

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

DOUBLE BENCH-I

APPEAL NO. AT-11/2020

Assistant Commissioner-(Unit-01)
Sindh Revenue Board,
09th Floor, Shaheen Complex,
M.R. Kiyani Road, Karachi.Appellant

Versus

M/s Grid Solution Pakistan (Pvt.) Ltd.
Suit No. 219, Glass Tower 2nd Floor,
Frere Road, Clifton, Karachi.....Respondent

Date of Filing of Appeal: 19.03.2020
Date of hearing: 24.11.2020
Date of Order: 10.12.2020

Mr. Manzoor Ahmad, AC- SRB for appellant.
Mr. Amir Ali, FCA and Mr. Uzair Memon, FCA for respondent.

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.3/2020 dated 20.01.2020 passed by the Commissioner (Appeals) in Appeal NO. 307/2018 filed by the respondent against the Order in Original (hereinafter referred to as the OIO) No. 769/2018 dated 13.09.2018 passed by Mr. Barkat Ali Dahio, Assistant Commissioner, (Unit-03) SRB Karachi.

02. This appeal was filed by the appellant/department challenging the OIA by which the penalties under Serial Number 3, 6(d) and 11A of Table



under section 43 of the Sindh Sales Tax on Services Act, 20110 (Act) amounting to Rs.1,043,935/=, 20,878,700/= and 20,878,700/= respectively were remitted/waived by Commissioner (Appeals) except Rs.100,000/=.

03. The Brief facts of the case as stated in the OIO were that the respondent had not declared and deposited Sindh Sales Tax (SST) amounting to Rs.36,995,400/= on the value of taxable services of Management Fees amounting to Rs.369,954,000/= reflected in the Audited Accounts for the tax periods from January, 2015 to December, 2016.

04. The respondent was served with Show Cause Notice (SCN) dated 05.03.2018 to explain as to why the SST amounting to Rs.36,995,400/- should not be assessed under section 23 of the Act and recovered from It under the section 47 of the Act read with relevant provisions of Sindh Sales Tax Special Procedure (Withholding) Rules, 2014 (Withholding Rules). The respondent was also called upon to show cause as to why default surcharge under section 44 should not be imposed along-with penalties under clause 3, 6(d), and 11(A) of the Table under section 43 of the Act.

05. The respondent in its reply dated 15.03.2018, denied the allegation and submitted that such amount was not remitted but the same was reversed.

06. The Assessing Officer (AO) passed OIO and ordered for recovery of SST of Rs.20,878,700/- on the value of service of Rs.208,787,000/= from the respondent. Moreover, the AO also imposed penalty of Rs.1,043,935/- under serial No.3 of Table under section 43 of the Act (for failing to deposit the amount of tax due). Penalty of Rs.20,878,700/- under serial 6(d) of Table under section 43 of the Act (for violation of section 2(94) of the Act) and Rs.20,878,700/- under serial 11A of the Table under Section 43 of the Act (for failing to comply with the provisions of the rules or notifications issued in relation to withholding or deduction of tax or payment of the tax).

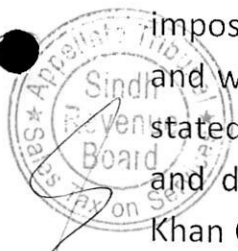
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07. The said OIO was challenged by the respondent before the Commissioner (Appeals) by way of filing of appeal, who maintained the OIO to the extent of principal amount of tax determined by the AO and the penalty to the extent of Rs.100,000/= only along-with default surcharge under section 44 of the Act. The instant appeal was filed by the department challenging the waiver of penalties.

08. The learned AC for SRB submitted that the impugned OIO passed by the learned Commissioner (Appeals) to the extent of remitting all the penalties was void, bad in law and against statutory provision of the Act and the Sindh Sales Tax on Services Rules, 2011 (Rules). It was further contended that the penalty imposed under serial no. 6(d) of the Table of section 43 of the was waived despite the fact that the respondent knowingly and without any lawful excuse failed to discharge its due tax liability. The offence under 6 (d) of the Act was covered under the tax fraud as defined under section 2(94) of the Act.

09. The learned representative of the respondent submitted that Commissioner (Appeals) had rightly waived the various penalties imposed by the AO since these were imposed without any justification and without establishing mensrea on the part of the respondent. It was stated that mensrea was a necessary ingredient for imposing penalty and default surcharge and relied upon the reported case of M/s D.G Khan Cements Company Limited versus the Federation of Pakistan (PTCL 2004 CL. 224) (SC Pak), on the point that the default surcharge and penalty could not to be imposed unless mensrea was established. He further contended that the penalty under serial No. 6(d) of the Table of section 43 of the Act could only be imposed if a taxpayer fraudulently and knowingly failed to pay or deposit due tax and the burden of proving any alleged fraudulent action lay on the department. It was also contended that since the allegation of fraud was leveled by the department therefore it was its statutory duty to establish such assertion through 'preponderance of the evidence'. The representative



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of the respondent placed reliance on case of Saadullah Khan and Brothers versus Appellate Tribunal of Inland Revenue, reported as 2019 PTD 776 (DB Islamabad High Court). He also contended that no penalty and default surcharge could be imposed where matter of interpretation was involved.

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

11. The AO imposed penalty of Rs.1,043,935/- under serial No.3 of Table under section 43 of the Act (for failing to deposit the amount of tax due). Penalty of Rs.20,878,700/- under serial 6(d) of Table under section 43 of the Act (fails to pay, recover or deposit the actual amount of tax or claims inadmissible tax credit or adjustment or deduction or refund) and Rs.20,878,700/- under serial 11A of the Table under Section 43 of the Act (for contravening any of the provisions of the rules or notifications issued in relation to withholding, or deduction of tax or payment of the tax so withheld or deducted). Apparently the AO imposed all possible penalties available under section 43 of the Act relating to non-payment/deposit of tax without first establishing mensrea on the part of the respondent. Although establishment of mensrea was necessary and corollary to imposition of penalty in case any such default was committed. Relying upon the judgments of the superior courts we have already held in our various pronouncements that the penalty could not be imposed without first establishing mensrea on the part of the tax payer. This view further gains support from the case of Pakistan through Ministry of Finance versus Hard Castle Waud Pakistan Limited, reported as PLD 1967 page 1.

12. Penalty under serial No. 6 (d) of Table under section 43 could only be imposed if department had established convincing evidence that "any person knowingly and fraudulently fails to pay, recover or deposit the actual amount of tax, or claims inadmissible tax credit or adjustment or deduction or refund". The burden was upon the department to prove that the respondent had "knowingly and fraudulently" failed to deposit

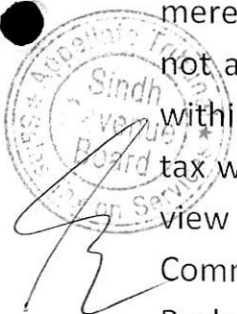
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tax but the department hopelessly failed to prove the same. The Word "knowingly" means with knowledge which, signifies knowledge of facts on which the non-payment of tax takes place. The word "fraudulently" means an intention to deceive or defraud, which signifies that a person does an act with intention to defraud. In the instant case the respondent was penalized thrice for committing same offence of non-payment of tax, under serial No.3, 6(d) and 11A of Section 43 of the Act. In the reported case of Gharibwal Cements v Income Tax Appellate Tribunal, 2005 PTD 1 the learned DB of Lahore High Court had held as under:-

"A fraud cannot be presumed. It must be proved as a positive act. Generally speaking, in Income Tax proceedings, an act of concealment is perfected and completed, when in any assessment year on the basis of wrong information supplied or an item of receipt liable to the tax is successfully suppressed or income chargeable to tax is not disclosed to the revenue or an illegal deduction is successfully claimed as expenditure incurred. As a rule, a deception, which does not deceive, is not fraud. It is only an attempt.

13. For imposing penalty under serial No. 6(d) of Section 43 of the Act the department had to establish beyond shadow of doubt that the payment of tax was knowingly or fraudulently avoided. The onus was upon the department to prove the same by producing evidence and mere assertion is not sufficient in this regard. Liability to pay penalty is not a necessary consequence or 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 avoided with malafide intention. This view gain support from the case of Masoodur Rehman versus Commissioner Income Tax (Appeals), reported as 2010 PTD 534 (DB Peshawar HC). The penalty could only be imposed when the department establishes a case indicating dishonest motives of a tax payer. In this case the department totally failed to establish the necessary ingredients of imposing penalties under the above two provisions. This view gain support from the reported case of Deputy Collector Central Excise and Sales Tax versus ICI Pakistan, Lahore, 2006 PTD page 1132 (Supreme Court of Pakistan.



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14. As far as the merits of the case are concerned, we hold that imposition of penalty was unjustified due to following reasons:--

(i) The department never succeeded in establishing the existence of mens rea.

(ii) That in fiscal matters a penalty could only be imposed for the reason that it was legal to do so. Particularly where the statute has vested discretion in the Revenue Authority;


(iii) In cases where imposition of penalty is discretionary, the power so vested may not be exercised unless the default is found contumacious.

15. In the instant case there is no independent determination of penalty and it was taken for granted by the AO that the liability to pay penalty was a necessary consequence or corollary of non-payment of tax.

16. In view of the above discussions we are satisfied that the Commissioner (appeals) has rightly waived the penalties, which were imposed by the AO without any just cause.

17. The appeal is dismissed. The Copy of the order may be provided to the learned representatives of the parties.


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER


(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi: Dated: 10.12.2020


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.

Certified to be True Copy


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Received on 29/12/2020


Registrar

Order Dispatched on 29/12/2020


Registrar