

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD AT
KARACHI
DOUBLE-BENCH-I
APPEAL NO. AT-24/2021

M/s Usman Carriage (Pvt.) Ltd.
(SNTN: 7336927-1
142-K, Model Town, Lahore.....Appellant

Versus


Assistant Commissioner (Unit-23),
Sindh Revenue Board,
3rd Floor, Shaheen Complex,
M.R. Kiyani Road, Karachi.....Respondent

Date of filing of Appeal 29.04.2021
Date of hearing 07.09.2021
Date of Order 14.09.2021

Mr. Arshad Basheer, FCMA & Syed Mansoob Hassan FCMA for appellant.


Mr. Yousuf Bukhari, AC (Unit-23), SRB for respondent

ORDER

 **Justice Nadeem Azhar Siddiqi**: This appeal has been filed by the appellant challenging the Order-in-Appeal (hereinafter referred to as the OIA) No. 36/2020 dated 04.03.2021 passed by the Commissioner (Appeals) in Appeal No. 36/2020 filed by the Appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 17/2020 dated 14.02.2020 passed by Mr. Yousuf Bukhari, Assistant Commissioner, (Unit-23) SRB Karachi.

02. The brief facts of the case as stated in the OIO were that the appellant has got voluntarily registration with SRB under service category of 'services provided or rendered by persons engaged in inter-city transportation or carriage of goods, Tariff Heading 9836.0000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred as 'the Act'), which

Was


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was chargeable to Sindh Sales tax SST at the reduced rate of 8% under section 8 of the Act read with rule 42G of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules).

03. It was also stated in the OIO that the persons engaged in providing the aforesaid services were not entitled to get input tax credit on sales tax paid on purchases of goods/services used or consumed in rendition of the aforesaid services as per Section 15A of the Act read with rule 22(2) and 22A of the Rules, provided that they elected or opted to pay SST at the statutory rate of 13% by submitting Election/Option Form-I to the concerned Commissioner-SRB under Rule 42G within 21 days from the date of commencement of every financial year (i.e. by 21st July every year). It was alleged that the appellant had not opted for statutory rate of 13% and had failed to submit the Form-I under Rule 42G of the Rules.

04. It was alleged in the OIO that the appellant had claimed input tax adjustment of Rs.8,751,974/- on account of purchases of Rs.67,322,882/- during the tax periods from October, 2018 to March, 2019 (6 tax periods) which was inadmissible under Section 15A of the Act read with aforesaid rules. The appellant vide email dated 12.09.2019 and letter dated 24.09.2019 was required, to submit evidence of submission of Form-I under rule 42G of the Rules in order to ascertain the facts, but it failed to comply with such email / letter.

05. It was further alleged in the OIO that the appellant had filed Null SST Returns during the tax periods from May-2019 up to July-2019. The appellant was required to provide sales records and copies of bank statement of the tax periods May-2019 to July-2019 under section 52(2) of the Act, in order to justify its Null declarations. However, the appellant failed to submit the requisite information and justify its position.

06. The registered person submitted letter dated 02nd October, 2019, that the appellant had ceased to carry logistics/transportation services due to cancellation of agreements with OMC, and it had closed its business w.e.f. 01.07.2019. However, the appellant had failed to submit the requisite sales information and bank statement to justify its position.

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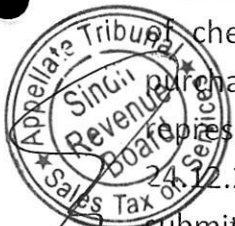
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07. The appellant was served with Show-Cause Notice (SCN) dated 08th October, 2019 to explain as to why SST liability of Rs.8,751,974/- may not be assessed and determined against it under section 23(1A) of the Act read with various sections of the Act in addition to default surcharge under section 44 of the Act. The appellant was also required to explain as to why penalties under Sr. No. 2, 3, 5, 6(d), 11, 12, 15 of the Table under Section 43 of the Act should not be imposed against it for violation of the various provisions of the Act and rules framed thereunder.

08. The authorized representative of the appellant submitted reply dated 28.11.2019, wherein, it was inter alia submitted that:-

- a) The input tax and output tax were calculated on the basis of invoices to SRB,
- b) The purchase invoices were the only invoices claimed with SRB while providing taxable services,
- c) That 50% of input tax was claimed in SRB because 50% revenue for inter-province transportation services was declared with SRB, as provided in The Sindh Sales Tax Special Procedure (transportation or carriage of petroleum oils through oil tankers) Rules, 2018, (hereinafter referred to as the Special Rules).

09. The registered person was required vide letter dated 16.12.2019, to provide copies of income tax returns/accounts with summary, list of invoices with details of loading and unloading and was also required to provide copies of cheques with respect to payments made against the under reference purchases with bank statement in order to support its contention. The representative of the appellant appeared and submitted written reply dated 27.12.2019, wherein it had reiterated its earlier submissions. It was verbally submitted that the invoices claimed with SRB were not declared in any other sales tax authorities. The representative was required to provide evidence of payment made against the under reference purchase invoices and also provide soft copies of sales tax returns filed with other sales tax authorities. The representative of the appellant submitted via email dated 16.01.2020 ledger of Gas & Oil Pakistan Ltd and details of loading and unloading points of its vehicles.



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10. The Assessing Officer (AO) passed OIO disallowing the input tax adjustment under section 15A of the Act, read with rules 22, 22A and 42G of the Rules. The AO imposed penalty of Rs.50,000/= under serial No. 6(d) of the Table under section 43 of the Act. The AO also imposed penalty of Rs.437,599/= under serial No. 11 of the Table under section 43 of the Act. The AO further imposed penalty of Rs.437,599/= under serial No. 12 of the Table under section 43 of the Act. The AO further imposed penalty of Rs.100,000/= under serial No. 12 of the Table under section 43 of the Act for violating the provisions of section 52 of the Act.

11. The tax payer filed appeal before the Commissioner (Appeals) who maintained the order of the AO, including the statutory default surcharge under Section 44 of the Act. However he deleted penalties but only maintained the penalty of Rs.437,599/= under Serial No.11 of Table under Section 43 of the Act. Resultantly filing of this appeal by the appellant before this Tribunal.

12. Mr. Muhammad Arshad Bashir, FCMA, the learned representative of the appellant submitted as under:-

i) The OIO and OIA were both erroneous and against the facts and law of the case.

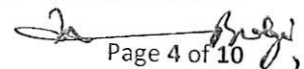
ii) As per the Notification dated 02.02.2018, (Rule 3 of Special Rules), the inter-province service of transportation of petroleum products through Oil Tankers were chargeable to SST @ 15% in view of Notification dated 02.02.2018 (Rule 30 of Special Rules). Such Form was duly submitted on 28.02.2018 within the extended time as per Circular No.2/2018. However both the forums, without considering the above fact disallowed the input tax of Rs.8,751,974/- and also imposed penalty without establishing *mensrea*.

iii) Rule 42G of the Rules was not applicable during the tax periods involved in this appeal instead Special Rules was applicable as the Special Rules excluded the General Rules.

iv) The Working Tariff of SRB provided that rate of SST payable was 15% without any condition in case of Oil Tankers providing inter-province transportation.

v) The AO while disallowing SST had not ordered for deposit of input tax adjustment claimed by the appellant. Whereas the Commissioner




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(Appeals) in the concluding para of OIA held that the appellant shall pay a penalty of Rs.437,599/= in addition to the principal amount adjudged at Rs.8,751,974/=.

- vi) The AC had not disputed submission of "Form-I" since in para 16 of the OIO he had contended that the Form-I was not submitted within due date.
- vii) The SST on transportation service had remained in abeyance till 31st December, 2017 and when the abeyance was lifted the appellant got registration on 20.02.2018 and started complying with the provisions of the Act and rules framed thereunder.

13. Mr. Yousuf Bukhari, the learned AC for respondent submitted as under:-

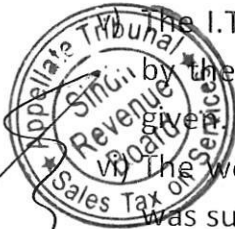
- i) The issue involved in this appeal was disallowance of input tax claimed by the appellant without submitting Form for opting for payment of standard rate of tax as provided under Special Rules.
- ii) The appellant had not submitted "Form-I" with SRB and photocopy of the covering letter produced by the appellant was not available in the record.
- iii) The special Rules of 2018 provided for the higher rate of tax at the rate of 13% or 15 % respectively subject to submission of written option for paying higher rate of SST.
- iv) The appellant failed to submit the original acknowledgment beside being provided with an opportunity.

v) The I.T. Section of SRB had confirmed that no Form-I was submitted by the appellant and in this context reference to page 9 of OIA was given.

vi) The working Tariff referred by appellant mentioning the rate of 15% was subject to Notification dated 02.02.2018. (Special Rules No. 3)

vii) The appellant got registered on 20.02.2018 whereas, the application for registration was submitted on 09.02.2018 and for all purposes the appellant was deemed to be registered on 09.02.2018 (Reference were given to para 23 of page 13 of OIA).

viii) The appellant fell under the old regime (References were given to para-25, page-13 of OIA and para-16, page-05 of OIA).



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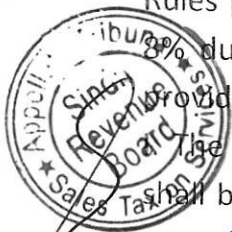
14. The learned representative of the appellant in rebuttal submitted that in the presence of acknowledgement of receipt of Form-I the burden was upon the department to establish that Form-I was not submitted and that in the OIO the submission of Form-I was not disputed. He further submitted that the Commissioner (Appeals) had called the Report from I.T. Department, SRB after conclusion of hearing and the said report was not confronted to the appellant and the same could not be used against the appellant.

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

16. The dispute relates to disallowance of the input tax adjustment claimed by the appellant on account of providing of inter-province service of transportation of petroleum products through oil tankers. The contention of the appellant was that since it had submitted Form-I, it was entitled to claim input tax adjustment. The contention of the respondent was that the inter-province service of transportation of petroleum products through oil tankers was subjected to reduced rate of SST @ 8% and the appellant was not entitled to claim input tax adjustment unless Form-I was submitted as per rule 42G of the Rules and rule 3 of the Special Rules. The other controversy related to whether the Commissioner (Appeals) while passing OIA could order for payment of tax in absence of any such direction in the OIO.

17. The controversy mentioned supra mainly revolves on the submission or non-submission of Form-I by the appellant. Sub-rule (4A) of rule 42G of the Rules provides the rate of SST at reduced rate of 6% which was enhanced to 8% during the tax periods involved in this appeal. The proviso to this rule provides for payment of SST at the rate of 13% on submission of written Form-I. The rule 3 of Special Rules provides that the rate of SST on inter-province sales tax shall be 15% in case the service provider elects or opts to pay the said higher rate of 15%.

18. The claim of the appellant was that it had submitted Form-I on 26.02.2018 under cover of its letter dated 28.02.2018 which bears the round seal of SRB and initial of some officer of SRB. The AO in para 16 of the OIO had mentioned that "The tax payer had failed to submit Form-I within due date in order to charge the SST at statutory rate and to claim the input tax adjustment



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under section 15 of the Act". From this phrase it is evident that the dispute was not in respect of submission of Form-I but it was in respect of date of submission of Form-I. Rule 3 of the Special Rules provided that the Form-I should be submitted within fourteen days from the date of the notification i.e. 02.02.2018. The time for submission of Form-I was extended vide Circular No. 2 dated 06.03.2018 till 31.03.2018, whereas the same was submitted on 28.02.2021 which was within time allowed by Circular No.2.

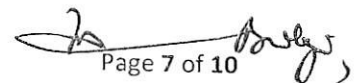
19. The contention of the AC before Commissioner (Appeals) recorded in sub-para iii. of para 11 of the OIA mentioned that "the appellant was required to opt for the standard rate and submit the Form-I within due date, to be able to avail input tax adjustment, in which he failed". Further contention of the AC on this issue was recorded in second part of para 13 of the OIA wherein it was mentioned that "the appellant failed to submit Form-I as required under rule 42G of the Rules in prescribed time and manner". It is thus clear from these contentions of the AC that the submission of Form-I was not denied but the time and manner in which the such Form was submitted was disputed.

20. The AC once chooses not to deny the submission of Form-I, was under law estopped from denying the submission of Form-I at subsequent stage of proceeding. Article 114 of the Qanun-e-Shahadat Order, 1984 read as under:-

"114. Estoppel: When one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing".

It is now well established that no evidence is admissible in any proceeding to deny such fact for which any person, by his act and omission, intentionally caused or permitted the other party to believe as true. The above provision of law was considered in the reported case of Dr. Muhammad Javaid Shafi versus Syed Rashid Arshad, PLD 2015 SC 212 and it was held as under:-

8..... a person is estopped by his own conduct, if he though was aware of certain fact(s), which is likely to cause harm to his rights and adversely affect him and is prejudicial against him, avowedly or through some conspicuous act or by omission, intentionally permits and allows



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another person to believe a thing to be true and act on such belief without taking any steps to controvert or nullify such adverse fact and instead he sleeps over the matter. In other words, where a person who is aggrieved of a fact, he has a right, rather a duty to object thereto for the safeguard of his right, and if such a person does not object, he shall be held to have waived his right to object and subsequently shall be estopped from raising such objection at a later stage. Such waiver or estoppel may arise from mere silence or inaction or even inconsistent conduct of a person”.

In the facts of the present case which were highlighted above non-denial of submission of Form-I by the AC at the initial stage estopped him to agitate the same at this stage.

21. It is thus apparent from Para 14 of the OIA that the AC under the direction of the Commissioner (Appeals) submitted Report dated 09.12.2021 regarding non-submission of Form-I alongwith photocopy of e mail sent by AC to Mr. Abdullah Soomro for calling record of letter dated 28.02.2018. In compliance Mr. Abdullah Soomro reported that he did not find any details/record of inward receipt of the attached letter. When the AC had not denied submission of Form-I calling report regarding submission of Form-I was amounted to allow the department to fill a lacuna which was not appropriate.

22. It is thus obvious from the OIA that after receipt of the Report dated 09.12.2020 no copy of the same was supplied to the appellant. Moreover no hearing took place after 08.12.2020 and the appellant was condemned unheard on the point of Report dated 09.12.2020. The Commissioner (Appeals) after concluding the hearing of appeal had erroneously entertained the Report dated 09.12.2020 submitted by the AC. It is apparent from the record that the Commissioner (Appeals) without confronting the appellant with the Report dated 09.12.2012 as mentioned in para 26 of the OIA had held that “as clearly shown above, in categorical terms, Appellant’s acclaimed ‘Form’ (under Rules 2018) was actually never filed by him with the concerned authority of SRB”. The material or evidence which was brought on record at the back of the appellant and not confronted to the appellant cannot be used against the appellant.

23. The submission and consideration of material/evidence at the back of the party was considered in the reported case of Karachi Textile and Dying



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Printing Works Karachi versus The Commissioner, Income Tax, Central, Karachi, PLD 1984 150 (DB-SHC) as under:-

"No party can be condemned on basis of evidence or information adduced behind his back and without any notice to him. It is true that technicalities of Evidence Act cannot fetter the exercise of power of the Assessing authority but rule of justice demands that before any adverse order, penalty or liability is passed or imposed upon a party he should be afforded full opportunity to meet the case and rebut the evidence used against him".

24. The Commissioner (Appeals) in para 16 of the OIA had mentioned about submission of same Form-I by the appellant on 19.07.2019. Since we have held that once AC had not denied the submission of Form-I he was estopped under law from denying or disputing the submission of Form-I, hence the filing of same form subsequently has no consequence.

25. The other argument of the representative of the appellant was that the AO in consequence of disallowing the SST had not ordered for deposit of input tax adjustment claimed by the appellant. Whereas the Commissioner (Appeals) in the concluding para of OIA held that "the appellant shall pay a penalty of Rs.437,599/= in addition to the principal adjudged amount of Rs.8,751,974/=". It is true that the AC while disallowing the input tax has not ordered for recovery of input tax adjustment claimed by the appellant, since no amount of SST was adjudged by him in the OIO.

26. The Commissioner (Appeals) under sub-section (1) of section 59 of the Act is vested with the power to pass such order as he thinks fit, confirming, varying, altering, setting aside or annulling the decision or order appeal against. However sub-section (3) of section 59 of the Act provides that the Commissioner (Appeals) shall not increase the amount of any tax payable by the appellant unless the appellant has been given an opportunity of showing cause against such increase. It is apparent from the OIA that no such show-cause was issued to the appellant and the appellant was not heard on the point of payment of SST in consequence of disallowance of input tax adjustment claimed by it. The Commissioner (Appeals) could not order for the depositing of SST which was not ordered by the AO. In view of non-issuance of the show-cause the appellant could not be directed to deposit such amount of SST, which was not determined and ordered by AO.

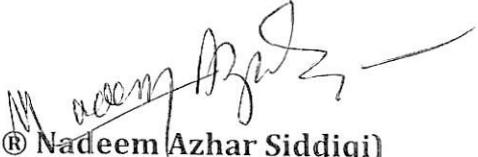


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27. In view of the above discussion, the appeal is allowed and both the OIO and OIA are set aside/annuled. The copy of this order may be provided to the learned representatives of the parties.


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER


(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi:

Dated: 14.09.2021

Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
- 2) The Assistant Commissioner, (Unit-23), SRB, for compliance

Copy for information to:-

- 3) The Commissioner (Appeals), SRB, Karachi.
- 4) Office Copy.
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REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on 23/09/2021

Registrar

Order Dispatched on 23/09/2021

Registrar