

(Quoted file)

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD KARACHI

DB-1

Review Application No. 01/2020  
In APPEAL NO. AT-14/2019

Assistant Commissioner, SRB, Karachi .....Appellant

Versus

M/s Foundation Securities (Pvt) Ltd.....Respondent

Date of Filing of Appeal : 21.01.2020

Date of hearing: : 23.01.2020

Date of Order: : 30.01.2020

Mr. Ameet Kumar, AC, SRB for Applicant

ORDER



**Justice<sup>®</sup> Nadeem Azhar Siddiqi:** This application has been filed by the applicant/department, which is in the nature of review of the order dated 09.12.2019 passed by this Tribunal after considering the merits of the case with the prayer to revise the said order and decide the Appeal No. AT-14/2019 together with Appeal No. AT-19/2019 after hearing.

01. The facts of the case necessary for the disposal of this application are that a show-cause notice (SCN) dated 15.08.2016 was issued by the applicant to the respondent for assessment of tax of Rs.32,678,691/= for the tax periods from July, 2012 to June, 2014 along with default surcharge and penalties under clause 3 and 6 (d) of section 43 of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act).

*MOS*

*[Signature]*

02. The Assistant Commissioner passed order in original (OIO) NO. 126/2017 dated 15.05.2017 amounting to Rs.34,278,691/= alongwith penalty of Rs.1,545,916/= under clause 3 of section 43 of the Act.

03. The tax payer has challenged the said order before Commissioner (Appeals-I) by way of filing Appeal No. 59/2017 who vide order in appeal (OIA) No. 01/2019 dated 01.01.2019 maintained the OIO to the extent of principal amount of tax and setaside the OIO in respect of penalty.

04. The applicant has challenged the OIA of waiving penalty in appeal before this Tribunal by way of filing Appeal No. AT-14/2019. The taxpayer also filed Appeal No. AT-19/2019. The Tribunal after hearing the learned Assistant Commissioner, SRB and learned representative of the respondent dismissed the appeal No. 14/2019 vide order dated 09.12.2019.

05. The applicant/department now filed this application which is in the nature of review of order dated 09.12.2019 with the prayer that the order dated 09.12.2019 may be revised and Appeal No. AT-14/2019 may be heard with Appeal No. AT-19/2019 which is still pending.

06. Mr. Ameet Kumar, the learned AC for the department in his written arguments raised the following contentions in support of his application:-

(i) The Tribunal without considering the fact that the appeals NO. AT-14/2019 and 19/2019 are interconnected with each other decided the departmental appeal No. AT-14/2019, whereas the appeal No. AT-09.12.19/2019 filed by the tax payer is still pending.

(ii) The Commissioner (Appeals) has not waived the total amount of default surcharge but waived such partial amount, but the Tribunal by misconstruing the facts has waived the total amount of default surcharge.

(iii) The Tribunal is vested under its inherent powers to make such orders as may be necessary for meeting the ends of justice or to prevent

03. Mr. Ameet Kumar, the learned AC for the department in his written arguments raised the following contentions in support of his application:-

abuse of the process of the law as provided under section 151, 152 and 153 the Code of Civil Procedure, 1908.

- (iv) Reference to clause 21 of the General Clauses Act, 1897 was made and it was submitted that such provision empowered this Tribunal to recall its earlier order.

We have heard the learned representative of the department and perused the record as well as the order of the Tribunal dated 09.12.2019.

07. The Tribunal before proceeding with this application vide order dated 21.12.2020 had put the learned AC on notice to satisfy the Tribunal regarding the maintainability of this application in absence of any specific provisions of law in relation to review or recalling the order of the Tribunal passed on merits. It was decided to discuss the maintainability of application in view of absence of power of Tribunal in the relevant statute to review or recall its own order/decision passed after considering the merits of the case.

08. It is clear from the perusal of the order dated 09.12.2019 that the order was passed on merits after hearing the learned representatives of both the parties and at the time of hearing none had requested to decide both appeals together.

09. The Act has no provision which gives power to the Tribunal to review or set aside or recall its own order passed on merits after hearing the learned representative of the parties. The review like appeal and revision is a substantive statutory right and unless provided in the statute the power of review cannot be exercised in view of the following decisions of superior courts:

(a) In the reported case of Desmond Vaz versus Karachi Building Control Authority, PLD 2005 Karachi, page 164 relevant page 174 © It has been held that ".....While examining the issue the Honorable Supreme Court observed that, 'The right to claim review of any decision of a court of law, like the right to appeal, is a substantive right and not a mere matter of procedure'.

*Handwritten signature*

*Handwritten signature*  
Page 3 of 6

The Honorable Supreme Court clarified that the right of appeal from any decision of any Tribunal must be given by express enactment and the principle is equally true in case of review, because both appeal and review, though differ in scope, are substantive rights'. The Honorable Supreme Court further observed that 'As such neither of them is available unless it has been conferred by law.....'".

(b) In another reported case of Muhammad Ashraf versus Sultan Humayun, 2003 SCMR 1221 relevant page 1228 © para c 11 it has been held that "..... Needless to say that the right of a party to claim a review of final judgment or order of the Court, judicial or quasi-judicial tribunal, in a substantive matter is not available in the absence of a provision in the relevant statute....." It was further held in the same judgment that ".....However, the cases of fraud, malafide and defect of jurisdiction generally stand on a different footing. It is well-settled that fraud vitiates the most solemn proceedings.....".

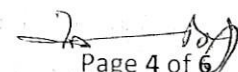
No fraud and defect of jurisdiction was argued before us. From perusal of above reported judgments it is clear that in absence of any statutory provision the power to review or recall of order cannot be exercised.

10. It is true that both the parties had filed separate appeals challenging the same OIA No. 01/2019. In the appeal filed by the department the waiver of penalty and default surcharge was challenged. In the other appeal the tax payer challenged the levy of tax. Both the appeals are between the same parties but are not interconnected since both the appeals have different issues involved and can be decided separately. Moreover during the pendency of appeal no request was made to consolidate both appeals and to decide the same together. Thus the Tribunal while deciding the appeal of the department on merits has not committed any illegality.

11. The learned AC argued that the Commissioner (Appeals) had waived the partial amount of default surcharge, but the Tribunal by misconstruing the facts has waived such total amount. It is suffice to say that Tribunal had not waived the total amount of default surcharge and the OIA was confirmed only to the extent of default surcharge waived by Commissioner (Appeals).



ACI

 Page 4 of 6

12. The learned AC referred to section 151, 152 and 153 of Civil Procedure Code, 1908. All these provisions are not attracted under the circumstances of the instant case. Section 151 deals with the inherent power of the courts to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court. Under this provision the Tribunal cannot review or recall its own order passed on merits of the case without showing any illegality in the order. No court possesses the inherent power to review its order, judgment and decree and this power must be expressly granted by statute.

Section 152 CPC deals with the clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. Nothing of this sort was pointed out in the application for review or recalling the order. The provisions of section 152 CPC are confined to the correction of the types of errors mentioned therein. The decision on merits cannot be reviewed or recalled under this provision of law.

Section 153 of CPC empowers the court to make all necessary amendments. This provision deals with the general power of the court to amend any defect or error in any proceeding in a suit for the purpose of determining the real question or issue raised by or depending on such proceeding. The powers under section 153 CPC can only be exercised during pendency of proceeding in the pleadings and not the order and judgment. The conscious order or judgment of the court cannot be reviewed or recalled under any of these provisions.

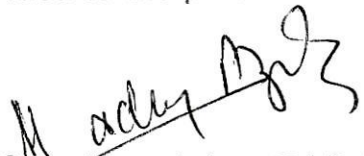
13. Section 21 of General Clauses Act, 1897 deals with the power to issue, to include power to add to, amend, vary or rescind notifications, orders, rules, or bye-laws under the Central Act and not under the laws of provinces. The power cannot be exercised in absence of a specific power of review in the statute and without pointing any error or illegality in the order itself.

14. In view of the above arguments the order or decision of the Tribunal is final subject to section 63 of the Act as provided under sub-section (8) of



section 62 of the Act. Moreover it is held that this Tribunal is not vested with the power to review or recall its own order or decision passed after hearing the parties on merits of the case, hence the application is dismissed. The copy of this order may be provided to the parties.

  
(Imtiaz Ahmed Barakzai)  
TECHNICAL MEMBER

  
(Justice<sup>®</sup> Nadeem Azhar Siddiqi)  
CHAIRMAN

Karachi. Dated: 30.01.2020

Certified to be True Copy

Copies supplied for compliance:-

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

  
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

06/02/2020

Registrar

Order Dispatched on

06/02/2020

Registrar

Karachi. Dated: 30.01.2020

Copies supplied for compliance:-

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

Copy for information to:-

- 3) The Commissioner (Appeals), SRB, Karachi.
- 4) Office copy
- 5) Guard file.