

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

DOUBLE BENCH-I

APPEAL NO. AT-45/2020

M/s Pakistan Defense Officers Housing Authority
Karachi.....Appellant

Versus

Assistant Commissioner, (Unit-02) SRB,
Karachi.....Respondent

Date of Filing of Appeal: 30.11.2020

Date of hearing: 24.12.2020

Date of Order 24.12.2020

Mr. Abdul Raheem Lakhani Advocate, Mr. Suneel Ali Memon Advocate and
Asif Khalique Shar Advocate for appellant

Mr. Hunain Tarique Assistant Commissioner (Unit-2) SRB Karachi for
respondent

ORDER

Justice[®] Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order of Vacation of Stay (hereinafter referred to as the Impugned Order) dated 14.12.2020 passed by Commissioner (Appeals-1) in Appeal No. 96/2020 filed by the appellant against Order in Original (hereinafter referred to as the OIO) NO. 204/2020 dated 09.10.2020 passed by the Assistant Commissioner, Unit-II (Mr. Sarmad Ali Wassan) 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 SRB under service category of "Services provided or rendered by Clubs", Tariff Heading 9810.0000 of the Second Schedule to the Sindh Sales Tax and Services Act, 2011 (hereinafter referred to as the Act). The registered person was selected for audit under section 28 of the Act for the tax periods July, 2016 to June, 2017.

03. It was alleged in the OIO that from the Contravention Report dated 31.10.2018 it had transpired that the appellant was involved in under declaration of the value of taxable services and had also not complied with the provisions of the Sindh Sales Tax Special Procedure (Withholding) Rules, 2014 (hereinafter referred to as the Withholding Rules).

04. A Show Cause Notice (SCN) dated 07.11.2028 was served upon the appellant. The Assessing Officer (AO) after hearing both the parties passed OIO at the sum of Rs.180,399,567/= alongwith default surcharge under section 44 of the Act. The AO also imposed penalty of Rs.9,019,978/= under serial No.3 of the Table under section 43 of the Act and penalty of Rs.10,000/= under serial No.12 of the Table under section 43 of the Act.

05. The appellant challenged the OIO before Commissioner (Appeals) alongwith a stay application. As per the Report of Commissioner (Appeals) the stay application was heard on 04.11.2020 and stay was granted till 30.11.2020. However in view of the appellant's request the appeal was re-fixed for hearing on 10.12.2020.

06. The appeal was reportedly heard on 14.12.2020 and the stay was rejected since the case of the appellant was on weak footing and balance of convenience was not in its favour, hence this appeal.

07. Mr. Abdul Raheem Lakhani, advocate for appellant submitted that the stay was vacated without just cause and proper reasoning. The case was prima facie in favour of the appellant as the OIO was time barred, and

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the amount of tax determined did not relate to applicant. Moreover the value of service and tariff heading were incorrectly applied and the earning from education was also wrongly taxed. He further contended that vacation of stay without just cause and proper hearing during pendency of appeal amounted to depriving the appellant from fair trial as provided under Article 10-A of the Constitution of Pakistan. He also contended that the Commissioner (Appeals) erroneously linked the grant of stay with deposit of 25 percent of tax as provided under proviso of section 66 of the Act without considering that sub-section (4) of section 58 of the Act does not provide any condition of deposit of 25 percent of the tax amount for grant of stay.

08. Mr. Hunain Tariq AC-SRB has fully supported the impugned order and submitted that the stay was rightly vacated as the appellant despite being provided with an opportunity, had failed to deposit 25 percent of the amount of tax as provided under the proviso of section 66 of the Act. He further contended that the appellant had incorrectly relied on the Judgment of the Honorable High Court in the case of Association of Builders and Developers although the facts of such case were distinguishable. He further submitted that arrears of tax amounting to Rs. 180,399,567/= were outstanding against the appellant and SCN was issued and tax liability was determined after audit under section 28 of the Act. It was also contended by AC that the appellant had not disputed that it was recipient of Construction Services in its grounds of appeal filed before the Commissioner (Appeals) and the same cannot be disputed at this stage.

09. Mr. Abdul Raheem Lakhani, advocate for the appellant submitted that the recovery of tax without first determination of the tax by an independent forum was deprecated by the superior courts and vacating the stay during pendency of appeal amounted to leaving the tax payer at the mercy of the department. He however, submitted that keeping in view the circumstances of the case the Tribunal in exercise of its power can direct the appellant to deposit 10% of the tax amount instead of 25% so that the

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appeal could be heard on merits. He further requested that the Commissioner (Appeals) may be directed to dispose the appeal expeditiously preferably within a period of 30 days.

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

11. The grant of stay is an equitable relief and could only be granted on showing prima facie case, balance of convenience or causing of irreparable loss. The relief is discretionary in nature and the discretion has to be exercised judiciously and not arbitrary. After preliminary hearing the grant of stay by the Commissioner (Appeals) clearly reflected that the appellant had made out a prima facie case. The stay once granted could be vacated only on sound grounds and reasoning and not arbitrarily merely to penalize a tax payer or to provide an opportunity to the department to recover the tax during pendency of appeal.

12. The grant of stay cannot be subjected to the deposit of 25 percent of the tax amount as per proviso of section 66 of the Act as sub-section (4) of section 58 is an independent provision and does not provide any such condition or restriction. We have noticed that the Commissioner (Appeals) without hearing the appellant on 03.11.2020 had directed it to deposit 25 percent of the adjudged amount for automatic stay order. However on 04.11.2020 the Departmental Representative (DR) also proposed for deposit of 25 percent of adjudged amount so that stay could be granted.

13. The Commissioner (Appeals) while rejecting the stay application observed as under:-

"7. Further stay in the matter is rejected after hearing both the parties today, as balance of convenience does not lie in appellant's favour on merits of the case.

8. Appellant's under declare tax in the matter and his under payment is prima facie visible. Appellant has been given an option to pay 25% of the

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defaulted amount to avail stay against recovery in terms of proviso to section 66 (1) of the Act, 2011, which he has refused. He is also not willing to accept his responsibility under section 18 of the Act, 2011. Extension of stay further, is not proper in the given circumstance".

14. It is thus apparent from the direction issued by Commissioner (Appeals) on 03.11.2020 and the order passed on 14.12.2020 that the Commissioner (Appeals) had made up his mind to grant stay subject to deposit of 25% of adjudged amount which was not a legally correct approach. Moreover it is evident from the Impugned Order that the stay was vacated without sound reasoning. The only ground on the basis of which the stay was vacated was that the appellant had no prima facie case and that too without any discussion. It was thus apparent that an opinion was formed without discussing merits of the case which was not a proper approach at interlocutory stage.

15. We have also found force in the arguments of the learned advocate for the appellant that recovery of tax without determination of tax by an independent forum was not proper and the superior courts had deprecated such practice.

16. Keeping in view the fact that the appeal is still pending before the Commissioner (Appeals) thus it is appropriate to provide a fair chance to the appellant to get its appeal decided on merits. Therefore this appeal is allowed and stay against recovery of tax dues is granted for a period of thirty days from the date of receipt of this order. The Commissioner (Appeals) is directed to decide the appeal within thirty days from the date of receipt of this order without allowing unnecessary adjournments. However in case the appeal is decided against the appellant further seven days-time is allowed to it to avail remedy available under law.

17. The learned advocate for the appellant has agreed to deposit 10% of the adjudged amount of tax with SRB within seven days from today subject

to outcome of pendency of the appeal before Commissioner (Appeals). However if the amount is not deposited within seven days the stay stands vacated.

19. The appeal and stay application is disposed of in the above terms. 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: 24.12.2020


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

Received on 29/12/2020


Registrar

Order Dispatched on 29/12/2020


Registrar