BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD, ATKARACHI

Double Bench-I
APPEAL NO. AT-13/2021

M/s Fiber Link (Pvt.) Ltd. .....Appellant

Versus

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

Date of filing of Appeal	19.02.2021
Date of hearing	23.11.2021
Date of Order	28.03.2022

Mr. Noman Zaher, Tax Officer for appellant.
Mr. Sajid Samo, AC (Unit-01), SRB Karachi alongwith Ms. Uzma Ghory, AC-DR for respondent .

ORDER

Imtiaz Ahmed Barakzai: This appeal has been filed by the appellant challenging the Order-in-Appeal (hereinafter referred to as the OIA) No. 109/2020 dated 02.12.2020 passed by the Commissioner (Appeals) in Appeal No.308/2018 filed by the Appellant against the Order-in-Original (hereinafter referred to as the OIO) No.317/2019 dated 25.04.2019 passed by Mr. Vicky Dhingra, Assistant Commissioner, (Unit-01) SRB Karachi.

02. Brief facts as stated in the OIO were that the appellant having SNTN-S3155596-9 was voluntarily registered under section 24 of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) from 23.07.2013 as internet and broadband service provider under Tariff Heading 9812.6000 of the Second Schedule to the Act. The services provided or rendered related to telecommunication including internet and broadband services which are chargeable to the Sindh Sales Tax (SST) under Tariff Heading 98.12 and sub-Tariff Headings thereof of the Second Schedule to the said Act.

03. It was alleged in the OIO that respondent had short declared the SST, claimed / adjusted inadmissible input tax and late filed the monthly SST returns

thus accordingly Show Cause Notice (SCN) dated 06.04.2018 was issued. It was confronted that the respondent had provided taxable services and received the consideration of Rs.735,992,105/- wherein the SST amount worked out to be Rs.140,732,123/- however the respondent only declared the output tax of Rs.23,489,366/-. Thus short declared SST of Rs.116,882,757/-. The respondent had also failed to e-file SST returns for the tax period July-2017 to February-2018 and had claimed input tax of Rs.25,121,319/- out of which input tax of Rs.23,268,401/- was time barred under Rule 22(1) of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules) as the registered person had filed the return after four tax periods.

04. The appellant was confronted in the SCN as to why SST of Rs.116,882,757/- may not be assessed and recovered alongwith levy of default surcharge under Section 44 of the Act and penalties may not be imposed under Serial No.2, 3, and 6(d) under section 43 of the Act. The representative of the appellant Mr. Noman Zaheer sought adjournments and thereafter provided some of the requisite record and details from time to time. However the Assessing Officer (AO) after considering all such explanations held that input tax of Rs.17,045,622/- was inadmissible irrespective of the fact whether the same was claimed, adjusted within the time limit prescribed. Moreover the apportioned input tax which otherwise was admissible in terms of fraction formula under rule 22(3) of the Rules but being time barred under Rule 22(1) of the Rules was needed to be added.

05. The OIO was passed and the AO added claimed / adjusted inadmissible input tax of Rs.22,364,897/- (being sum of Rs.17,045,622 and Rs.5,319,275/-) as mentioned in para (4) supra. The AO held that the respondent was required to pay the said amount of tax alongwith default surcharge under section 44 of the Act. He also imposed penalty of Rs.1,118,245/- (being 5 percent of Rs.22,365,897/-) under Serial Number 3 of Table under section 43 of the Act, and penalty of Rs.80,000/- (Rs.10,000/- per tax period) under Serial No.2 of Table under section 43 of the Act.

06. The appellant challenged the OIO by way of filing appeal before the Commissioner (Appeals) under section 57 of the Act. The Commissioner (Appeals) in para 21 decided the case as under:-

> *"...21...(i) I hold Appellant's claim to the input tax worth Rs.5,319,275/- as inadmissible for being time-barred, unless such time-bar is condoned by the competent authority under section 81 of the Act, 2011. Appellant is*

therefore, allowed a grace-period of 60 days, starting from the service of the instant Order-in-Appeal. During this time, he shall approach the competent Authority of the SRB and secure the needful condonation of delay, in respect of the aforenoted amount, as per law and procedure. In this regard, respondent department, should inter alia, look into Appellant's plea of 'financial crises' and 'loss of record/data' etc. On the expiry of the given 60 days' time-limit, respondent department shall be at liberty to proceed for recovery of the inadmissible input tax amount adjudged in the impugned OIO, as per law, in respect of which the Appellant fails to produce the requisite condonation of delay. With that, the department may also recover from the Appellant due default surcharge under section 44 ibid. Minor amount of Rs.15/- may be recovered from the Appellant as well, which is his admitted liability but leftover the unknown reasons.

(ii) Respondent AC is also directed to cross-check and verify, the genuineness of the input tax claim amount itself, being Rs.5,319,275/-. With that, the AC should also verify the amount of penalty and default surcharge that the Appellant claims to have availed 'waiver' of, under the SRB Tax Amnesty Notification 2019. These two exercises must be completed by the incumbent AC within 15 days of the service of this Order-in-Original. Appellant should extend full cooperation and must also provide requisite record/data/information to the incumbent AC without any delay, in his own interest.

(iii) AC may note that in case any further discrepancies/short-payments/excess input-claims etc., are uncovered as a consequence of exercises at (ii) above, the respondent department shall be at liberty to take-up assessment thereof with the instant Appellant, separately, as per law and procedure. Such assessment, if undertaken by the department, shall not constitute a part of the instant proceedings.

(iv) As regards the penalty imposed on the Appellant Rs.1,118,245/- (for late-filing), despite Appellant's clear mens rea, I tend to consider the same as harsh and accordingly reduce the same to the Rs.250,000/- only. On the same analogy, I also remit in toto, the other penalty of Rs.80,000/- as imposed on the Appellant. Penalty amount of Rs.250,000/- shall be payable by the Appellant, irrespective of the amounts and the payment time-lines thereof, as mentioned in the foregoing paragraphs."

Resultantly the appeal was filed before this Tribunal.

07. The learned representative of the appellant Mr. Noman Zaheer submitted before this Tribunal as under:-

(i) That the respondent had required it to deposit the amount of Rs.23,563,142/- for the reason that the input tax adjusted was inadmissible under sub-Rule(1)(3) of Rule 22 of the Rules and penalties as imposed under Serial No.3 and under Serial No.2 of the Table under Section 43 of the Act. However in view of the 'reconciliation report' filed by the Department / AC dated 09.03.2020 before the Commissioner (Appeals) which was reproduced at para 15(i) of the OIA. It was admitted that the appellant had deposited an amount of Rs.17,570,607/- into the Sindh Treasury between 24.05.2019 to 10.06.2019 by availing SRB Tax Amnesty Notification dated 18.05.2019 which allowed 'partial waiver' of the demand. This payment has liquidated appellant liability as assessed in the OIO to the extent of Rs.17,045,622/-.

(ii) That the SRB has issued SCN dated 06.04.2018 for the entire amount mentioned in Audit report and charged SST of Rs.116,882,757/- for tax periods from July-2011 to June-2016.

(iii) That the disallowance of input tax was not confronted to the appellant through SCN dated 25.04.2019, thus the disallowance of input tax is patently illegal and without jurisdiction.

(iv) As per section 15 of the Sindh Sales Tax on Services Act, 2011, it is legal right of the appellant to adjust/ claim the input tax which is directly used in provision of internet services. Disallowing the huge amount of input tax would put extra financial burden upon appellant which is equal to violation of human rights guaranteed by Constitution of Pakistan 1973.

(v) That the input tax was wrongly disallowed on the ground that the same was time barred as it could be claimed in the next six succeeding tax periods.

08. The learned AC for respondent submitted as under:-

(i) That after the issuance of the show-cause notice dated 05.04.2017, the appellant filed tax returns and claimed input

tax (otherwise time barred). Therefore, the notice dated 05.10.2017 was issued in continuation to the show-cause notice wherein, the appellant was given due opportunity to defend its position of claiming time barred input tax. Thus, the notice dated 05.10.2017 cannot be considered as the second show-cause notice. in this regard, reliance was placed upon the judgment reported as Assistant Collector of Customs AFU, Lahore vs. Triple-M (Pvt.) Ltd. and 4 others PLD 2006 SC 209 wherein, the Honorable Court has held that:

> *"subsequently notice dated 31.08.1992, was a notice of date of hearing requiring the importer to appear before the Authorities for showing cause as to why short recovery as regulatory duty be not recovered....Issuance of notice of date of hearing was not a fresh show cause notice....Second notice had to be treated as a notice in continuation of the proceedings before the Authorities which had commenced within time, under the earlier SCN and was merely a notice of date of hearing of the case...".*

(ii) That the appellant has not claimed the output tax alongwith default surcharge. Moreover the appellant has not paid amount of penalty for late filing of return.

(iii) That the appellant being registered person failed to charge and deposit due amount of SST and also failed to file its tax returns in time, manner and mode prescribed by the Act which clearly show the willful default of appellant and the penalties have rightly been imposed in OIO.

(iv) That the content of para D to the extent of the provisions of section 15 are not denied however, the adjustment of input tax under section 15 of the Act, 2011 is subject to conditions and restrictions prescribed by the Board. Hence, section 15 of the Act, 2011 must be read with section 15A ibid and rule 22 of the Rules for the admissibility of input tax. It is submitted that the section 7 of the Sales Tax Act, 1990 is identical to the rule 22 of the Rules and in the reported judgment cited as M/s Shaheen Steel Furnance Gujranwala vs. Government of

Pakistan and 4 others (PTCL 2009 CL 782), the Honorable High Court Lahore has held that *"the requirements mentioned in Section 7 are necessary pre-conditions for claiming input tax"*.

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

10. The instant appeal pertained mainly to disallowance of input tax. In the OIO the input tax disallowed amounted to Rs.22,364,897/-. However the appellant had deposited an amount of Rs.17,570,607/- with the SRB by availing Tax Amnesty declared by SRB dated 18.05.2019. Thus the only dispute raised by the appellant in this appeal pertained to the addition of remaining input tax credit of Rs.5,319,275/-. The contention of the appellant was that in view of Section 15 of the Act it was its legal right to claim / adjust input tax which was directly used in provision of internet services and disallowance on this account was illegal. Whereas the contention of respondent was that admissibility of input tax under section 15 of the Act was dependent upon and must be read with section 15A of the Act and rule22(1) of the Rules. The respondent stated that the appellant had filed SST after due date and had claimed input tax after 4 months of purchase / date of filing returns thus the input tax was time barred and was rightly disallowed.

11. The representatives of appellant and respondent were required to prepare reconciliation showing suppliers, NTN, Name, Date of purchase, input tax, month in which input was claimed, Due date of filing return, date on which return was actually filed and delay in days. It was evident from the reconciliation filed that the apportioned time barred input tax amounted to Rs.5,319,275/- since such input tax was claimed after delay of four months.

12. It would be pertinent to examine the legal position since the adjustment of input tax under section 15 of the Act is subject to the conditions and restrictions prescribed by the Board. Hence for admissibility of input tax under Section 15 of the Act must be read in conjunction with Section 15A of the Act read with Rule 22 of the Rules. Rule 22(1) of the Rules is reproduced for ready reference as under:-

> *"1. Subject to the provisions of rule 22A and other relevant provisions of the Act and the rules and notifications issued thereunder, a registered person who holds a tax invoice (for the purchase of goods or services used or consumed in providing or rendering of taxable services) in his name, bearing his sales tax registration / NTN, shall be entitled to deduct / adjust input tax paid during the relevant tax*

period, subject to the condition that the input tax in relation to the taxable services shall be worked out first and the amount, so worked out, shall be bifurcated for the services provided or rendered in Sindh and also taxed in Sindh and for those provided or renderded outside Sindh and also not taxed in Sindh:

Provided that where the registered person did not deduct or adjust the input tax in the relevant period, he may claim such input tax deduction or adjustment in the tax returns for any of the [six] succeeding tax periods".

13. The above rule provided that where the registered person did not deduct or adjust the input tax in the relevant period, he may claim such input tax deduction or adjustment in the tax returns for any of the six (four during the relevant tax periods) succeeding tax periods. Moreover a tax period comprised of one month as per sub-section (95) of section 2 of the Act. The appellant was required to file SST returns for every succeeding tax period to adjust the input tax adjustment of the previous tax period, since the appellant had to do things in the manner as they are required to be done or not done at all. This view gains support from the following cases.

(i) Muhammad Idrees versus Collector of Customs and others, PLD 2002 Karachi page 60 as under:-

"15...It is established principle of law that the things should be done as they are required to be done or not at all. Nobody can be allowed to contravene, flout or violate the statute or the rules framed thereunder in the name of national interest or any other so-called high or subline idea or ideal. The rule of law requires that every person in execution of law should follow strictly the law as laid down and should not exceed the limit of law for any reasons whatsoever...".

(ii) Assistant collector Customs and others versus Khyber Electric Lamps and three others reported as 2001 SCMR page 838. It was held as under:-

"4....It is well settled proposition of law that a thing required by law to be done in a certain manner must be done in the same manner as prescribed by law or not at all....".

(iii) Muhammad Mustafa versus Syed Azfar Ali and three others, PLD 2014 Sindh page 224, it was held as under:-

> *"12...It is significant to add there that where things have not been done in the manner, as required by the law and procedure, the same cannot be given legal sanctity particularly when the same are resulting in penal consequences or causing rights of an individual, therefore, we safely hold that basis judgment of the learned trial Court judges has not been in accordance with meaning and objective of order XII, Rule 6, C.P.C. hence the same cannot sustain...".*

14. It is thus evident that the above case laws that the appellant had not acted in accordance with law by not filing SST returns for every tax periods as provided under section 30 of the Act and rule 22 of the Rules and was not entitled to the adjustment of input tax at its whims and it could not blame others for its own fault and negligence. Thus in view of above discussion the apportioned time barred input tax adjustment amounted to Rs.5,319,275/- is disallowed.

15. The penalty imposed in the OIO for Rs.80,000/- under Serial No.2 of the Table under section 43 of the Act on account of late filing of return is maintained. However the penalty of Rs.1,118,245/-imposed under Serial No.3 of Table under Section 43 of the Act is deleted as the Department has failed to establish mens rea in the instant case. This view gains support from the following decisions of the Superior Courts.

i. In case of Commissioner of Income Tax versus Habib Bank Ltd. reported as 2007 PTD 901, it has been 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, 1921, on this point".*

ii. In case of Deputy Collector, Central Excise Lahore Versus M/s ICI, Pakistan Limited, Lahore, reported as 2006 SCMR 626, it has been held as under:

> *"02. in case of failure of a registered person to pay the sales tax within time, he shall also be liable to pay additional tax and surcharge. The liability being not automatic B would be determined by the appropriate authority as to whether or not there was any reasonable ground for default in payment of sales tax which could be considered to be wilful and deliberate".*

16. In view of the above discussions the appeal is disposed off in terms of para 14 and 15 supra.

17. The copy of this order may be provided to the learned authorized representative of the parties.

(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN

(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER

Certified to be True Copy

REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Karachi:
Dated:28.03.2022

Copy Supplied for compliance:

1) The Appellant through Authorized Representative.
2) The Assistant Commissioner, SRB, for compliance

Order issued on 29/03/2022

Registrar

Copy for information to:-

3) The Commissioner (Appeals), SRB, Karachi.
4) Office Copy.
5) Guard File.

Order Dispatched on 29/03/2022