

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

DOUBLE BENCH-I

APPEAL NO. AT-13/2020

M/s Procon (Pvt.) Limited,
House No. 92, 10th Street, Khayaban-e-Rahat,
Phase-6, DHA, Karachi.....Appellant

Versus

Assistant Commissioner, (Unit-03),
Sindh Revenue Board,
3rd Floor, Shaheen Complex,
M.R. Kiyani Road Karachi.....Respondent

Date of Filing of Appeal: 03.03.2020
Date of hearing: 10.03.2021
Date of Order 07.04.2021

Fawad Hussain Chand Advocate for the appellant.
Mr. Sunjay Kumar AC-SRB, (Unit-03), 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.16/2020 dated 04.02.2020 passed by the Commissioner (Appeals) in Appeal NO. 245/2015 filed by the Appellant against the Order in Original (hereinafter referred to as the OIO) No. 561/2015 dated 10.11.2015 passed by the Abdul Rauf Deputy Commissioner, SRB Karachi.

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02. The brief facts of the case as stated in the OIO were that the appellant was registered with Sindh Revenue Board (SRB) and engaged in the service category of construction falling under Tariff Heading 9824.0000 of the Second Schedule to Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) and were subject to Sindh Sales Tax (SST) at the applicable rate during the relevant tax periods to 16% (Presently it is 15% w.e.f. 1st July, 2014). The appellant was required to charge, collect and pay SST on taxable services rendered or provided by it.

03. It was alleged in the OIO that the scrutiny of withholding statement filed by M/s Pak-Arab Refinery Limited (PARCO) revealed that the appellant had rendered or provided the taxable services of construction of Rs.69,805,270/- to PARCO during the tax periods from September-2014, October-2014 and November, 2014. It was further alleged that the appellant had charged and collected the sales tax of Rs.8,376,632/= (Rs.10,470,491-Rs.2,094,158) from M/s Pak-Arab Refinery Limited (PARCO) but had failed to deposit the same with SRB.

04. The appellant was served with Show-Cause Notice (SCN) dated 23rd April, 2015 to explain as to why the SST liabilities of Rs.8,376,632/= should not be recovered from it under section 23 and 47 (1A) of the Act alongwith default surcharge. The appellant was also required to explain as to why penalties under Serial No. 2, 3, 5, 6(d), 11 and 12 of the Table under section 43 of the Act should not be imposed for contravention of various provisions of the Act.

05. The appellant filed reply dated 24.04.2015 and submitted that it was registered with SRB under service category with Tariff Heading 9824.0000 and as per SRB Notification dated 18.06.2013 the SST was 0%. The sales tax was mentioned on Invoice No. 1 to 5 on the instance of PARCO and not as per the terms of Agreement. The appellant in its reply dated 28.10.2015 submitted that it was not liable to charge tax from PARCO and was also not liable to pay tax to SRB. It was also stated that the tax was payable by

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PARCO as service recipient and appellant being service provider was not registered with SRB.

06. The Assessing Officer (AO) passed OIO and ordered for the recovery of SST of Rs.8,376,632/- along with default surcharge (to be calculated at the time of payment) under section 44 of the Act. The AO also imposed penalty of Rs.418,831/- under Serial No. 3 of the Table under section 43 of the Act.

07. The appellant had challenged the OIO before Commissioner (Appeals) by way of filing of appeal which was dismissed, hence this appeal by the appellant. The operative part of the OIA is reproduced for ready reference as under:-

"18. PARCO correctly withheld 20% of said tax amount, being Rs.2,094,158/- and deposited the same in the treasury; however, Appellant failed to pay into treasury the balance 80% being Rs.8,376,633/-. Appellant was accordingly, show caused for this much amount. The SCN was later converted into the impugned OIO, whereby the said amount was held recoverable in toto, along with penalty and default surcharge as per law. Instant Appeal was filed by the Appellant on 10.12.2015. as categorically stated by the DR in his written statement, dated 08.01.2020, as reproduced above in verbatim, the entire principal amount of Rs.8,376,633/- along with default surcharge Rs.215,053/- stands paid by the Appellant during the currency of the instant Appeal in May 2018. The adjudged penalty amount of Rs.418,831/- was waived under the tax-amnesty scheme 2018 (vide Notification No.SRB-3-4/11/2018 dated 18.05.2018). As such, no further government dues are recoverable from the Appellant as far as the impugned OIO is concerned".

08. Mr. Fawad Hussain Chand, advocate for appellant submitted as under:-

- i) The OIO was passed beyond the period as provided in sub-section (3) of Section 23 of the Act.
- ii) The Note Sheet dated 01.09.2015 by which the then DC allegedly extended time for 60 days was disputed, and it was submitted

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that this Note sheet was recorded back dated to cover the lapse of time in passing OIO.

- iii) The department had suspended the registration of the appellant due to which the appellant had paid tax under coercion and was forced not to file its SST returns.
- iv) The tax was deposited under protest and the appellant was entitled to the refund of such amount.

09. Mr. Sanjay Kumar, AC-SRB for respondent submitted as under:-

- i) The OIO was passed within time allowed by law after extending 60 days-time on 01.09.2015 vide Note Sheet of the same date.
- ii) The OIO was rightly passed, as the appellant despite charging and collecting the SST from PARCO failed to deposit the same with SRB.



During the pendency of appeal before the Commissioner (Appeal) the appellant voluntarily availed Amnesty Scheme of 2018, and deposited SST of Rs.8,376,633/-. It also voluntarily deposited default surcharge of Rs.215,053/-.

- iv) The appellant as per section 17 of the Act was not entitled to claim refund of the SST deposited by it as the amount of SST was charged from PARCO but the same was not deposited with SRB.

10. The advocate for the appellant in rebuttal submitted as under:-

- i) The appellant had deposited SST by availing Amnesty Scheme of 2018 under protest.
- ii) The extension of time by 60 days was not mentioned in OIO.

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

12. The claim of the appellant was that it was not liable to charge, collect and pay SST to SRB. Whereas the claim of the respondent was that despite

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charging, collecting SST from PARCO the appellant had not deposited the same with SRB.

13. The appellant was registered with SRB on 24.04.2014 under the service category of Contractor of Buildings, Tariff Heading 9814.2000 which was got modified on 01.01.2015 and service category was changed to Construction Services, Tariff Heading 9824.0000. As per sub-section (1) of section 9 of the Act the liability to pay the tax was on the registered person providing the services. It was an admitted position that the appellant had provided construction services to PARCO, and PARCO after withholding SST amounting to Rs.2,094,158/= had deposited the same with SRB.

14. After hearing the learned representatives of the parties the issues which require consideration are enumerated as under:-

i) Whether the OIO was time barred?



ii) Whether the appellant had charged and collected the tax from PARCO and had failed to deposit the same with SRB?

iii) Whether the appellant was entitled to claim the refund of SST deposited by it under Amnesty Scheme of 2018?

15. We will take up the first issue "Whether the OIO was time barred?" This issue is discussed as under:-

a) The SCN was issued on 05.05.2015, whereas, on the first page of the OIO the date of SCN was mentioned as 25.05.2015. In the SCN the date of hearing was fixed on 12.05.2015 from which it was established that the correct date of SCN was 05.05.2015. On the first page of OIO different dates of passing and issuance of OIO were mentioned. On the top of the first page of the OIO the date was mentioned as 10.11.2015. In column No.5 of the first page the date of judgment issued was mentioned as 28.10.2015 and the date of issue was mentioned as 10.11.2015. It has been noted for the first time that two dates of issuance of OIO have been

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mentioned in such order although the date of the issuance of the OIO should be the date on which the OIO was passed. In time bound proceedings the officials cannot be allowed to first announce order and then to write, sign and issue the same.

- b) The AO while passing OIO had deliberately mentioned the wrong dates of issuance of SCN and had also mentioned different dates of issuance while passing the OIO. This is not a good practice and the date of issuance of the Order is the date of order as the AO is not vested with the power to first announce the order and then write and sign the same. This privilege is only available to the Superior Courts of Pakistan. The AC submitted that the AO extended 60 days-time for passing order vide Note Sheet dated 01.09.2015. The said Note Sheet reads as under:-



"Mr. Akram Faheem Chief Executive of M/s Procon (Pvt.) Ltd, requested that they requires time to resolve issue of sales tax payment as their payments of the contract in question is still outstanding and are payable by M/s Pak Arab Refinery. For this purpose they expect this issue may be resolved through arbitration with their service recipient within one or two months which is granted to provide the fair opportunity to Taxpayer for settlement of their issue with Pak Arab Refinery. Accordingly, the time of SCN is extended for further Sixty days as per section 23(3) of the Sindh Sales Tax on Services Act, 2011".

- c) The learned AC despite specific directions by us has failed to produce the Note Sheets and the details of adjournments sought by the appellant on the pretext that the file was not available. However he could only produce photo copy of note sheet dated 01.09.2015 in support of his contention to justify that the time was extended. The OIO is silent about such extension of time. This solitary Note Sheet was apparently prepared subsequently to cover up the lapse of time in passing the OIO.
- d) The AO as per sub-section (3) of section 23 of the Act was required to record reasons in writing for extending the period for

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passing OIO, which was not done by him. Moreover it is necessary that such reasons should be such which may appeal a prudent mind, and should not be capricious or arbitrary. Apparently the reason recorded were not valid for extension of time to pass OIO but the time was given to the appellant to get the matter resolved with PARCO by way of arbitration. In absence of valid reason the extension of time was of no use, since it is evident that from the date of issuance of SCN on 05.05.2015 to the date of passing of OIO dated 11.11.2015 total days consumed were 190. However even if the 60 days extension was treated as valid the OIO was passed on 11.11.2015 (120+60=180) on 190th day instead of 180 days.

- e) In view of the above discussion we hold that the SCN was issued on 05.05.2015 and the OIO was announced on 11.11.2015 on 190th day and thus was time barred.

16. Now we will take up second issue "Whether the appellant had charged and collected the tax from PARCO and had failed to deposit the same with SRB?" This issue is discussed as under:-



The appellant has denied to have charged / collected the tax from PARCO. It is not disputed that the appellant was a service provider and was providing or rendering taxable services to PARCO. Sub-section (1) of section 9 of the Act provided that where a service is taxable by virtue of sub-section (1) of section 3 of the Act, the liability to pay the tax shall be on the registered person providing the service. As per law it was the liability of the service provider to pay the SST.

- b) The appellant is admittedly a service provider and had provided taxable services to PARCO and it could not deny its liability to pay SST. It is evident from the invoices produced by the appellant that the appellant had charged/shown the SST in all the invoices, and PARCO after withholding 20% of such amount had deposited the same with SRB. There was no doubt that the appellant had

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charged and collected the tax from PARCO, but has failed to deposit the same with SRB.

- c) In view of the above discussions we hold that the appellant had charged and collected the tax from PARCO but had failed to deposit the same with SRB.

17. Now we will take up the third issue "Whether the appellant was entitled to claim the refund of SST deposited by it under Amnesty Scheme of 2018?" This issue is discussed as under:-

- a) The appellant had availed the Amnesty of 2018 and paid the SST after waiver of 90% of default surcharge and 100% of penalty amount. The appellant has taken plea that the amount was paid under protest. However no evidence or proof in support of such contention could be produced. The appellant had charged and collected the SST from PARCO and was liable to pay the same to SRB. The appellant by paying SST to SRB has not done any act of extra ordinary nature and only discharged its statutory obligations. The amount of SST was passed on by PARCO to appellant for depositing the same with SRB since such amount belonged to PARCO.

- b) The appellant had deposited the SST amount voluntarily under Amnesty 2018 after passing of OIO. Despite the fact that the OIO was barred by time the appellant was not entitled to claim refund as the deposit was covered under sub-section (1) of Section 16 of the Act which deals with collection of excess sales tax and read as under:-

"16. Collection of excess sales tax: (1) Any person who has collected or collects any tax or charge, whether under misapprehension of any provision of this Act or otherwise, which was not payable as tax or charge or which is in excess of the tax or charge actually payable and the incidence of which has been passed on to the person to whom the service is provided, shall



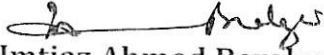
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pay the amount of tax or charge so collected to the Government.....”.

- c) Considering the above provision and in view of facts and law we hold that the appellant was not entitled to claim the refund of SST deposited by it after receiving the same from PARCO.

18. In view of the above discussions and in the light of findings recorded on the above issues, the appeal filed by the appellant is dismissed. 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

Karachi:

Dated: 07.04.2021

Certified to be True Copy

Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
- 2) The Assistant Commissioner (Unit-03), SRB, Karachi.


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Copy for information to:-

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

Order issued on 30/04/2021

Registrar

Order Dispatched on 30/04/2021

Registrar