

General file

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD
AT KARACHI

DOUBLE BENCH

APPEAL NO. AT-19/2020

M/s Abdullah Construction Company,
Engineers and Contractor, Hyderabad.....Appellant

Versus

Assistant Commissioner (Unit-01), SRB,
Karachi.....Respondent

Date of Filing of Appeal: 21.05.2020

Date of Hearing: 25.01.2021

Date of Order: 12.02.2021

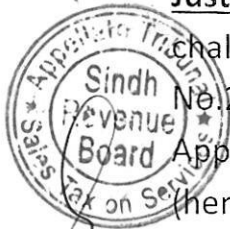
Mr. Lajpat Khatri, Advocate for Appellant.

Mr. Nasir Bachani, AC-SRB, 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. 24/2020 dated 17.02.2020 passed by the Commissioner (Appeals) in Appeal NO. 394/2019 filed by the Appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 735/2019 dated 29.10.2019 passed by Mr. Nasir Bachani, Assistant Commissioner, (Unit-01) SRB, Hyderabad.

02. The brief facts as stated in the OIO were that the appellant was registered with SRB in the service category of Construction Services-



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9824.0000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter to as the Act), subject to levy of Sindh Sales Tax (SST).

03. It was alleged in the OIO that on the basis of scrutiny of monthly sales tax returns filed by the appellant for the tax periods from February-2017, April-2017, July-2017 and November-2017, it revealed that the appellant had claimed inadmissible input tax credit against the provision of section 15A of the Act read with rule 22A of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules). The details of inadmissible input tax are as follows:

S.NO	Tax Period	Inadmissible Tax input
01	Feb-17	3,277,992
02	Mar-17	733,999
03	Apr-17	970,432
04	Jul-17	160,221
05	Nov-17	296,790
		5,439,434

04. The appellant was statedly informed about the SRB's Notification No. SRB-3-4/82013 dated 1st July, 2013, wherein, it was notified that input tax credit/adjustment against the construction services as classified under Tariff Heading 9824, 0000 of the Second Schedule to the Act was not admissible.

05. The appellant was served with a Show-Cause Notice (SCN) dated 26.02.2019 to explain as to why the SST amount of Rs. 5,439,434/- should 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 should not be imposed ^{charged} and also, penalties, mentioned at Sr. 3 and 6 (d) of the Table of section 43 of the Act should not be imposed.

06. The appellant submitted reply to the SCN vide its letter dated 04.03.2019 and letter dated 10.10.2019 alongwith copies of invoices. It was submitted by the appellant that it was liable to adjust input tax from output tax but it was not aware about filing of Form "C" required to be submitted under sub-rule (6) of rule 42B of the Rules.



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07. The Assessing Officer (AO) passed OIO directing the appellant to deposit SST of Rs.5,439,434/= alongwith default surcharge and also imposed penalty of Rs.271,972/= under serial No. 3 of Table of section 43 of the Act.

08. The appellant had challenged the OIO before Commissioner (Appeals) by way of filing of appeal. The Commissioner (Appeals) setaside the OIO and allowed the department to issue a fresh SCN to the appellant.

09. Mr. Lajpat Khatri the learned advocate for the appellant at the very outset submitted that the OIA was passed against the provisions of Act, and allowing issuance of a fresh SCN amounted to denovo trial which was prohibited under sub-section (2) of section 59 of the Act. He further submitted that the order to the extent of allowing issuance of fresh SCN was coram non judice. He contended that allowing issuance of fresh SCN amounts to allowing denovo trial as after the issuance of fresh SCN a fresh inquiry was to be undertaken and fresh OIO was to be passed.

10. The learned advocate further contended that the Commissioner (Appeals) rightly setaside the OIO on the ground that the OIO was based on sub-rule (6) of rule 42B of the Rules which was not invoked in the SCN. He further submitted that OIO was time barred and this fact was ignored by Commissioner (Appeals).He submitted that the proceedings were started on February 26, 2019 and the OIO was issued on 29.10.2019 which shows that the same was passed after 245 days.

11. Mr. Nasir Bachani the learned AC-SRB supported the OIA and submitted that the Commissioner (Appeals) had rightly allowed the department to issue fresh SCN. He further submitted that the appellant adjusted inadmissible input tax without furnishing Form "C" and in case the department was not allowed to issue fresh SCN the public exchequer would suffer. He further submitted that the Commissioner (Appeals) adequately dealt with the issue of time barred OIO and rightly concluded that the OIO was within time. He submitted that non-invoking of sub-rule (6) of rule 42B of the Rules was an error not affecting the merits of the case and the OIO should not be setaside merely on this account.

12. The learned advocate for the appellant in rebuttal submitted that no loss was caused to public exchequer as the tax was charged at the statutory



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rate of 13% and after adjustment of input tax the same was deposited with SRB.

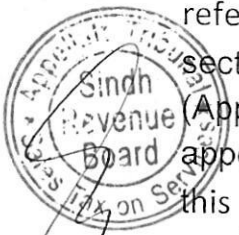
13. We have heard the learned representatives of the parties and perused the record made available before us including the written synopsis submitted by the parties. The dispute in the instant appeal relates to adjustment of input tax by the appellant without submitting Form "C" as required by sub-rule (6) of rule 42B of the Rules.

14. The Commissioner (Appeals) set aside the OIO on the ground that the same was based on sub-rule (6) of rule 42B of the Rules but the said rule was not invoked in the SCN. We have perused the SCN and found that the said rule was not invoked in the SCN. The purpose of issuance of SCN was to inform the tax payer regarding the allegation against him so that he may take a proper defence. It is now well settled that OIO could not be passed on a ground not mentioned in the 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 Commissioner (Appeals) had rightly set aside the OIO which was clearly based on a ground not mentioned in the SCN.

15. The Commissioner (Appeals) while setting aside the OIO allowed issuance of fresh SCN. The learned advocate contended that the same was against the specific provision of law and amounted to denovo trial and referred to sub section (2) of Section 59 of the Act. The requirement of sub-section (2) of section 59 of the Act appears to be that the Commissioner (Appeals) may make such further inquiry himself during pendency of the appeal provided he shall not remand the case for denovo consideration. In this section the word "shall" was used with word "not" which made the provision mandatory and specifically prohibited Commissioner (Appeals) from remanding the case for denovo consideration. In the book Understanding Statutes, Edition 2008 by S. M. Zafar at page 275 it was mentioned that *"Negative words give a statute an imperative effect. Negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statute imperative"*.



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16. The issuance of fresh SCN amounted to denovo trial as after issuing of the fresh SCN the AO will again adjudicate upon the same matter and will pass fresh OIO. The term "denovo trial" is defined in the Black's Law Dictionary, Tenth Edition at Page 1737 as "a new trial on the entire case-that is, on both questions of fact and issues of law-conducted as if there had been no trial in the first instance".

The Commissioner (Appeals) is permitted under sub-section (2) of Section 59 of the Act to make such further enquiry as may be necessary provided that he shall not remand the case for denovo consideration. It is therefore evident that if law has prohibited from doing something it cannot be done at all even under exercise of lawful jurisdiction. Since the law specifically prohibited Commissioner (Appeals) from remanding the case for denovo consideration thus such powers were not available with him and the Commissioner (Appeals) had committed an illegality in this regard. In the reported case of Ummatullah Versus Province of Sindh, PLD 2010 K 236 it was held as under:-

"It is a settled principle of law that what cannot be done directly cannot be done or allowed to be done indirectly. It is also trite principle of law; what is not possessed can neither be conferred nor delegated."

Apparently the Commissioner (Appeals) was not vested with the power to remand the case for denovo consideration and could not allow issuance of fresh SCN after curing the defect pointed out in the SCN.



17. In view of the above discussions we hold that the Commissioner (Appeals) was not vested with the power to allow issuance of fresh SCN consequently the appeal is allowed and the OIA to the extent of allowing issuance of fresh SCN is annulled. Since the OIA is annulled thus the discussion on the other points is unnecessary.

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


(Intiaz Ahmed Barakzai)
TECHNICAL MEMBER


(Justice Nadeem Azhar Siddiqi)
CHAIRMAN Certified to be True Copy

Order Dispatched on

05/03/2021

Registrar

Order issued on

05/03/2021

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REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Karachi:

Dated: 12.02.2021

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.