

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD AT
KARACHI

DOUBLE BENCH

APPEAL NO. AT-28/2021

M/s Meclay (Private), LimitedAppellant
(SNTN: 7197611-5)
Plot No-24, Sector-14, Korangi Industrial Area,
Korangi, Karachi.

Versus

Assistant Commissioner (Unit-24),
Sindh Revenue Board,
6th Floor, Shaheen Complex,
M.R. Kiyani Road, KarachiRespondent

Date of filing of Appeal 24.03.2021
Date of hearing 13.09.2021
Date of Order 07.10.2021

Mr. Nazeer Ahmed Malik, Advocate for the appellant.

Mr. Moinuddin, AC-SRB and Ms. Uzma Ghory, AC-DR for the 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. 18/2021 dated 24.03.2021 passed by the Commissioner (Appeals) in Appeal No. 26/2020 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 868/2020 dated 20.01.2020 passed by the Ms. Nida Noor, Assistant Commissioner, (Unit-24) SRB Karachi.

M. J.

[Signature]

02. The brief facts as stated in the OIO were that the appellant is holding SNTN:7197611-5 and was covered by the terms of 'Withholding Agent', as provided under sub-rule (2) of rule 1 of the Sindh Sales Tax Special Procedure (Withholding) Rules, 2014 (hereinafter referred to as Withholding Rules). The appellant also got e-signed up on February 29, 2019 with Sindh Revenue Board (SRB) as Withholding Agent under the principal activity of "FBR-Registered or SRB-Registered Persons Receiving the Services of Advertisement".

03. It was alleged in the OIO that on perusal of annexure "C" of the Sindh Sales Tax (SST) returns (Form SST-03), as filed by SRB Registered persons for the tax periods from April, 2016 to June, 2019, showed that the services provided to the appellant amounted to Rs. 14,526,568/= involving SST of Rs.1,963,046/-. The said declaration further revealed that appellant had deducted SST of Rs.1,888,686/-. However, despite withholding the due amount of SST the appellant did not deposit the same with SRB. It was also alleged in the OIO that the appellant vide e-mail dated July 22, 2019, was required to submit copy of their audited annual financial statement for the year ended 2017-2018, but the appellant failed to submit such copy, hence it contravened the provision of sub-rule (10) of rule 3 of the Withholding Rules.

04. The SRB vide its letter dated 25.07.2019 advised the appellant to deposit SST of Rs.1,888,686/= and to furnish the copy of audited financial statement for the year ended June. 2018. However the same could not be submitted.

05. The Show-Cause Notice (SCN) dated 04.10.2019 was issued to the appellant under section 47(1) (a) and 47(1B) of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) requiring it to explain as to why short paid SST of Rs.1,888,686/- may not be recovered alongwith the amount of default surcharge under section 44 of the Act. The appellant was also asked to explain as to why penalties, as provided under S.No.3 and 11A of the Table under section 43 of the Act may not be imposed and recovered for the above mentioned contraventions of Withholding Rules, 2014.

06. The representative of the appellant filed written response. The main contention in the written response was that the impugned amount of SST was inadvertently deposited with Federal Board of Revenue (FBR) and the appellant was ready to approach the FBR for transfer of amount from FBR to SRB.

07. The Assessing Officer (AO) passed OIO directing for the recovery of SST of Rs.1,888,686/- from the appellant under section 47 (1B) read with section 47 (1A)

(a) of the Act alongwith default surcharge under section 44 of the Act. The AO imposed penalty of Rs.1,888,686/= under Serial No. 11A of the Table under section 43 of the Act. The AO also imposed penalty of Rs. 94,434/= under Serial number No.3 of the Table under section 43 of the Act.

08. The appellant challenged the said OIO before Commissioner (Appeals) by way of filing of appeal which was dismissed, and the following observations were made vide para 14 of the OIA:

"...14. In view of the foregoing, I uphold the impugned OIO to the extent of the principal amount adjudged therein. As a measure of relief to the Appellant, I remit the penalties imposed on him in toto. The amount of default surcharge, as leviable under section 44 ibid, shall however, be recoverable from the Appellant as it cannot be remitted under law. Appellants shall have to pay default surcharge amount at the time of payment of the principal adjudged amount in this matter. I further direct the instant Appellant to immediately approach FBR, under intimation to SRB, with the written request to refund/ remit Rs.1,888,686/- being the amount wrongly paid to FBR by the Appellant, into the Sindh Government treasury, without delay, through any recognized legal mechanism. SRB's concerned quarters should peruse this matter with FBR's concerned quarters vigorously, as per law and procedure. However, in case the said amount is not transferred/ remitted by FBR into the Sindh Government treasury, within 60 days of this Order, the instant Appellant shall be liable to pay equal amount himself, into the Sindh treasury, along with due default surcharge, under section 44 ibid. After lapse of given 60 days' time, respondent AC-SRB shall be at liberty to pursue recovery in this matter under section 66 of the Act, 2011. The Appeal stands disposed of in the same terms".



09. Mr. Naseer Ahmed Malik, the learned advocate for the appellant submitted as under:-

- i) The Accountant of the appellant had inadvertently deposited the SST with FBR. However the Commissioner (Appeals) instead of directing the appellant to approach the FBR for transfer of the amount of SST from FBR to SRB has asked the appellant to pay such amount itself if the same was not transferred within 60 days. Furthermore he has threatened action under section 66 of the Act which amounted to double taxation which was not permissible.

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- ii) The appellant had approached the Chairman FBR as well as concerned Commissioner, Inland Revenue for transfer of the adjudged amount of SST to SRB.
- iii) The OIO to the extent of directing the appellant to get the amount transferred from FBR to SRB within sixty days was erroneous as the appellant could not force the FBR to pass appropriate order within this period.
- iv) The appellant undertakes to make all efforts to get the amount transferred from FBR to SRB as early as possible and the time limit provided in the OIA may be deleted.

10. Mr. Amiruddin Kolachi the learned AC-SRB submitted as under:-

- i) The appellant has not disputed the liability of SST amounting to Rs.1,888,686/- which pertained to SRB.
- ii) The Commissioner (Appeals) while directing the appellant to get the amount transferred within sixty days had not committed any illegality. Moreover sufficient time was allowed to the appellant to get the amount transferred from FBR to SRB but no tangible action was taken.
- iii) The appellant was solely responsible to deposit the adjudged amount with SRB since FBR has no mechanism to adjust the amount of SST inadvertently deposited with FBR.

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

The appellant had not disputed the liability of SST amounting to Rs.1,888,686/= to SRB. However due to inadvertance the amount of SST was deposited with FBR and the appellant had applied to the Chairman FBR as well as concerned Commissioner, IR to transfer the adjudged SST amount to SRB. The Advocate of appellant has submitted that asking the appellant to deposit such amount to SRB amounted to double taxation / jeopardy which was not permissible under law. It was further submitted that the appellant would made all out efforts to get the amount transferred from FRB to SRB as early as possible.

13. Mr. Amiruddin AC has contended that the amount of SST of Rs.1,888,686/- undisputedly pertained to SRB thus the appellant was bound to get the same transferred from FBR to SRB. It was further submitted that Commissioner (Appeals) had rightly held that if the amount was not transferred / remitted by

FBR into the Sindh Treasury within 60 days the appellant was required to pay such amount itself alongwith default surcharge under Section 44 of the Act. Moreover it was held that recovery measures for recovering such amount could be undertaken within 60 days under Section 66 of the Act.

14. In the light of above discussions and considering the view point of both the parties the appellant is directed to approach FBR for remitting the SST amounting to Rs.1,888,686/- which was wrongly paid to it. The respondent is also directed to pursue this matter with FBR, as per law and procedure. However mutually agreed time of 6 months from the date of this order is allowed to the appellant for transferring this amount from FBR to SRB, and if the amount is not transferred / remitted by FBR into Sindh Government Treasury within this time, the appellant shall be liable to pay such amount itself, into Sindh Government Treasury, alongwith due default surcharge under Section 44 of the Act. Moreover after lapse of 6 months time as allowed, the respondent shall be at liberty to pursue recovery in this matter under Section 66 of the Act.

15. The AO imposed penalty of Rs.1,888,686/- under Serial No.11A of the Table under section 43 of the Act, and penalty of Rs.94,434/- under Serial Number 3 of the Table under Section 43 of the Act. These penalties were deleted by the Commissioner (Appeals). It may be mentioned that the above two 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

M. J.

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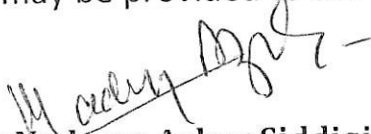
judgments of the superior Courts of India and Pakistan from the very inception of Income Tax Act, 1921, on this point”.

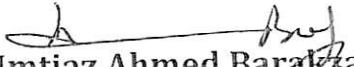
- ii) In case of Deputy Collector, Central Excise Lahore versus M/s ICI, Pakistan Limited Lahore, reported as 2006 SCMR 626, it was held as under:-

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

16. In the instant case the AO had failed to follow the above judgments of the superior courts and had failed to establish *mens rea*. In view of the fact that the department has failed to establish *mens rea* and malafide on the part of the appellant thus the order of Commissioner (Appeals) who has deleted the penalties is confirmed.

17. In view of the above discussions the appeal is partly allowed to the extent of extending time to six months from the date of receipt of this order. The copy of this order may be provided to the learned representatives of the parties.


(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER

Certified to be True Copy

Karachi:

Dated: 07.10.2021

Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
- 2) The Assistant Commissioner, (Unit-04), SRB, for compliance

Copy for information to:-

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


REGISTRAR
APPELLATE TRIBUNAL

SINDH REVENUE BOARD

Order issued on

25/10/2021

Order Dispatched on

25/10/2021