

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD
AT KARACHI

DOUBLE BENCH-I

APPEAL NO. AT-21/2020

M/s Mahrose Beauty Parlor,
Karachi.....Appellant

Versus

Assistant Commissioner (Unit-13), SRB,
KarachiRespondent

Date of Filing of Appeal: 07.07.2020

Date of hearing: 20.10.2020

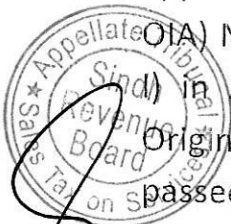
Date of Order: 03.11.2020

Dr. Manzoor Ahmed Memori, ITP and Mr. Aniq Memon, ITP for Appellant.

Mr. Aminuddin Kolachi 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.57/2020 dated 29.06.2020 passed by the Commissioner (Appeals-Original (hereinafter referred to as the OIO) No. 38/2017 filed by the Appellant against the Order in Appeal NO. 38/2017 filed by the Appellant against the Order in Original (hereinafter referred to as the OIO) No. 69/2017 dated 24.03.2017 passed by the Assistant Commissioner, (Ms. Pirah Ashfaq, Unit-25) SRB Karachi.



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02. It was stated in the OIO that the appellant was registered with SRB under the services category of "Beauty Parlors, beauty clinics, slimming clinics or canters and others" covered under the Tariff Heading 9810.0000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act), chargeable to Sindh Sales Tax (SST) at the rate 10% under section 8 of the Act read with Rule 42C of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules).

03. It was alleged in the OIO that during the scrutiny of the Income Tax Returns of the appellant for the years ended June-2014 and June-2015, the following observations were recorded.

(i) The appellant had earned revenue amounting to Rs.209,166,667/- during the tax periods from July-2013 to June-2015. However, it had failed to deposit the due SST amount against the services provided. The details are given in the table below:

Tax year	Value of taxable services			SST payable @ 10% of value of taxable services	SST Paid with SRB's online tax profile	Balance SST Payable on value of services
	Net Revenue	Other Revenue	Gross Revenue			
July-2013 to June-2014	57,997,326	45,704,631	103,701,957	10,370,196	5,799,732	4,570,464
July-2014 to June-2015	64,045,210	41,419,500	105,464,710	10,395,128	6,395,128	4,151,343
Total	122,042,536	87,124,131	209,166,667	20,916,997	12,194,860	8,721,807



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04. In view of above, the appellant was served with a Show-Cause Notice (SCN) dated 31.08.2016 as to why the short payment of SST amounting to Rs. 8,721,807/- should not be assessed u/s 23 of Act and recovered under section 47(1) of the Act and why penalties should not be imposed under serial No.3 and 15 of the Table under section 43 of the Act along with default surcharge u/s 44 of the Act.

05. On the date of hearing, Mr. Imran Fayaz (representative for appellant) had appeared and stated that the "Other Revenue" as mentioned in the annual Income Tax Returns pertained to receipts from training of beauticians. A Written Reply dated 19.09.2016 was also filed on behalf of the appellant taking the same defence as above with addition that the revenue earned from training was exempted from payment of SST.

06. After receiving the file from the then AC the Assessing Officer (AO) passed OIO dated 24.03/2017 and directed the appellant to deposit the principal amount of Rs. 8,721,807/- along with amount of default surcharge (to be calculated at the time of payment) under section 44 of the Act and imposed penalty of Rs. 8,027,921/-, under Serial No. 3 & 15 of the Table under section 43 of the Act.

07. The said OIO was challenged by the appellant before the Commissioner (Appeals) by way of filing of appeal, who dismissed the appeal and maintained the OIO ~~in toto~~, hence this appeal.

08. In this appeal the appellant through its authorized representatives Dr. Manzoor A. Memon, ITP and Mr. Aniq M. Memon, ITP have challenged that both OIO and OIA were passed beyond the time prescribed by law. They submitted that the Additional Grounds of Appeal were filed before Commission (Appeals) on 25.02.2019 but the same were not considered and adjudicated upon in its true perspective. It was also submitted that the AO after receiving the file of the case from the previous AC had not provided any opportunity of hearing to the appellant and passed the OIO without hearing the representative of the appellant. They also submitted that both



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grounds urged by them are legal grounds and the same may be decided first.

09. The learned AC for SRB submitted that both the orders were passed within the time allowed by law and were not time barred and this ground was taken to avoid payment of huge amount of SST which was withheld for no reason. He also submitted that the AO after receiving the file issued notice to the representative of the appellant for 07.02.2017 but no one attended the hearing and the appellant cannot take the benefit of its own negligence at this stage.

10. The grounds taken by the appellant that both OIO and OIA were time barred and right of hearing before passing of OIO was not provided are legal grounds relating to the jurisdiction of the AO and the Commissioner (Appeals) to pass OIO and OIA. We are therefore, inclined to decide the legal grounds first.

11. In the instant case after the issuance of SCN dated 31.08.2016 Syed Rizwan Ali, Deputy Commissioner-SRB started adjudication proceedings and fixed number of dates for hearing till 23.01.2017. Thereafter on 31.01.2017 the case was transferred to Ms. Pirah Ashfaq, Assistant Commissioner-SRB who recorded the first Note Sheet as under:-



"The case has been handed over to me on 30.01.2017. in order to scrutinized the facts of the case thoroughly, the undersigned extends the period by 60 days exercising the power conferred under section 23 (3) of the SSTOS Act, 2011. Furthermore, a hearing notice (31.01.2017) is also issued to the registered person fixing the date of hearing for 07.02.2017".

Sd/= 31.01.2017

12. The next Note Sheet was recorded on 24.03.2017 which read as under:-

"On 07.02.2017 nobody appeared to plead the case. Thus, the case is being finalized on available record. OIO issued".

Sd/= 24.03.2017

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13. It is not known whether the Notice dated 31.01.2017 was issued or not or was served or not upon the appellant or its representative as the copy of said notice with acknowledgement was not produced. Moreover it is evident from the Note Sheet that the matter was not taken up on 07.02.2017 as no Note Sheet was recorded on that date and the AO had also not recorded any definite finding that the notice issued was actually served upon the appellant or its representative. However, in absence of a party or while proceeding ex parte a notice was to be served in terms of section 75 of the Act. The AO has to satisfy himself that the notice was duly served and this fact should be recorded in the Note Sheet to avoid any suspicion.

14. It was evident from the Note Sheets that the case was transferred to AO on 31.01.2017 and AO without hearing the appellant or its representative issued the OIO on 24.03.2017. He stated in para 13 of the OIO that "heard the AR of the registered person", although such statement was incorrect.

15. In judicial and quasi-judicial proceedings the right of hearing is very important. The right of hearing cannot be taken away unless the party was found negligent. Apparently the proceedings were concluded in unnecessary haste without affording proper right of hearing to the appellant and its representative.

16. A duty is cast upon every public functionary to act fairly, justly and without arbitrariness. Article 4 of the Constitution of Islamic Republic of Pakistan provides that right of individuals to be dealt with in accordance with law and to enjoy protection of law is the inalienable right of every citizen. After insertion of Article 10A in the Constitution a person shall be entitled to a fair trial and due process of law. Due process of law includes the right to be treated according to law and right of hearing is the part of due process of law. The principles of natural justice, fairness, procedural propriety and reasonableness should be kept in mind while passing orders adversely affecting the person and property which were lacking in the instant case. In the reported case of Commissioner Inland



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Revenue versus Ali Hassan Metal Works, 2018 PTD 1399, it has been held as under:-

"10. The authorities, exercising quasi-judicial powers under a statute are bound to conduct a fair adjudication. To be dealt in accordance with law, due process and fair trial are inalienable fundamental rights guaranteed under Articles 4 and 10-A of the Constitution of the Islamic Republic of Pakistan 1973 ("Constitution"). August Supreme Court of Pakistan in the Province of East Pakistan v. MD. Mehdi Ali Khan (PLD 1959 SC 387) held:-

"The determination of every right or liability claimed or asserted in a legal proceeding depends upon the ascertainment of facts and the application of the law to the facts so found. It is a normal feature of the judicial process first to discover the facts and then to determine what rights and liabilities follow from the application of the law to the facts found."

17. It is also noted with concern that the AO passed the OIO after fifty two days of receiving. However the AO did not deem it fit to issue any further notice of hearing or reminder to the appellant nor fixed any further date of hearing. The OIO was passed under sub-section (1) of section 23 of the Act. Whereas, sub-section (2) of section 23 of the Act provides for issuance of SCN and providing an opportunity of being heard to the person. The issuance of SCN and hearing is the mandatory condition for exercise of jurisdiction and cannot be overlooked or by passed and in the absence of right of hearing OIO cannot be sustained.

18. In the reported case of Jumnan Khan versus Sindh, PLD 1981 Karachi 311 a learned DB has held as under:-



Now, we would take up the first ground that the order has been passed in violation of the principle of audi alteram partem; It is admitted that before passing the order under Martial Law Order No. 64 no show-cause notice for passing such order was given nor was any opportunity of hearing given to the petitioner (emphasis supplied). However, the submission of Mr. Agha Ghulam Ali is that Martial Law Order No. 64 does not provide any such notice or opportunity of hearing. It is well settled that in every statute the provision of notice and opportunity hearing before passing any order that adversely affect

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the rights of a citizen is considered to be a part of the statute unless, the statute itself expressly excludes such notice or opportunity of hearing (emphasis supplied).

The same principle will apply to all orders passed by the officials of SRB affecting a person or his property unless the ACT itself excludes such notice or opportunity of hearing.

19. In another reported case of Abdul Haq Indhar versus Sindh, 2000 SCMR 907 it was held as under:-

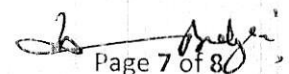
"There is no cavil with the proposition that the principle of natural justice enshrined in maxim "audi alteram partem" is always deemed to be embedded in the statute and even if there is no such specific or express provisions, it would be deemed to be one of the parts of the State because no adverse action can be taken against a person without providing right of hearing to him".

20. In another reported case of Babar Hussain Shah versus Mujeeb Ahmad Khan, 2012 SCMR 1235 relying upon the reported case of Collector, Sahiwal and 2 others v. Muhammad Akhtar (1971 SCMR 681)", it was held as under:-

"This Court has gone to the extent of pointing out that the mere absence of a provision in a statute as to notice cannot override the principle of natural justice that an order affecting the rights of a party cannot be passed without an opportunity of hearing and also held that where the giving of a notice is a necessary condition for the proper exercise of jurisdiction then failure to comply with this requirement renders the order void and the entire proceedings which follow also become illegal."

21. The OIA was passed on the basis of OIO which was found defective since it did not provide proper right of hearing to the appellant and its representative before passing of OIO. Since the OIO was found defective no superstructure could be built on such OIO nor the OIA could be maintained.

22. In view of the above discussions the appeal is allowed. The OIO and OIA are set aside and annulled. The case is remanded back to the

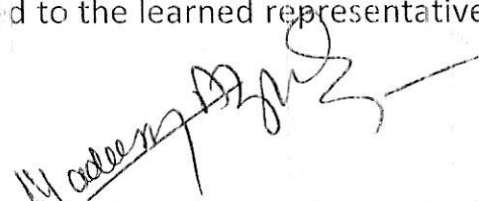

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Assessing Officer for passing fresh OIA on merits after providing proper opportunity of hearing to the learned representative of the appellant and considering evidence furnished by them.

23. Since we have allowed the appeal on the ground that no right of hearing was provided to the appellant at the adjudication stage after transfer of case from the then AO to the AO who passed OIO, the discussion on other legal ground is not necessary.

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


(Imtiaz Ahmed Barakzai)
Technical Member


(Justice® Nadeem Azhar Siddiqi)
Chairman

Karachi:

Dated: 03.11.2020

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

05/11/2020

Registrar

Order Dispatched on

05/11/2020

Registrar