

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

DOUBLE BENCH-I

APPEAL NO. AT-12/2020

M/s M. Sharif Rajput Enterprises
Hyderabad.....Appellant

Versus

Assistant Commissioner, SRB
Hyderabad.....Respondent

Date of filing of Appeal: 31.03.2020
Date of hearing: 14.09.2020
Date of Order: 21.09.2020

Syed Kamran Rizvi, advocate for appellant.
Mr. Nasir Bachani, AC-SRB, Hyderabad for respondent.

ORDER

Justice[®] Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.14/2020 dated 31.01.2020 passed by the Commissioner (Appeals) in Appeal NO. 244/2018 filed by the Appellant against the Order in Original (hereinafter referred to as the OIO) No. 477/2018 dated 14.05.2018 passed by the Assistant Commissioner (Ms. Nasir Bachani) SRB, Hyderabad.

02. The facts of the case as mentioned in the OIO are that the appellant was registered voluntarily under the principal activity of "Construction Services" (Tariff Heading 9824.0000) of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) and are chargeable to sales tax at rate specified under second schedule to the Act with effect from 01.07.2010.

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03. It was alleged in the OIO that from the withholding statement filed by M/s United Energy Pakistan Limited it was revealed that it had received taxable services from the appellant valuing ~~to~~ Rs.23,290,498/= involving Sindh Sales Tax (SST) of Rs.3,088,561/=. This amount of SST was collected/charged by the appellant for the tax periods from December, 2015 to February, 2018 out of which and M/s United Energy Pakistan Limited withheld and deposited Rs.617,775/= while the appellant was required to deposit Rs.2,470,786/=.

04. It was further alleged that appellant had only paid an amount of Rs.335,072/= (for the tax periods December-2016, February-2017 and May-2017) against total SST liability of Rs.2,470,786/= whereas the remaining SST amounting to Rs.2,135,714/- had not been deposited. Moreover the appellant had failed to file true and correct sales tax returns for the tax periods from December, 2015 to February, 2018 as provided under section 30 of the Act.

05. A Show-Cause Notice (SCN) dated 24.03.2018 was served upon the appellant to show cause as to why the SST amounting to Rs.2,135,714/- may not be assessed and recovered under section 23 and 47(1A) (a) of the Act. The appellant was also required to explain as to why default surcharge under section 44 may not be imposed alongwith penalties mentioned at Sr. No. 2, 3, 6(c) and 6(d) of the Table under section 43 of the Act.

06. As per the OIO the appellant neither submitted any written response to the SCN nor appeared on date of hearing fixed for 31.03.2018. He also failed to appear on number of hearings fixed subsequently.

07. The Assessing Officer (AO) passed OIO levying SST at Rs.2,135,714/= for the tax periods from December-2016 to February-2018 (except December-2016, February-2016, February-17 and May-2017), under section 23 and 47 of the Act alongwith default surcharge under section 44 of the Act. The AO also imposed penalty of Rs.106,786/= for non-payment of SST under serial No. 3 of the Table of section 43 of the Act and Rs.2,908,330/= for non-filing of monthly sales



tax returns for the tax periods from December, 2015 to July, 2016, January, 2017, April, 2017 and June, 2017 to February, 2018 in contravention of section 30 of the Act read with rule 13 of Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules), Further penalties were imposed under serial No. 2 of the Table of section 43 of the Act at Rs.83,748/= and Rs.2,135,714/= under serial No. 6(c) and 6(d) of the Table of section 43 of the Act.

08. The said OIO was challenged by the appellant by way of filing appeal before the Commissioner (Appeals), who dismissed the appeal and upheld the OIO to the extent of principal amount of tax and penalties imposed under serial No. 2 and 3 of the Table under section 43 of the Act and deleted the penalties imposed under serial No. 6 (c) and 6 (d) of the Table under section 43 of the Act. The said OIA has now been challenged before this forum.

09. The learned representatives of the appellant submitted as under that:-

(i) The appellant had deposited a sum of Rs.2,470,803/= against the principle amount of tax of Rs.2,135,714/= which included default surcharge of Rs.173,129/= which was paid during pendency of appeal before Commissioner (Appeals). However this amount was not considered by the Commissioner (Appeals) while confirming penalty imposed under serial No.3 of Table of Section 43 of the Act.

(ii) The penalty imposed under serial No.2 of Table of Section 43 of the Act was against law, arbitrary, whimsical, and harsh and without establishing mensrea.

(iii) The penalty under serial No.2 of Table of section 43 of the Act was calculated and imposed against the provision of law and Order of this Tribunal in Appeal No. AT-92/2016, in the case of M/s Slingshot (Pvt.) Limited versus Assistant Commissioner, (Unit-21), SRB, Karachi.

(iv) The penalty under serial No. 2 of Table of section 43 of the Act provided Rs.10,000/- as one time penalty for an offence whereas the AO had compounded the penalty with every month for the whole period of default of non-filing of returns and such calculation was against the law.

10. The learned representative of the respondent submitted as under:-

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- (i) The appellant had deposited the tax after due date thus the penalty under serial No.3 of Table under section 43 of the Act was rightly imposed.
- (ii) The long unexplained delay in filing of monthly tax returns clearly established the mensrea on the part of the appellant.
- (iii) The calculation of penalty under serial No. 2 of Table of section 43 of the Act was rightly made as per the provision of law thus rightly confirmed by the Commissioner (Appeals).

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

12. The SCN was issued on 24.03.2018 for non-payment of SST and non-filing of monthly tax returns. It was stated in the SCN that out of SST due to the appellant at Rs.2,470,803/= an amount of Rs.335,072/= was deposited thus leaving balance of Rs.2,135,714/=. It is evident from the Statement prepared by the AC reproduced on page No.4 of OIA that his assertion in the SCN was incorrect and the amount of due SST was exaggerated in the SCN. However it is evident from record that against the determined liability of SST of Rs.2,135,714/= the appellant had already deposited a sum of Rs 2,470,803/=.

13. The issue remained to be adjudicated in this appeal related to the imposition of penalty under serial No.2 and 3 of Table of section 43 of the Act for non-filing of returns and late deposit of SST. These returns related to the tax periods from December-2015 to July-2016 (8 months), January-2017, March and April-2017, June to December-2017 (10 months) and January and February-2018 (2 months) at Rs.2,908,330/= which was calculated at the rate of Rs.333.33 per day and in addition a penalty of Rs.106,786/= was imposed for late payment of SST.

14. The appellant had late deposited SST consecutively for 21 months which is apparent from the statement filed supra. The appellant has failed to furnish any explanation or justification for the same. Thus the AO was justified in imposition of penalty and default surcharge on account of this unexplained and unjustified late deposit of SST.



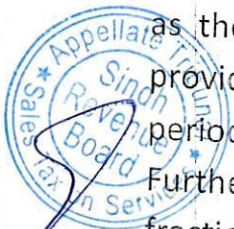
Therefore in our opinion the penalty of Rs.106,786/= and default surcharge (to be calculated at the time of payment) has been rightly imposed.

15. The calculation of the amount of penalty under serial No.2 of Table under section 43 of the Act was not confronted in the SCN. Apparently the AO has taken the case very casually and failed to confront the penalty amount in the SCN. Any adjudication beyond the contents of SCN is not sustainable. In the reported case of Collector Central Excise and Land Customs versus Rahm Din **1987 SCMR 1840** it has been held that:

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

16. The penalty under serial No.2 of Table of section 43 of the Act was calculated and imposed in contravention to the provision of law and Order of this Tribunal in the case of M/s Slingshot (Pvt.) Limited versus Assistant Commissioner, (Unit-21), SRB, Karachi, Appeal No.AT-92/2016. It is provided at Sr. No.2 of Table of section 43 of the Act that *“Where any person fails to furnish a return within the due date. Such person shall be liable to a penalty of Rs.10,000/= per month or a **fraction** (emphasis supplied) thereof; provided that if a return is filed within ten days of the due date, a penalty of 300 rupees for each day of default shall be paid”*.

17. In the above provision of the Act per month means per tax return as the tax period defined in sub-section (95) of section 2 of the Act provides that “tax period means a period of one month or such other period as the Board may, by notification in the Official Gazette, specify.” Furthermore the Assessing Officer has incorrectly calculated penalty in fraction. In the provision at S. No.2 of Table of section 43 of the Act the word “fraction” denotes that in case of defaults of more than ten days the penalty for full month was to be imposed. Therefore for non-filing of monthly return penalty can only be imposed at Rs.10,000/= per month. This view gains support from the decision of this Tribunal in the case of Sling Shot versus SRB Appeal No.AT-92/2016 wherein it was held as under:-



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"Besides, the learned counsel took the plea that the quantum of penalty imposed by the A.C. was not only harsh but unjustified and based on lack of proper interpretation of the penal provision. He argued that section 43(2) provided Rs.10,000/- only one time for an offence whereas the A.C. had compounded the penalty with every month for the whole period of default of non-filing of returns for 13 months, December 2014 to February 2016. It is noted that in this case the default of non-filing of monthly returns pertains to 13 returns for the months of December 2014 to February 2016. Penalty @ Rs.10,000/- for each not filed return works out to Rs.130,000/- in aggregate. However, the Assistant Commissioner multiplied the number of returns with the number of months for which it continued and imposed penalty of Rs.1,206,000/- which is too harsh and excessive. The intention of legislation in the enactment of penal provision is always deterrent and corrective in nature. Here also the phrase per month appears to be related to a return of sales tax which is to be filed every month. It is now well settled principle of law that if there appears any ambiguity in any provision of law the same has to be resolved in favor of tax payer as held in M/s Mehran Associates Versus Commissioner Income Tax, Karachi 1993 SCMR page 274. It was also held by Sindh High Court in M/s Citi Bank versus Commissioner Inland revenue that if two reasonable interpretations are possible, the one favoring the tax payer will be adopted. Multiplying the amount of penalty with number of months will be illogical and against the spirit of law".

18. In another Appeal No. 47/2018, M/s Fumican Services versus Assistant Commissioner, SRB decided on 16.10.18 relying upon the earlier Order of Sling Shot the Tribunal had held as under:-



"Furthermore the penalty under serial No.2 of the Table under section 43 of the Act has been erroneously imposed against the provision of law and against the earlier order of Tribunal in Appeal NO. AT-92/16 (SLINGSHOT VS AC) decided on 25.02.2017 by DB-1 of this Tribunal. It is noted that in this case the default of non-filing of monthly returns pertains to 07 returns and Penalty @ Rs.10,000/- for each not filed return works out to Rs.70,000/- in aggregate. However, the Assistant Commissioner multiplied the number of returns with the number of months for which it continued and imposed penalty of Rs.647,994/- which is too harsh and excessive and is not tenable.

19. In Appeal No. 175/2018 (OIA Dated 221/2018 dated 29.11.2018) Powertech Switchgear Services versus AC-SRB the then Commissioner

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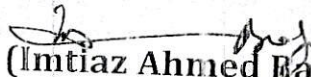
(Appeals) relying on the Order in the case of Sling Shot supra held as under:-

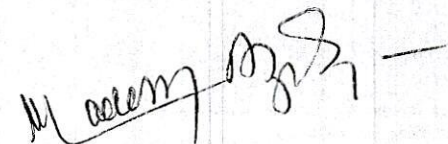
"5.... However, regarding the quantum of the penalty of offence No 2, I am aware of a Judgment of the Honorable Appellate Tribunal of the SRB in the case titled as M/s Slingshot (Pvt.) Ltd. versus the Assistant Commissioner, SRB in this Judgment the Honorable Appellate Tribunal of the SRB discussed in detail the language of the Offence No. 2 and language of the penalty thereon and held that such person in default shall be liable to pay a penalty of Rs.10,000/- per return only and that same is not recurring in nature".

20. The above Orders of the Tribunal are final as provided under sub-section (8) of section 62 of the Act and are still holding the field and have not been set aside by the Honorable High Court in referential jurisdiction and are binding upon the Assessing Officers as well as on the Commissioner (Appeals). Any order/decision of the Assessing Officer and the Commissioner (Appeals) cannot be sustained if the same is against the order/decision of Tribunal. The Department should follow the orders of Tribunal in later and spirit and the Commissioner (Appeals) should maintain consistency in his orders and should avoid delivering conflicting orders.

21. In view of above, this appeal is partly allowed and the penalty imposed by the Assessing Officer and confirmed by the Commissioner (Appeals) under Table 2 of section 43 of the Act is reduced from Rs.2,908,303/= to Rs.200,000/=.

22. The copy of this order may be provided to the learned representatives of the parties.


(Imtiaz Ahmed Barakzai)
Technical Member


(Justice® Nadeem Azhar Siddiqi)
Chairman

Certified to be True Copy

Karachi

Dated: 21.09.2020


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SINDH REVENUE BOARD
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Order Dispatched on

05/10/2020

Registrar

Order issued on

05/10/2020

Registrar

Copy for compliance:

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

Copy for information to:-

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

