

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

DOUBLE BENCH-I

APPEAL NO. AT-02/2021

Assistant Commissioner SRB, (Unit-03)
Karachi..... Appellant

Versus

M/s Hydrochina International
Engineering Company Limited
Karachi..... Respondent

Date of Filing of Appeal: 07.01.2021
Date of Hearing: 28.01.2021
Date of Order: 16.02.2021

Mr. Manzoor Ahmed AC (Unit-03), SRB and Ms. Uzma Ghory AC-DR for
appellant.



ORDER

Imtiaz Ahmed Barakzai: This appeal has been filed by the Assistant Commissioner (Unit-03), SRB Karachi challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.96/2020 dated 02.11.2020 passed by the Commissioner (Appeals) in Appeal No. 271/2018 filed by the respondent against the Order in Original (hereinafter referred to as the OIO) No. 608/2018 dated 12.06.2018 passed by the Mr. Bakhat Ali Dahio Assistant Commissioner, (Unit-03) SRB Karachi.

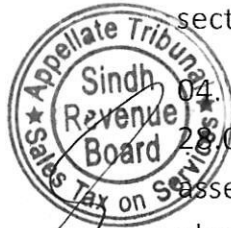
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02. It was stated in the OIO that the respondent was registered with SRB and was providing taxable services classified as the "Construction Services" falling under Tariff Heading 9824.0000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) wherein, "Construction Services" is taxable services since 01.07.2011, at the following applicable rates of Sindh Sales Tax (SST):

Tariff heading	Description of Services	Financial Years							
		Rates	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
9824.0000	Construction Services	Statutory	16%	16%	16%	15%	14%	13%	13%
		Reduced	4%	4%	4%	5%	6%	8%	8%
		Applicable	16%	16%	16%	15%	6%	8%	8%

03. It was alleged in the OIO that on scrutiny of the SRB's online tax profile of respondent it was revealed that the registered person had adjusted/claimed input tax amounting Rs. Rs.77,964,079/-during the tax periods from July-2017 to April, 2018(10 tax periods) against the various invoices. These invoices were inadmissible in view of Rule 22 & 22A of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules) read with Rule 42B of the Rules read with section 15 and 15A of the Act.



04. The respondent was served with Show-Cause Notice (SCN) dated 28.05.2018 to explain as to why SST at Rs.77,964,079/-should not be assessed and recovered under the provisions of section 23 of the Act alongwith default surcharge under section 44 of the Act. The respondent was also called upon to explain as to why penalties under Serial No. 2, 3, 6 (d) and 11 of the Table of Section 43 Act should not be imposed,

05. The respondent submitted reply stating therein that it was engaged in rendering construction services at 13% therefore it was availing the input tax credit under section 15, 15A of the Act read with Rule 22A and 42B of the Rules. It was further submitted by the respondent that it was allowed input tax adjustment in the earlier OIO

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and that taxpayers who were paying SST at the statutory rate were not required to file the option.

06. The Assessing Officer (AO) passed OIO directing the respondent to deposit SST at Rs.77,964,079/- alongwith default surcharge and to revise their return for the period July-2017 to April, 2018 The AC also imposed penalty of Rs.3,898,204/- under serial No.3 of section 43 of Act and Rs.3,898,204 under serial No.11 of section 43 of Act.

07. The respondent challenged the OIO before Commissioner (Appeals) by way of filing of appeal who maintained the order to the extent of payment of principal amount of SST at Rs.77,964,079/- along with due default surcharge under section 44 of the Act. However the Commissioner (Appeals) reduced the penalty imposed by the AO under serial No. 3 of Table under section 43 of the Act from Rs.3,398,204/- to Rs.500,000/- and remitted the penalty imposed under serial No. 11 of Table under section 43 of the Act. The relief allowed in OIA has now been challenged by the AC before this forum.

08. Mr. Manzoor Ahmed the learned AC-SRB submitted that the reason for late filing of appeal was that he was suffering from Covid-19 from 11.12.2020 to 03.01.2021 (24 days) and relied upon the Medical Certificates produced by him. He further submitted that the copy of OIA dated 02.11.2020 was received on 05.11.2020 and while he was preparing appeal he was declared Covid-19 positive and remained in quarantine from 11.12.2020 to 03.01.2021. He further submitted that his COVID test was declared negative vide report dated 02.01.2021 (3rd January being Sunday) and after taking one day rest on 04th January, 2021 he resumed his duties on 05.01.2021 and immediately put up file before Cluster Head who put up the file before Commissioner-III for approval of filing of appeal. The approval was granted on 07.01.2021, and on the same day the appeal was filed.

09. He contended that the delay in filing of appeal was not deliberate or willful, but he was precluded from filing of appeal within time due to circumstance beyond his control.



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10. The learned AC submitted that in the OIO the AO had imposed penalties of Rs.7,796,408/- for violation of serial No. 3 and 11 of Table under section 43 of the Act and such penalties were erroneously reduced by the Commissioner (Appeals) to Rs.500,000/- in respect of serial No. 3 and remitted in respect of serial no. 11 of the Table under section 43 of the Act. He further submitted that mensrea was apparent on the face of the record and reduction and remittance of penalty on the part of Commissioner (Appeals) was illegal. He further submitted that the principal amount of tax of Rs.77,964,079/- and penalty of Rs.7,796,408/- imposed by AO was recovered by way of attachment of Bank Account of the respondent and this appeal was filed to avoid refund of penalty to the respondent.

11. We have heard the learned AC and perused the record made available before us.

12. The AC prayed for condonation of delay in filing of appeal before this forum. Moreover as per the Medical Certificates produced by the AC it is evident that he was suffering from Covid-19 from 11.12.2020 to 03.01.2021 and could not file the appeal within time. The AC received the copy of OIA on 05.11.2020 and appeal before the Tribunal could be filed within sixty days from the date of receipt of copy of OIA. The last date of filing of appeal was 04.01.2021 whereas the same was filed on 07.01.2021 after delay of three days. However in view of the prevailing circumstance due to Covid-19, and taking a lenient view we condone the delay in filing of appeal.

13. The AC has challenged the action of learned Commissioner (Appeals) in reduction and remittance of penalties imposed by the AO. In our view the Commissioner (Appeals) was vested with the power to impose or not to impose penalties. The discretion exercised by Commissioner (Appeals) without any apparent bias and malafides on his part could not be challenged. The Commissioner (Appeals) for valid reason reduced and remitted penalties which were imposed by AO without any justification. The AC contended that the mensrea was apparent from the record. However the AO failed to establish 'mensrea' in the OIO and even failed to use this word in his order. The imposition of penalty is quasi criminal in nature and for imposing



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penalty the existence of mensrea is mandatory and the onus was upon the Department to establish mensrea. In the reported case of Commissioner Income Tax versus Habib Bank Limited, 2007 PTD 901 it was held as under:

"13. There can be no cavil to the arguments of the learned counsel for the respondent that the penal provisions under the Income Tax Act are quasi-criminal in nature and mandatory condition required for the levy of penalty under section 111 is the existence of mens rea and, therefore, it is necessary for the department to establish mens rea before levying penalty under section 111. There is a plethora of judgments of the superior Courts of India and Pakistan from the very inception of Income Tax Act, 1922, on this point. The judgments relied on by the learned counsel for the respondents also supported this proposition. The reliance of the learned counsel for the applicant on the judgment of the Tribunal authored by the then Chairman of the Income Tax Appellate Tribunal in which the learned Chairman has held that the penalties levied under the Income Tax Ordinance are in nature of civil liabilities, is well founded as the order of the Tribunal cannot overrule the judgments of the apex Court and this Court. Therefore, we have no hesitation in answering the question framed by this Court with the consent of the parties on 05.05.2006, in negative.



The above judgment was although related to Income Tax Ordinance but the conclusion drawn is fully applicable in the instant case.

14. It has been held by the Superior Courts that the penalty cannot be imposed without first establishing mens rea on the part of department, moreover it has to prove that claiming of input tax was dishonest and malafide. In this regard reference is made to the judgments reported as:

(a) Pakistan through Ministry of Finance versus Hard Castle Waud, PLD 1967 SC 1, (b) M/s DG Khan Cement Company Limited versus The Federation of Pakistan and others 2004 SCMR 456 (2004 PTD 1179) Supreme Court of Pakistan, whereby it has been held that "Each and Every case was to be decided on its own merits as to whether the evasion or non-payment of tax was willful or mala fide, decision on which would depend upon question of recovery of additional tax. In the facts and circumstances of the case, the non-payment of the sales tax

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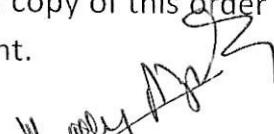
within tax period was neither willful nor it could be construed to be mala fide evasion of payment of duty, therefore, the recovery of additional tax as penalty or otherwise was not justified in law" and (c) Dy. Collector Central Excise versus ICI Pakistan Limited, 2006 SCMR 626.

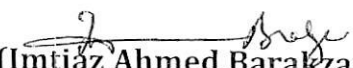
15. Another aspect of the case is that against the determined liability of Rs.77,964,079/= the Department had already recovered an amount of Rs.85,760,487/= from the respondent in the year 2018 by attaching its bank account and the respondent had not challenged the OIA before this forum.

16. The Commissioner (Appeals) in the concluding para 29 of the OIA had concluded that "As regards the penalty imposed on the Appellant under the impugned OIO, despite that Appellant's 'mensrea' in the matter is transparent from the foregoing, I am still inclined to give them some relief on this account.....". In our opinion the Commissioner (Appeals) has failed to consider the fact that there was no adjudication in the OIO on the point of existence of 'mens rea'. Merely claiming input tax by paying statutory rate of SST without any malafide and deliberate attempt to defraud the department was therefore not sufficient to establish 'mens rea'.

17. In view of the above discussions we are satisfied that the Commissioner (Appeals) in reducing and remitting the penalties had rightly exercised discretion vested with him and we do not find any legal infirmity in the OIA. Consequently the appeal is dismissed in limine being devoid of merit.


18. The copy of this order may be provided to the learned AC and the respondent.


(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER


Karachi
Dated: 16.02.2021

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REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD
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Order Dispatched on 10/03/2021

Registrar

Order issued on 10/03/2021

Registrar

Copy for compliance:

- 1) The Assistant Commissioner (Unit-), SRB, Karachi.
- 2) The Respondent.



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