally after hearing, the Assessing Officer (AO) passed OIO dated 20.08.2018 determining the tax liability of Rs.43,580,298/= alongwith payment of default surcharge (to be calculated later on) and penalties amounting to Rs.38,865,422/= under clause 2, 3 and 6 (d) of section 43 of the Act.

05. The Respondent challenged the OIO by way of filing Appeal No.184/2018 before the Commissioner (Appeals) who after agreed reconciliation reduced the tax amount to Rs.1,661,005/= which was deposited by the respondent.

06. Mr. Sarmad Ali the learned AC submitted that the Commissioner (Appeals) determined the Sindh Sales Tax (SST) to Rs. 1,661,005/- which was paid by the respondent and there was no controversy in this regard. He then submitted that the Commissioner (Appeals) erroneously waived the default surcharge and penalty of Rs. 38,865,422/- under various clauses of Section 43 of the Act including penalty under clause 6(d) of the Table of Section 43 of the Act. He then submitted that respondent

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made available before us.

From perusal of the operative part of the OIA the alternate submission of the learned AC was found to be correct. The Commissioner (Appeals) knowingly and fraudulently short paid the SST and the AO had rightly imposed penalties which cannot be waived by Commissioner (Appeals).

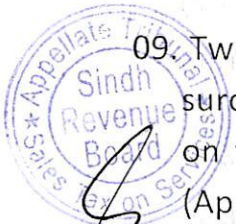
07. The learned AC has submitted alternately that the OIA was silent with regard to the payment or non-payment of penalties and default surcharge. He also submitted that by not paying due tax as prescribed in law the respondent had caused monetary losses to the Sindh exchequer and was thus liable to pay penalties and default surcharge.

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

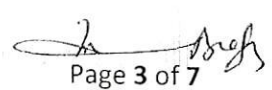
08. From perusal of the operative part of the OIA the alternate submission of the Learned AC was found to be correct. The Commissioner (Appeals) while disposing of appeal has not commented on the question of payment of default surcharge and penalties imposed by the AO.

09. Two impressions appear on the question of payment of default surcharge and penalties while perusing the OIA. (i) By not commenting on the payment of default surcharge and penalties the Commissioner (Appeals) impliedly upheld the default surcharge and penalties imposed by the AO. (ii) By not commenting on the payment of default surcharge and penalties the Commissioner (Appeals) impliedly waived the default surcharge and penalties imposed by the AO. Since there is an ambiguity in interpretation of OIA the same is to be resolved in favour of the tax payer.

10. Now the question as argued by the learned AC is whether the Commissioner (Appeals) was not empowered to waive the default surcharge and penalties. The learned AC has argued that the Commissioner (Appeals) erroneously waived the default surcharge and penalty of Rs.38,865,422/- under various clauses of Section 43 of the Act including penalty under clause 6(d) of the Table of Section 43 of the Act. The amount of penalty has been wrongly mentioned by the AC in his arguments. In appeal the tax liability was determined at Rs. 1,661,005/=



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...of failure of a person to pay the sales tax keeping in view the facts and circumstances of the case and reason for non-payment. The principle laid down in the reported cases is squarely applicable to this case despite of the fact that the same was related to Sales Tax Act, which at no stretch of imagination could attracted the penalties of Rs.38,865,422/-. This argument has no force. The Commissioner (Appeals) is vested with the power to impose or not to impose the penalties and default surcharge which is evident from the following reported cases of the superior courts:

(a) In the reported case of Malt-79 Manufacturers vs. Collector 1995 PTD 345 Honorable Lahore High Court has held that expression "shall be liable" in contradistinction to "shall pay" clearly vests discretion in the Adjudicating Officer to levy or not to levy additional sales tax even in the event of failure of a person to pay the sales tax keeping in view the facts and circumstances of the case and reason for non-payment". The principle laid down in the reported cases is squarely applicable to this case despite of the fact that the same was related to Sales Tax Act, 1990.

(b) In the case of Assistant Collector Customs and Central Excise, Karachi versus M/s. Mari Gas Company Limited 2003 PTD 818 a learned DB of High Court of Sindh has held that: "The use of phrase "shall pay" makes it mandatory on the person to pay the amount while the use of the words "he shall be liable to pay" gives a discretion to the concerned officer of the Excise Department to impose additional tax or waive it totally if, in his opinion, the circumstances so require".

11. In the Table, Column (2) of Section 43 of the Act the phrase "such person shall be liable to pay penalty" was used which gives discretion to the Officer to impose or not to impose penalty. In our view the Commissioner (Appeals) has the discretion to impose or not to impose penalties and default surcharge and by not commenting on the question of payment of penalties and default surcharge he has chosen to waive the penalties and has therefore, not committed any illegality.

12. The penalties and default surcharge cannot be imposed without establishing mensrea, willfulness and malafides on the part of the tax payer. The imposition of penalty is quasi criminal and presence of mensrea is mandatory as held in the following reported judgments of the superior courts:-

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(a) In the judgment of Commissioner Income Tax versus Habib Bank Limited, 2007 PTD 901 (DB SHC) it has been held that "13. There can be no cavil to the arguments of the learned counsel for the respondent that the penal provisions under the Income Tax Act are quasi-criminal in nature and mandatory condition required for the levy of penalty under section 111 is the existence of mensrea and, therefore, it is necessary for the department to establish mensrea before levying penalty under section 111. There is plethora of judgments of the superior courts on India and Pakistan from the very inception of Income Tax Act, 1922, on this point".....

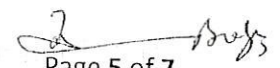
(b) In the judgment of Pakistan through Secretary Ministry of Finance versus Hard Castle Waud (Pakistan) PLD 1967 SC I it has been held that ""Even in the case of a statutory offence the presumption is that mens rea is an essential ingredient unless the statute creating the offence by express terms or by necessary implication rules it out".

13. The AO has also imposed penalty under clause 6(d) of section 43 of the Act which deals with the imposition of penalty for knowingly or fraudulently failing to pay, recover or deposit the actual amount of tax, or who claims inadmissible tax credit or adjustment or deduction or refund. If the offence is committed knowingly or fraudulently, subject to presence of mensrea penalty can be imposed under Serial No. 6 (d) of Section 43 of the Act. Word "knowingly" means with knowledge which, signifies knowledge of facts on which the non-payment of tax takes place. The word "fraudulently" means an intention to deceive or defraud, which signifies that a person does an act with intention to defraud. On examining the contents of clause 6(d) of section 43 of the Act it is clear that such provisions can only be invoked if the offences mentioned in the provision have been committed knowingly or fraudulently and not otherwise.

14. While imposing penalty under clause 6(d) of section 43 of the Act the department has to establish beyond shadow of doubt that the non-payment of tax was knowingly or fraudulently committed. The department has to prove the same by producing some material and evidence and mere oral assertion of the AO in OIO is not sufficient in this regard. Liability to pay penalty is not a necessary consequence or

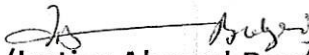



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corollary of every non-payment of tax within stipulated period but is subject to proof that the non-payment of tax was knowingly or fraudulently evaded or not paid with malafide intention. The penalty could only be imposed when the department establishes a case indicating dishonest motives of a tax payer. In the instant case the department has totally failed to establish the necessary ingredients of imposing penalties under the above provision.



15. The AO has imposed penalty of Rs. 2,179,065/= (5% of Rs.43,581,298) under clause 3 of section 43 of the Act, Rs.36,674,357/= (100% of the payable amount of tax) under clause 6 (d) of section 43 of the Act and Rs.12,000/= under clause 2 of section 43 of the Act. The Total Penalty works out to Rs.38,865,422/=. The penalties were imposed by the AO without establishing mensrea on the part of the respondent as evident from the OIO.
16. In appeal the Commissioner (Appeals) worked out the tax to Rs.1,661,005/= which was duly paid by the respondent. In view of the reduction of tax the amount of default surcharge and penalties were to be consequently reduced and would not remain the same as imposed by the AO. Thus the learned AC has wrongly mentioned in his arguments that the Commissioner (Appeals) had waived the penalties of Rs.38,865,422/-.
17. In view of the above discussions we are satisfied that penalties were imposed by the AO without any cause and justification and we do not find any defect in the OIA and consequently this appeal is dismissed in limine. The copy of this order may be provided to the learned representatives of the parties.

  
(Imtiaz Ahmed Barakzai)  
TECHNICAL MEMBER

  
(Justice<sup>®</sup> Nadeem Azhar Siddiqi)  
CHAIRMAN

Karachi  
Dated: 31.01.2020

Certified to be True Copy

Order Dispatched on 11/02/2020 Order issued on 11/02/2020  
 Registrar  Registrar

  
REGISTRAR  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD

Copy for compliance:



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

Copy for information to:-

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