

Guard file.

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

DOUBLE-BENCH-I

APPEAL NO. AT-36/2020

Assistant Commissioner, (Unt-30) SRB,
09th Floor, Shaheen Complex,
09th Floor M.R Kiyani Road, Karachi.....Appellant

Versus

M/s Polyset Industries (Pvt.) Ltd.,
B-12/B, Estate Avenue, SITE, Karachi.....Respondent

Date of Filing of Appeal: 09.10.2020
Date of hearing: 09.03.2021
Date of Order 18.03.2021

Mr. Mukhtiar Ali Memon, AC-SRB, for the appellant.

Mr. Irshad Alam, advocate for the respondent.



ORDER

Justice Nadeem Azhar Siddiqi: This appeal has been filed by the Assistant Commissioner (Unit-30), SRB Karachi challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.67/2020 dated 12.08.2020 passed by the Commissioner (Appeals) in Appeal No. 462/2018 filed by the respondent against the Order in Original (hereinafter referred to as the OIO) No. 983/2018 dated 03.12.2018

(Signature)

(Signature)
Page 1 of 11

passed by Ms. Shumaila Yaar Muhammad, Assistant Commissioner, (Unit-30) SRB Karachi.

02. The brief facts of the case as stated in the OIO were that respondent was engaged in providing or rendering the services in respect of "manufacturing or processing for other on toll basis" (Tariff Heading 9830.000) of the Second Schedule to the Sindh Sales Tax on Services Act (hereinafter referred to as the Act). The said services were chargeable to Sindh Sales Tax (SST) with effect from 1st July, 2013, under section 8 of the Act read with Rule 42H of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules).

03. It was alleged in the OIO that from the scrutiny of the online sales tax profile of the respondent as maintained with the Sindh Revenue Board (SRB) it was observed that the respondent had declared output tax of Rs.1,706,032/- and Rs.3,323,414/- for the tax periods from July- 2013 to June-2014 and July-2015 to June-2016 respectively. Whereas, examination of the documents provided by the respondent revealed that the respondent had mentioned service revenue amounting to Rs.43,764,199/- and Rs.23736,672/- in its Annual Audited Accounts for the periods ended on June-2014 and on June-2016, involving SST of Rs.10,325,406/=. However, the online profile of the registered person depicted that it had declared SST amounting to Rs.5,029,446/- for the tax periods from July-2013 to June-2014 and July-2015 to June-2016 thus resulting in a short payment of SST of Rs.5,295,960/-.

04. It was further alleged that the respondent has provided services in the matter of manufacturing or processing to various persons/companies on toll basis and had charged SST at the rate of 3%, 6% and 8% for the tax periods from June-2017 to December-2017 instead of charging SST at the applicable rate of 13% as mentioned in the Second Schedule to the Act resulting in short payment of SST amounting to Rs.4,202,716/-.

05. The respondent was served with a Show-Cause Notice (SCN) dated 22.02.2018 to explain as to why the SST of Rs.9,498,676/- should not be assessed and recovered under section 23(1) and 47 of the Act alongwith default surcharge

H.S.

[Signature]
Page 2 of 11

under section 44 of the Act. The respondent was also called upon to explain as to why penalties under Serial No.3 and 6 (d) of the Table under section 43 should not be imposed.

06. The representative of the respondent filed reply dated 19.03.2018 and submitted that the respondent was registered with SRB on 21.05.2014 and had deposited due taxes accordingly. It was also stated that prior to registration the respondent had neither charged SST nor was liable to deposit the same with SRB. It was further stated that prior to registration with SRB the tax was charged from the clients and was deposited under section 3 (1) of Sales Tax Act, 1990 (STA-1990) with FBR.


07. It was further stated in the reply that respondent had rented out company properties to different entities on rental basis and charged and deposited SST as notified through SRO-3-4/3/2015 dated 01.07.2015. The SST was charged @ 6% during Tax Year 2015, 8% during Tax Year 2016 and 3% during Tax Year 2017.

08. The Assessing (AO) passed OIO assessing the SST under section 23 read with section 47 (1A) of the Act and directed to recover SST of Rs.8,326,408/= (SST on Toll Manufacturing Rs.5,295,960/= + Renting of Immovable Property Rs.3,030,488/=) alongwith default surcharge. The AO also imposed penalty of Rs. 416,320/= under Serial No.3 of the Table under section 43 of the Act and Rs.8,326,408/= under Serial No. 6 (d) of the Table under section 43 of the Act.

09. The respondent challenged the OIO by way of filing appeal before the Commissioner (Appeals) who partly allowed the appeal to the extent of amount of Rs.5,295,960/= deposited with the FBR. Regarding the SST of Rs. Rs.3,030,488/= worked out by AO on account of renting of immovable property the Commissioner Appeals enhanced the same to Rs.4,202,716/= and held that except an amount of Rs.1,027,972/= (which pertained to service recipient M/s Haier Pakistan Limited which had filed Constitutional Petition No. 8980/2018 in the High Court of Sindh and secured stay order against recovery) all other amounts stood reconciled, recovered and settled in favour of the department. The Commissioner Appeals

also setaside the default surcharge and penalties imposed by the AO. Hence, this appeal was filed by the department.

10. Mr. Mukhtiar Ali Memon the learned AC-SRB submitted that the OIA was erroneous, unwarranted and unlawful and ultra-vires to the provisions of the Act. The learned Commissioner (Appeals) has erred in law to direct the AC to get the amount of SST deposited with FBR to be transferred to SRB on the strength of alleged MOU which was not in existence, instead of directing the respondent to deposit the SST with SRB on account of services of Toll Manufacturing provided by it alongwith default surcharge and penalties. He further contended that the SST amount which was wrongly deposited with FBR does not discharge the liability of respondent to pay tax on services to the SRB. He further submitted that the respondent had deliberately deposited the amount with FBR denying the jurisdiction of SRB to recover service tax on toll manufacturing. He further contended that the Commissioner (Appeals) erroneously setaside total liability raised against the service of renting of immovable property, default surcharge and penalties resulting in loss to the public exchequer.

The learned advocate for the respondent Mr. Irshad Alam submitted that the SRB could not legally demand SST from the respondent before the date of its registration with SRB i.e. 21.05.2014. He further submitted that toll manufacturing was not a service but manufacturing process and the tax was rightly deposited with FBR. He further submitted that after registration with SRB during the period from May, 2014 to February, 2016 an amount of Rs.12,047,622/- was deposited with SRB. He further submitted that before registration with SRB the respondent had deposited an amount of Rs.5,295,960/- with FBR during the period from August, 2013 to April, 2014. He further submitted that SST on renting of immovable property was paid by the tenants of the respondent to SRB being withholding agent. He further submitted that since the respondent has not committed any default the default surcharge and penalties were erroneously imposed without establishing mensrea.

12. The learned AC in rebuttal submitted that the respondent was covered under definition of registered person provided under sub-section (71) of section 2



of the Act and being a person liable to be registered thus it was also liable to pay tax prior to date of its registration.

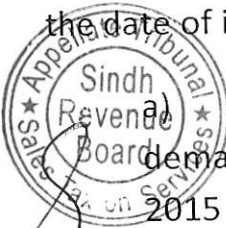
13. We have heard the learned representative of the parties, perused their written submissions and the record made available to us. The following issues are involved in the instant appeal:-

- i) Whether the respondent was liable to pay/deposit the SST before the date of its registration?
- ii) Whether the SST could be charged on the service of renting of immovable property without issuing SCN and whether the Commissioner (Appeals) could increase the tax without notice?
- iii) Whether the Commissioner (Appeals) had rightly directed the AC to get the amount of SST deposited by the respondent from FBR to SRB and rightly waived default surcharge and penalties?

14. Now we take up each issue separately.

- i) Whether the respondent was liable to pay / deposit the SST before the date of its registration. This issue is discussed as under:-

The respondent was registered on 21.05.2014 and the SST was demanded for the tax periods from July-2013 to June-2014 and July-2015 to June-2016. The tax could not be demanded from a non-registered person, which is evident from Section 3 (taxable service) of the Act read with section 9 (person liable to pay tax) of the Act do not provide for SST to be charged and paid by non-registered person. Reliance of the learned AC on sub-section (71) of section 2 of the Act and his submissions that a person liable to be registered is equated with registered person is not sufficient to hold that non-registered service provider was liable to charge and deposit the SST. If the argument of the learned representative is accepted than section 24 of the Act which deals with registration would become redundant. However comparison of sub-rule (3) and (4) of rule 3 of the Withholding Rules it is evident that sub-rule (3) of rule 3 of the



1193

Withholding Rules provides for the deduction of one-fifth of the total sales tax shown in the tax invoice issued by a registered person. Whereas sub-rule (4) of rule 3 of the Withholding Rules provides that a withholding agent on receipt of taxable services from unregistered persons has to deduct sales tax at the applicable rate of the value of the taxable services provided or rendered to him from the payment due to the service provider. This sub-rule clearly fixes the responsibility of deduction of sales tax upon the service recipient who deals with un-registered person. Moreover the unregistered person could neither charge tax in its invoice nor the withholding agent after withholding the amount of SST can pass on the same to unregistered service provider for depositing the same with SRB.

b) There is an apparent conflict between sub-section (71) of section 2 and sub-section (1) of section 24 of the Act. Since sub-section (71) of the Act provided that registered person means a person who is registered or is liable to be registered under this Act. Whereas sub-section (1) of section 24 of the Act provided that registration will be required for all persons who are residents; and provide any of the services listed in the Second Schedule from their registered office or place of business in Sindh. Sub-section (71) of section 2 of the Act is a general provision and is declaratory in nature, whereas sub-section (1) of section 24 of the Act deals particularly with registration and is a special provision and will prevail over sub-section (71) of section 2 of the Act. Furthermore in case of apparent conflict between the two provisions of the same Act the subsequent provision will prevail. In the reported case of Mst. Sakina Bibi versus Crescent Textile, PLD 1984 SC 241 and the relevant portion is reproduced for ready reference as under:-

Moreover, section 81 being a later provision would obviously control section 73 in case there is any conflict regarding the scope of both the provisions.

MS

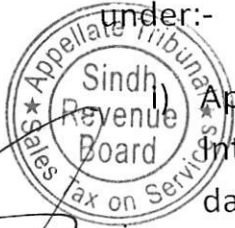
[Signature]
Page 6 of 11

c) This view further gains support from the decision of Lahore High Court in the case of Commissioner Inland Revenue, Gujranwala vs. S.K. Steel Casting Gujranwala, 2019 PTD 1493 wherein it was held as under:-

“.....16. Needless to say that under the law, a definition clause in a statute is of a declaratory nature. Though normally the definitions provided for in the definition clause are to be read into the provisions of the Act while interpreting the defined terms/words, but if the contents of the provisions of the Act indicate otherwise, the definition clause cannot override a main provision of the statute. Definition clause is foundational when construing provisions of law.....”

d) The Commissioner (Appeals) in his various OIAs had held that SST cannot be demanded from a service provider prior to its date of registration, few of such OIA's are mentioned for ready reference as

under:-



i) Appeal No.73/2018, OIA No.97/2020 M/s Sinopec International vs. Assistant Commissioner (Unit-03), SRB dated 03.11.2020

ii) Appeal No.308/19, OIA No.109/2020, dated 02.12.2020 – M/s Fiber Link vs. Assistant Commissioner (Unit-01), SRB

iii) Appeal No.456/2018, OIA No.110/2020, dated 02.12.2020 – M/s Fiber Link vs. Assistant Commissioner (Unit-01), SRB

The above view of Commissioner (Appeals) has been upheld in our various pronouncements. Few of such decisions are mentioned for ready reference as under:-

a) AT-47/2020 dated 15.02.2021 – AC (Unit-04) vs. M/s MYN Pvt. Ltd.

b) AT-234/2015 dated 26.11.2019 – Nasir Khan & Sons vs. Commissioner (Appeals) & DC (Unit-13), SRB

MCS

Page 7 of 11

e) It was an admitted position that the respondent was registered with SRB on 21.05.2014. The tax periods involved in this appeal were from July-2013 onwards. The appellant was not registered with SRB for the tax periods July-2013 to 24.05.2014. Therefore we hold that the respondent was not liable to charge and deposit the SST with SRB for the period when appellant was not registered with it.

15. The second issue – whether the SST could be charged on the service of renting of immovable property without issuing SCN and the Commissioner (Appeals) could increase the tax without notice? This issue is discussed as under:-

a) In the instant case the SCN was issued for short deposit of SST of Rs.8,326,408/= on account of providing toll manufacturing services. The OIO was passed for the same amount splitting the SST amount into two heads (SST on toll manufacturing Rs.5,295,960/= and renting of immovable property Rs.3,030,488/=). The SCN was silent with regard to providing of service of renting of immovable property by the respondent. The OIO could not be passed on a ground which is not part of SCN. In the reported case of Collector Central Excise and Land Customs versus Raham Din it was held as

under:



order of adjudication being ultimately based on a ground which was not mentioned in the SCN, was palpably illegal on face of it".

The learned AC submitted that he was satisfied that tax liability in respect of renting of immovable property was properly discharged except an amount of SST of Rs.257,064/- which was stayed by the High Court.

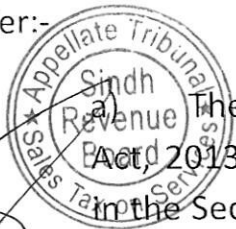
b) The AO assessed SST on renting of property at Rs.3,030,488/=.The Commissioner (Appeals) increased the same to Rs.4,202,716/= without issuing notice to the respondent as provided under sub-section (3) of section (59) of the Act. Law prohibits^{this} and it

MOS

has been held that no act can be performed against the provision of law.

c) We therefore hold that the SST could not be charged on the service of renting of immovable property without issuing SCN and the learned Commissioner (Appeals) could not increase SST without issuing notice. However this conclusion will not affect the SST already deposited in view of the statement of the respondent that the SST was deposited by the tenants being withholding agents and the said deposit was covered under sub-section (1) of section 16 of the Act.

16. The third issue was: whether the Commissioner (Appeals) had rightly directed the AC to get the amount of SST deposited by the respondent with FBR to SRB and rightly waived default surcharge and penalties? This issue is discussed as under:-



a) The toll manufacturing service was taxed vide Sindh Finance Act, 2013 effective 11.07.2013 by inserting Tariff Heading 9830.000 in the Second Schedule to the Act. Prior to the insertion of this Tariff Heading the toll manufacturing was taxable under section 3 of the STA, 1990. The respondent prior to the charging of SST was paying tax to FBR and continued to pay the same till its registration with SRB. However after its registration with SRB on 21.05.2014, it has started paying SST to SRB.

b) The learned AC-SRB contended that the deposit of SST by the respondent with FBR could not be treated as inadvertent and the same was deliberate willful and the respondent was liable to deposit the SST with SRB. It was submitted that the SRB was not responsible to get the tax transferred from FBR since there was no MOU between SRB and FBR in this regard. In an earlier Appeal No.AT-131/2015, in case of M/s Orient Electronics (Pvt.) Limited versus The Commissioner (Appeals), SRB Mr. Raheel Soomro, Deputy Commissioner, SRB had made a statement before the Tribunal "that

M S

Page 9 of 11

the amount deposited with FBR can be recovered by SRB through adjustment under a Memorandum of Understanding signed between SRB & FBR". In Appeal No. No.19/2013 (Abbott Laboratories (Pakistan) Limited) the then Commissioner (Appeals) vide order dated 21.02.2014 allowed adjustment of SST wrongly deposited with FBR. In the Appeal No. AT-18/2016 and AT-23/2016, M/s. Burj Bank Limited versus the Commissioner, SRB the Tribunal allowed similar relief to the tax payer who had inadvertently deposited SST with FBR. Thus it is evident that the respondent by inadvertently depositing the SST with FBR does not become willful defaulter. The department had to prove that such deposit was deliberate with malafide intention, which is lacking in this case. The findings of the learned Commissioner (Appeals) were in consonance of an earlier order of the then Commissioner (Appeals) and various orders passed by the Tribunal.



We have carefully considered the findings recorded by the learned Commissioner (Appeals) in this regard and do not find any illegality and infirmity in his finding.

d) The default surcharge and penalties could not be imposed in this case as the respondent had inadvertently deposited the SST with FBR treating it as tax under STA, 1990 and the SRB could claim the said amount from FBR as per understanding between both the authorities. It could be said that the respondent had discharged its liability by depositing the amount of SST with FBR. The deposit of SST with FBR is apparently without carrying any patent contumaciousness and obvious willfulness to disregard statutory provisions. Once it was found that the tax payer had been out of pocket to the extent of such erroneous, but bonafide, deposit could not be treated as defaulter. The word "default" necessarily imports of an element of negligence or fault and means something more than mere non-compliance of statutory provisions. To establish default

M/S

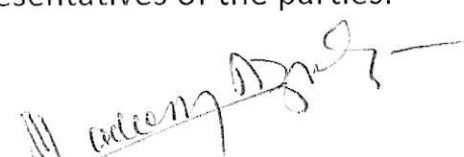

Page 10 of 11

one must show that the non-compliance of statutory provisions had been due to some un-avoidable cause. Mere wrong or delay in deposit of tax amount without element of willfulness, malafide and mens- rea could not entail default surcharge and penalties. Furthermore the Commissioner (Appeals) was vested with the power to impose or not to impose default surcharge or penalties as held in the reported case of Assistant Collector Customs versus Mari Gas, 2003 PTD 818.

e) We therefore hold that Commissioner (Appeals) had rightly directed the AC to adjust the amount with FBR and rightly waived the default surcharge and penalties.

17. In view of the above discussions we do not find any merits in this appeal, hence maintain the OIA, and resultantly dismiss the appeal. The copy of this order may be provided to the learned authorized representatives of the parties.


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER


(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi:

Dated: 18.03.2021

Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
- 2) The Assistant Commissioner, SRB, for compliance

Copy for information to:-

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

Certified to be True Copy


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on


26/03/2021

Registrar

Order Dispatched on


26/03/2021

Registrar