

(Grand file)

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD AT KARACHI

DB-I

APPEAL NO. AT-26/2021

M/s Khan Afzal & Sons (SNTN: S1000853)
Plot # A-364, Sector 5/A, Qasba Town Ship,
Karachi.Appellant

Versus

Assistant Commissioner-(Unit-23)
Sindh Revenue Board,
09th Floor, Shaheen Complex,
M.R. Kiyani Road, Karachi.....Respondent

Date of filing of Appeal: 20.05.2021
Date of hearing: 11.10.2021
Date of Order: 12.10.2021

Mr. Farooq Ahmed, Accountant of appellant and Mr. Shwar Gul, Proprietor of the appellant.

Mr. Irfan Waheed, AC and Ms. Uzma Ghory AC-DR for SRB, respondent.

ORDER



Justice Nadeem Azhar Siddiqi: This appeal has been filed by appellant challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.24/2021 dated 29.03.2021 passed by the Commissioner (Appeals) in Appeal No. 213/2019 filed by the Appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 442/2019 dated 31.05.2019 passed by the Mr. Tashkeel Hussain, Assistant Commissioner, (Unit-23) SRB Karachi.

02. The facts as stated in the OIO were that the service provided or rendered by persons engaged in inter-city transportation or carriage of goods by road or through pipeline or conduit were chargeable to the Sindh Sales Tax (SST) under

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Sindh Sale Tax on Services Act, 2011 (hereinafter referred to as the Act) falling under Tariff Heading 9836.0000 of the Second Schedule to the Act read with the rule 42G of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules)

03. It was stated that the appellant was informed vide this office letter dated 21-01-2019 to e-file true and correct returns and in response the appellant filed NULL returns with the SRB for the tax periods from May-2016 to Aug-2016 and Oct-2016 to Dec-2018 respectively.

04. It was alleged in the OIO that from the scrutiny of Bank Statement of the business bank account of the appellant it was revealed that an amount of Rs.121,038,124/- credited into his business account during the period from May-2016 to December, 2018 involving SST of Rs.9,683,050/- calculated at the rate of 8%. On the contrary, the appellant filed NULL returns which meant the registered person conducted no business activity during the aforesaid tax periods.

05. The appellant was served with a Show Cause Notice (SCN) dated 03.04.2019 to explain as to why the tax liability of Rs.9,683,050/- may not be assessed and determined under section 23 of the Act alongwith default surcharge under Section 44 of the Act. The appellant was also asked to explain as to why the penalties under Serial No. 2, 3, 6(d), 11, 12 & 15 of the Table under section 43 of the Act should not be imposed for violations of the various provisions of the Act and the Rules made thereunder.

Mr. Tariq Khan, manager of the company and Mr. Muhammad Imran, representative of the company, appeared on behalf of the appellant on 19.04.2019 and submitted that they had provided transportation services to M/s Shabbir Tiles & Ceramics Limited within city and since the services were within city limits no SST was charged, collected and deposited.

07. The Assessing Officer (AO) passed OIO determining the SST of Rs.9,287,278/- alongwith payment of default surcharge under section 44 of the Act. The AO also imposed penalty of Rs.310,000/- (Rs.10,000/- per month for failure to e-file true and correct SST returns for the tax periods May-2016 to Aug-





2016 and Oct-2016 to Dec-2018) as per serial No.2 of the Table under section 43 of the Act. Penalty of Rs.464,364/- (5% of the Principal/ Tax amount i.e. Rs.9,287,278/-) was imposed as per serial No.3 of the Table under section 43 of the Act. Penalty of Rs.9,287,278/- (100% of the Principal/ Tax amount i.e. Rs.9,287,278/-) was imposed as per serial No.6(d) of the Table under section 43 of the Act. Penalty of Rs.464,364/- (5% of the Principal/ Tax amount i.e. Rs.9,287,278/-) was imposed as per serial No.11 of the Table under section 43 of the Act. Penalty of Rs.464,364/- (5% of the Principal/ Tax amount i.e. Rs.287,278/-) was imposed as per serial No.12 of the Table under section 43 of the Act. Penalty of Rs.100,000/- was imposed as per serial No.15 of the Table under section 43 of the Act. The AO directed the appellant to immediately deposit the SST amounting to Rs.20,377,648/- with SRB.

08. The appellant challenged the OIO before Commissioner (Appeals) by way of filing of appeal. The Commissioner (Appeals) maintained the OIO and dismissed the appeal filed by the appellant, and held as under:-

"...15. In view of the foregoing position of facts and law, I have doubts that Appellant has been making false and baseless claims which he is unable to prove with any cogent evidence to prove/ justify/ reconcile the credit side entries of his impugned Bank Statement. Appellant has been filing "NULL" sales tax returns in SRB willfully, knowingly and fraudulently, only to suppress his legitimate taxable sales and thereby, to evade payment of lawful tax thereon. Contrary, his claims, Appellant's service-recipient M/s Shabbir Tiles and Ceramics has plainly denied (vide their letter Ref. No. Fin/081/2019) having any business transactions with the Appellant during the under-reference tax-periods. Appellant claimed that the Credit entries appearing in his impugned business bank account reflected his "intra-city" transportation services (and hence not taxable under the Act, 2011). However, despite availing approximately two years' time so far, Appellant has filed to come up with any cogent documentary evidences to support his claims that he rendered 'intra city' and not 'intra city' transpiration/ carriage services during the said tax periods. It is evident that Appellant has in fact, been rendering "inter-city taxable transportation services but failed to declare those to SRB ad failed charge, collect and pay due SSTs thereon in contravention of section 3, 8, 9 & 17 ibid. His willful Null Filing of SSTs returns, during the under reference ax-periods, amply proves his illegal actions and his mens rea in this matter.



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16. In view of the foregoing points of facts and law, I find no reasons to interfere with the impugned Order-in-original No.442/2019 dated 31.05.2019 and accordingly, uphold the same in toto, without any modifications. This Appeal stands disposed of accordingly”.

Resultantly the appeal was filed before this Tribunal.

09. The main contention of the appellant was that the assessment order was bad in law since it was passed only on the basis of the credit entries available in the bank statement of the appellant. His other contentions was that he had only provided exempted intra city transportation services to Shabbir Tiles, and the letter received from Shabbir Tiles was never confronted to him thus the same could not be used against him.

10. The learned AC disputed the contention of the appellant and submitted that the OIO and OIA were passed after examination of the documents submitted by the appellant and the confirmation received from Shabbir Tiles and after providing proper right of hearing to the appellant.

11. Heard the learned representatives of the parties and perused the record made available before us.

12. The contention of the appellant that the assessment order was passed only on the basis of the credit entries available in the bank statement of the appellant and thus was bad in law has force. The assessment order passed merely on the basis of credit entries without linking the said entries with the provision of service was not sustainable in law and was against the dictum laid down by the Honorable High Court in the case of Al-Hilal Motors vs. Collector Sales Tax reported as 2004 PTD 868.

13. The appellant during the pendency of the appeal was directed vide order dated 17.08.2021 to provide all documents and details to the AC to examine its contention that the assessment order was passed merely on the basis of credit entries available in the bank statement of the appellant and that it had exclusively provided exempted intra city transportation service. The AC after examination of the documents submitted Report on 11.10.2021 which is reproduced as under:-



Khan Afzal & Sons (SNTN: 1000853)	
Tax Periods (May-2016 to December-2018)	
Particulars	Amount - RS.
Bank Statement	121,038,124
SRB Declaration	(4,947,153)
Deference Amount (As established in Order-in-Original and Order-in-Appeal)	116,090,971
Amount Reconciled (As per Information/ records (including the copy of Agreement) received from the Services Recipient (M/s Shabbir Tiles Ceramics Limited)	(87,440,315)
Short Declared Value	28,650,656
Short Paid SST	2,292,052

14. Mr. Irfan Waheed, AC submitted that Reconciliation Report was prepared in consultation with Mr. Farooq Ahmed, Accountant of the appellant who had signed the Reconciliation Report as a token of acceptance of the same.

15. Mr. Farooq Ahmed, Accountant of the appellant accepted the Reconciliation Report and agreed to pay and short balance of SST amounting to Rs.2,292,052/- with SRB. He submitted that presently, due to Covid-19 the business and financial condition of the appellant was not good thus it was unable to deposit such huge amount forthwith. He requested that at least six months' time may be allowed to the appellant for payment of short paid SST. He further submitted that exorbitant penalties were imposed erroneously by the AO and illegally confirmed by Commissioner (Appeals) without proper application of mind.

16. Mr. Irfan Waheed, AC did not dispute the request of the appellant for payment of SST within six months. He however, requested that the appellant may be bound to pay the SST within six months with default surcharge and penalty under Serial No. 3 of the Table under section 43 of the Act.

17. Keeping in view the facts and circumstances of the case and the prevailing condition due to Covid-19 in the province as well as in the county, six months

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time is allowed to the appellant to deposit/pay the SST amount of Rs.2,292,052/- alongwith default surcharge. It is made clear to the appellant that no extension for payment would be allowed. However in case the appellant failed to deposit the agreed amount within specified time action under section 66 of the Act should be initiated against him in accordance with law.

18. The AO imposed penalties under Serial No.2, 3, 6(d), 11, 12 and 15 of the Table under section 43 of the Act amounting to Rs. 11,090,370/= against the assessed amount of SST of Rs.9,287,278/=/. The various type of penalties were imposed without application of mind or establishing mensrea thus the same were in violation of the judgments of the superior courts. It has been held that it was not necessary to follow that in every case of default the imposition of penalty was automatic. However it was to be necessarily established that there should be reasonable ground for default in payment of tax which could be considered to be willful and deliberate, few of such judgments are mentioned as under:-

- i) In case of Commissioner of Income Tax versus Habib Bank Limited , reported as 2007 PTD 90, 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, 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 was 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

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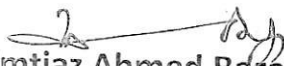
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reasonable ground for default in payment of sales tax which could be considered to be willful and deliberate”.

19. In the instant case the AO had failed to follow the above judgments of the superior courts and had failed to establish *mens rea*. The Commissioner (Appeals) without application of mind whether the penalties imposed could be invoked and without any deliberation as to the existence of *mens rea* confirmed the same and has thus committed an illegality. In view of the fact that the department has failed to establish *mens rea* and malafide on the part of the appellant the penalties imposed by AO and confirmed by Commissioner (Appeals) are set aside.

20. In the light of above facts and the consent of the appellant to pay SST within six months, the appeal is partly allowed. The OIO and OIA are maintained to the extent of payment of SST of Rs.2, 292,052/= alongwith default surcharge to be calculated at the time of payment.

21. 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: 12.10.2021

Certified to be True Copy


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Copy Supplied for compliance:

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

Order issued on 22/10/2021

Copy for information to:-

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

Order Dispatched on 22/10/2021
