

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD, ATKARACHI

Double Bench-I
APPEAL NO. AT-14/2021

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

Versus

Assistant Commissioner (Unit-01), SRB, KarachiRespondent

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. 110/2020 dated 07.12.2020 passed by the Commissioner (Appeals) in Appeal No. 456/2018 filed by the Appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 1000/2018 dated 07.12.2018 passed by Mr. Vicky Dhingra, Assistant Commissioner, (Unit-01) SRB Karachi.

02. Brief facts as stated in the OIO were that M/s Fiber Link (Pvt.) Ltd. SNTN-S3155596-9 (hereinafter referred to as the appellant) 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. It was observed from the SST profile that the respondent failed to e-file returns for the tax periods July-2011 to June-2013, March-2014 to June-2015 and from April-2016 to February-2017. Such contravention were



offences liable to penalties prescribed at Serial Number 02, 03 of the Table under section 43 of the Act.

03. It was alleged in the OIO that the respondent filed a month wise summary sheet wherein it was stated that the payable amount of tax was Rs.12,696,023/-. However after adjustment of input tax of Rs.5,624,035/- and 20% withheld at source the total tax amount before adjustment was Rs.18,453,331/-. The respondent claimed that the company had availed benefit of relief package announced by SRB vide Notification dated 18.05.2018. The payable amount of SST was Rs.18,453,330/- out of which Rs.12,386,103/- were paid on 20.06.2018 and Net payable amounted to Rs.6,867,227/-. The respondent also deposited the default surcharge at Rs.1,373,093/- vide CPR No.S201806201027160012 dated 20.06.2018 being 20% of total default surcharge in terms of Notification dated 18.05.2018.

04. The respondent was served with Show Cause Notice (SCN) dated 05.04.2017, and in continuation to SCN a further Notice dated 05.10.2018. The account officer of the respondent appeared and submitted that total Sindh Sales Tax was Rs.18,453,330/- out of which input tax amounting to Rs.5,624,035/- was adjusted and net amount worked out at Rs.12,829,295/- as under:-

Tax period	Sindh sales tax	Input tax amount	Net amount
March-14	1,484,264	375,105	1,127,159
April-14	1,663,700	353,235	1,310,465
May-14	914,609	355,167	559,442
June-14	976,781	358,379	618,402
July-14	1,565,153	177,487	1,387,666
Aug-14	765,820	519,672	246,148
Sep-14	749,711	350,782	398,929
Oct-14	1,222,151	358,487	863,664
Nov-14	707,016	342,104	364,912
Dec-14	716,666	343,304	373,362
Jan-15	1,081,271	237,368	843,903
Feb-15	1,272,238	358,062	914,176
Mar-15	1,436,835	431,217	1,005,618
Apr-15	1,475,961	407,759	1,068,202
May-15	1,290,251	337,397	952,854
Jun-15	1,130,903	336,510	794,393
Total	18,453,330	5,624,035	12,829,295

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The respondent had deposited the tax of Rs.12,386,103/- under relief package announced by SRB vide Notification dated 18.05.2018. However it did not deposit the remaining amount of tax of Rs.6,067,227/- which relates to input tax as under:-

Tax Period	Payable Amount of SST	Paid on 20-06-2018		Net Payable (b-c)
(a)	(b)	(c)	CPR No.	
14-Mar	1,484,264	874,083	S2018062010271159996	610,181
14-Apr	1,663,700	1,291,431	S2018062010271159998	372,269
14-May	914,609	544,358	S2018062010271160002	370,251
14-Jun	976,781	607,205	S2018062010271160000	369,276
14-Jul	1,565,153	1,375,799	S2018062010271160007	189,354
14-Aug	765,820	238,505	S2018062010271159997	527,315
14-Sep	749,711	293,313	S2018062010271160001	356,398
14-Oct	1,222,151	857,120	S2018062010271160006	365,031
14-Nov	707,016	359,665	S2018062010271159999	347,351
14-Dec	716,666	368,380	S2018062010271160003	348,286
15-Jan	1,081,271	755,193	S2018062010271160005	326,078
15-Feb	1,272,238	914,176	S2018062010271160004	358,062
15-Mar	1,436,835	1,002,823	S2018062010271160009	434,012
15-Apr	1,475,961	1,062,382	S2018062010271160011	413,579
15-May	1,290,251	949,812	S2018062010271160010	340,439
15-Jun	1,130,903	791,858	S2018062010271160008	339,045
Total	18,453,330	12,386,103		6,067,227

05. The Assessing Officer (AO) observed that the respondent deposited tax amount of Rs.12,386,103/- alongwith default surcharge of Rs.1,373,093/- being 20% of the total default surcharge under section 44 of the Act. However since the returns for the tax periods from March-2014 to May-2015 have been filed very late a penalty of Rs.150,000/- (Rs.10,000 per tax period) was imposed under Serial No.2 the Table under Section 43 of the Act.

06. The respondent had raised the plea that the amount of Rs.6,067,227/- pertained to input tax credit and stated that it was their legitimate right to adjust the same. However the AO vide Notice dated 05.11.2018 confronted the respondent to justify the claim of input tax under sub rule(1) Rule 22 of the Rules and interpreted the term period as defined under sub-section(95) of Section 2 of the Act. AO held that the input tax could only be claimed in the month of return or four subsequent tax periods. However since the respondent had failed to do so thus, the AO disallowed the input tax claimed / adjusted by the respondent and held that the respondent was required to pay the SST of Rs.6,067,227/- alongwith default surcharge under section 44 of the Act. Moreover the penalty of

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Rs.303,361/- being 5 percent of the SST amount was also imposed under Serial No.3 of Table under Section 43 of the Act.

07. The OIO was passed for the recovery of penalty of Rs.150,000/- under Serial No.2 of Table under Section 43 of the Act. Recovery of Rs.6,067,227/- on account of disallowance of input tax claimed / adjusted by the respondent alongwith default surcharge (to be calculated at the time of payment) under section 44 of the Act. Further penalty of Rs.303,361/- was imposed under Serial No.3 of the Table under section 43 of the Act.

08. 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 25 of the OIA held as under:-

"...25. In view of the foregoing fact and circumstances, I am inclined to decide this matter in the following terms:

(i) The defaulted amount of Rs.443,192/- is Appellant's admitted tax liability because his Accountant Mr. Noman Zaheer has already acknowledged the same fact before the respondent AC, in writing and also verbally, on 13.04.2018. Appellant must pay this amount into the Sindh Government treasury alongwith due default surcharge under section 44 ibid, forthwith.



(ii) Hold Appellant's claim to input tax claim of Rs.5,624,035/- to be inadmissible for the afore-noted reasons. The same amount is thus held recoverable from the Appellant, as per law and procedure, together with due default surcharge under section 44 ibid.

(iii) Respondent AC must also cross-check/verify the correctness and genuineness of Rs.133,273/- which amount, as per the Appellant, was withheld/ deducted by his service recipients during the under-reference tax-periods.

(iv) Likewise, the AC must also check and verify, if the acclaimed 'waiver' of penalty and default surcharge availed by the Appellant, purportedly under the SRB Tax Amnesty Notification 2018, was correct and lawful.

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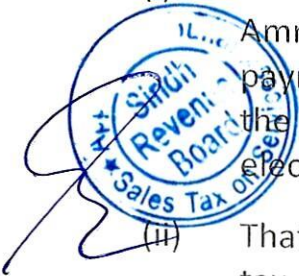
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- (v) While the Appellant must comply with the directives at (i) & (ii) above immediately, a collective timeline of 30 days is allowed to the rival parties to complete verifications as required vide sub-paras (iii) & (iv) above. This time-line shall start from the date of service of this Order-in-Appeal. Further assessment action against the Appellant if any, in respect of (iii) & (iv) may be taken up by respondent department, separately, as per the attending provisions of the Act, 2011 and the Rules-2011, if deemed necessary.
- (vi) As regards the penalties imposed in the impugned OIO, that is, Rs.150,000/- (for late-filing of returns) and Rs.303,361/- (for late-payment / non-payment of due tax) keeping in view Appellant's clear mens rea in this matter, I do not feel the need to temper with these penalties and therefore, uphold both in toto.

Resultantly an appeal was filed before this Tribunal.

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

- (i) That the appellant had paid SST of Rs.12,386,103/- under Amnesty of 2018 and the department was pressing for payment of Rs.5,319,275/- on account of input tax claims by the appellant on acquiring internet services and payment of electricity bills.
- (ii) That the instant appeal pertained to the disallowance of input tax only and it had claimed input tax as provided in law and thus not caused any financial loss to the department.
- (iii) That actual input tax disallowed was Rs.5,624,035/- and not Rs.6,067,227/- as wrongly mentioned in the OIO.
- (iv) That 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.
- (v) That in view of Section 15 of the Act, it was legal right of the appellant to adjust / claim the input tax which was directly



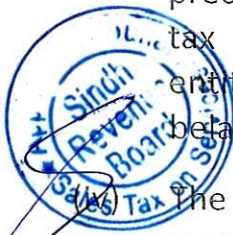
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used in provision of internet services. Disallowance of such huge amount of input tax was illegal and violation of the Constitution of Islamic Republic of Pakistan 1973 (hereinafter referred to as the Constitution).

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

- (i) That the appellant filed SST returns after due date and claimed input tax after six months which was time barred thus the input tax was rightly disallowed.
- (ii) The adjustment of input tax under Section 15 of the Act is subject to condition and restrictions prescribed by the Board. Hence Section 15 of the Act must be read with Section 15A of the Act and Rule 22 of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules) for the admissibility of input tax.
- (iii) That the appellant was required to claim input tax in the relevant tax period or in the tax returns for any of the four succeeding tax periods. The appellant has failed to meet the preconditions prescribed in rule 22 of the Rules thus the input tax was barred by time. Therefore the appellant was not entitled for the adjustment of time barred input tax at this belated stage.



The total input tax amount time barred as per reconciliation amounted to Rs.5,624,035/- and the amount pertaining to output short payment worked out to Rs.443,192/- resultantly the principal amount was adjudged at Rs.6,067,227/-. Moreover the OIA passed by Commissioner (Appeals) was valid lawful and within jurisdiction order. He had passed such order after considering all aspects of the case and facts available on record.

- (v) That the appellant being registered person failed to charge and deposit due amount of SST and also failed to file its returns in the time, manner and mode prescribed by the Act which clearly shows willful default of the appellant thus the penalties were rightly imposed upon it.

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

12. The appellant has submitted that this appeal pertained to disallowance of input tax of Rs.5,624,035/- and by claiming input tax as provided in law the appellant had not caused any financial loss to the Department whereas the plea of the respondent was that the appellant had filed SST returns after due date and had claimed input tax after six months of the purchase / date of filing of returns which was time barred thus the input tax was rightly disallowed. Both the representatives were required to prepare a reconciliation showing suppliers name, NTN, date of purchase, input tax amount, tax return in which input was claimed, due date of filing returns, date on which return was actually filed and delay in days.

13. It was evident from the reconciliation that time barred input tax worked out to Rs.5,624,035/- since the input tax was claimed after delay of 1226 days to 1679 days therefore it was time barred. Moreover the amount pertaining to output short payment amounted to Rs.443,192/- thus totaling Rs.6,067,227/- (Rs.5,624,035 + Rs.443,192). The amount of Rs.443,192/- was appellant's admitted tax liability because the accountant of respondent had acknowledged such fact before AC in writing as well as verbally on 13.04.2018. This fact has also been mentioned at para 25(i) of the OIA.

14. 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

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and also taxed in Sindh and for those provided or rendered 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”.

15. 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 reported cases.

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

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"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..."

It is evident from the above case laws that the appellant had not acted in accordance with the 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 thus 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 amounting to Rs.5,624,035/- is disallowed.

16. The defaulted amount of Rs.443,192/- relating to output short payment was appellant's admitted tax liability because his Accountant Mr. Noman Zaheer had acknowledged the same before the respondent AC in writing, and this fact has also mentioned at para 25(1) of the OIA. Therefore we maintain this addition alongwith due default surcharge. The total addition maintained would work out to Rs.5,624,035 + 443,192 = Rs.6,067,227/-.

The penalties imposed for Rs.150,000/- under Serial No.2 of Table under Section 43 of the Act for late filing of return is maintained. However the penalty of Rs.308,361/- 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

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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”.

18. In view of the above discussions the appeal is disposed off in terms of para 16 and 17 supra.

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


(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi:


Dated:28.03.2022

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.


(Imtiaz Ahmed Barakzai),
TECHNICAL MEMBER

Certified to be True Copy


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on

29/03/2022

Order Dispatched on

29/03/2022

Registrar