

(Quoted file)

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD AT KARACHI
DOUBLE BENCH-I

APPEAL NO. AT-30/2021

M/s Tracking & Surveillance (Pvt.) Ltd.
Plot No. D-8, Muhammad Ali Cooperative
Housing Society, Karachi.Appellant

Versus

Assistant Commissioner, (Unit-01),
Sindh Revenue Board,
9th Floor Shaheen Complex,
M. R. Kiyani Road, Karachi.....Respondent

Date of filing of Appeal 26.05.2021
Date of hearing 24.11.2021
Date of Order 31.12.2021

Mr. Arshad Siraj Memon, advocate along with Mr. Osama, ITP for appellant.

Mr. Mohammad Faraz Sheikh, AC-(Unit-01), SRB along with Ms. Uzma Ghory, AC-
DR, 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. 36/2021 dated 30.04.2021 passed by the Commissioner (Appeals) in Appeal No. 105/2021 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 32/2021 dated 04.02.2021 passed by the Mr. Muhammad Faraz Sheikh, Assistant Commissioner, (Unit-01) SRB Karachi.

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02. The brief facts of the case as stated in the OIO were that the appellant having SNTN: S3965468-7 was registered with Sindh Revenue Board (SRB) since 08.01.2014 under the services category of "Vehicle Tracking Services" under the Tariff Heading 9812.8100 (previously 9812.9490), the services provided or rendered in respect of Telecommunication including Vehicle Tracking Services of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) were chargeable to the Sindh Sales Tax ("SST") under section 3 and section 8 of the Act read with Rule 35 of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as Rules) at the applicable rates.

03. It was alleged in the OIO that during the scrutiny of the online profile of the appellant maintained with SRB for the tax periods from July-2013 to January-2020, it was revealed that the appellant had provided the taxable services amounting to Rs.306,980,492/- to M/s EFU General Insurance Limited (NTN-944893) involving SST of Rs.53,432,299/-. Whereas the record available with SRB showed that the appellant had paid SST of Rs.6,957,727/- and thus it had short paid SST of Rs.46,474,572/-.

04. The appellant was served with a Show-Cause Notice (SCN) dated 24.02.2020 to explain as to why short paid SST of Rs.46,474,572/- (53,432,299-6,957,727) for the tax periods from July- 2013 to January- 2020 should not be assessed and recovered under section 23 and 47 (1A) to the Act along with default surcharge under section 44(1) and 44(2) of the Act. The appellant was also called upon to explain as to why penalties prescribed under Serial No. 2, 3, 4, 5, 6, 8 and 15 of the Table under section 43 of the Act should not be imposed.

05. The appellant despite numerous opportunities had failed to allegedly file any reply to the SCN.

06. The Assessing Officer (AO) passed OIO determining the SST of Rs.46,474,572/= under section 23 read with section 47 (1A) of the Act along with default surcharge. The AO also imposed penalty of Rs.60,000/- (5000 for 12 tax periods from July, 2013 to June, 2014) and Rs.670,000/- (1,000 for 67 tax periods from July, 2014 to January, 2020) under Serial No.2 of the Table under section 43

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of the Act, penalty of Rs.2,323,729/- under Serial No.3 of the Table under section 43 of the Act, penalty of Rs.300,000/- under Serial No. 4, 5 and 15 of the Table under section 43 of the Act, penalty of Rs.46,474,572/- under Serial No. 6 (d) of the Table under section 43 of the Act and penalty of Rs.500,000/- under Serial No.8 of the Table under section 43 of the Act.

07. The appellant had challenged the said OIO before Commissioner (Appeals) by way of filing of appeal under section 57 of the Act. The Commissioner (Appeals) without touching the merits of the case dismissed the appeal as barred by time. Hence, the instant appeal under section 61 of the Act before this Tribunal.

08. The learned advocate for the appellant submitted as under:-

i. The OIO was passed ex-parte without providing proper right of hearing to the appellant and the same was erroneous and illegal as the SST was levied on the item upon which SST could not be charged.

ii. The service of OIO upon Mr. Saeed who is a Chowkidar and technically he was not the principal officer or the legal representative of the appellant was not proper and legal. Reference was given to Section-67 (1) (b) of Act read with Section 75 of the Act and the decision reported as (1967) 15 Tax 103, Commissioner of Income Tax V/s M. Idris Barry & Co., on the point that the service should be made on the authorized agent.

iii. The AO levied SST on the cost of goods making the OIO illegal and without jurisdiction.

iv. The OIA was illegal as the same was passed without considering the illegalities committed by the AO and without touching the merits of the case and the Commissioner (Appeals) failed to consider that OIO was patently illegal and no limitation was available against such illegal order.

v. The Commissioner (Appeals) while dismissing appeal on technical ground had failed to exercise jurisdiction vested in it and as such the OIA was without jurisdiction.

vi. The appellant was registered on 08.01.2014 and the SST was wrongly demanded for the period before registration of the appellant which fact



was overlooked by Commissioner (Appeals) in ignorance of his earlier orders in which it was held that the tax prior to registration could not be levied.

vii. The SST was levied on assumption and presumption as no material was available with the AO for levying SST.

viii. The AO has imposed all possible penalties to the tune of Rs.50,328,301/- without establishing mensrea and tax fraud and all these facts and illegalities were over looked by the Commissioner (Appeals).

ix. The services provided to EFU were threefold, i.e. i) sale/cost of tracking device, ii) monitoring fees and iii) renewals and the levying SST on the cost of tracking device was illegal and without jurisdiction.

x. The tax periods involved in this appeal were from July-2013 to January-2020 out of which the SST from July-2011 to June-2014 amounting to Rs.9,152,757/= was already taxed by passing OIO No.812/2016 dated 18.10.2016 and passing of fresh OIO for the same period was illegal.

xi. The Reconciliation Report dated 24.11.2021 prepared by the AC is correct and his client is ready and willing to pay deferential of SST worked out in Annexure "C" at Rs.27,777,807/-.

09. The learned AC-SRB submitted as under:-

i. The SCN and notices of hearing were properly served upon the appellant at its registered address. However the appellant deliberately avoided to appear before the AO.

ii. The appellant malafidely and with ulterior motives avoided to provide details of services provided and rendered to EFU.

iii. The SST was rightly levied on the basis of declaration made by the service recipient of the appellant in it returns.

iv. The OIO was properly served upon the representative of appellant at its registered address and the appeal filed by it was barred by time. Therefore it was rightly dismissed.

v. The SST was rightly charged on the gross amount for providing and rendering services by the appellant as the goods supplied along with service become the integral part of service. Thus the SST was rightly charged on

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gross amount as per sub section (79) of section 2 of the Act read with Rule 35 of the part VI of SST Rules reliance was placed on 2017 PTD 2296 (Pak Telecom Mobile Ltd. Versus Federation of Pakistan).

vi. The default surcharge and penalties were rightly imposed as the appellant had failed to deposit due SST as prescribed. Thus it had caused financial losses to the exchequer.

vii. The appeal filed by the appellant before Commissioner (Appeals) was barred by time and was rightly dismissed.

viii. The appellant being a service provider of taxable services was a person liable to be registered and was covered under the definition of registered person provided under sub-section (71) of section 2 of the Act and SST was rightly levied.

ix. The Reconciliation Report dated 24.11.2021 was prepared on the direction of the Tribunal bifurcating the goods and services and the payable SST on the component of service was worked out at Rs.27,777,807/=.

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

11. The dispute between the parties is with regard to levying SST on the cost of the tracking devices/goods. The contention of the appellant was that no SST could be levied on tracking device which falls within the definition of goods. Whereas the contention of the respondent was that the goods supplied alongwith services become integral part of the services and the SST was rightly chargeable on the gross amount.

12. The appellant is in the business of providing car tracking services. It has provided monitoring services, and has charged fees for renewals and also supplied tracking devices to the customers.

13. The appeal filed by the appellant before Commissioner (Appeals) was dismissed without considering the legal grounds viz., whether the AO could levy SST prior to date of registration of the appellant, whether the SST could be levied on cost of goods supplied alongwith the services and whether the SST could be

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levied for the same tax periods in the subsequent OIO which was earlier levied vide OIO No. No.812/2016 dated 18.10.2016.

14. It was the duty of the AO to pass an OIO in accordance with law despite non-filing of reply by the appellant. The grounds raised supra were legal grounds and could be raised at any stage of the proceedings. The AO failed to look into the legal grounds probably due to the reason that no reply to SCN was filed by the appellant. The AO could not levy SST on component of goods. However levying the SST on goods and passing fresh OIO for the periods already taxed has rendered the OIO without jurisdiction, illegal and void. It is now well settled that no limitation runs against a patently illegal order. In the reported case of Muhammad Sham versus Mushtaq Ali 1996 SCMR 856 it was held as under:-

"Bar of limitation may be ignored in respect of void orders but not in respect of erroneous orders. The question of limitation may not arise in respect of judgments which are nullity in law, void or ultra vires. As a matter of fact if an order is without jurisdiction and void, it need not be formally set aside as held in cases of Ali Muhammad v. Hussain Bakhsh (PLD 1976 SC 37) and Ch. Altaf Hussain and others v. The Chief Settlement Commissioner (PLD 1965 SC 68) and Syed Ali Abbas and others versus Vishan Singh and others (PLD 1967 SC 294). In Malik Khawaja Muhammad and others Marduman Baber Kahol and others (1987 SCCMR 1543)"

"As respects the question of limitation, the learned High Court found that the decree in the suit having been passed in utter contravention of the mandatory provisions of law, such order was a nullity against which no limitation could run".

15. It is evident from the perusal of the record that the appeal filed by the appellant before Commissioner (Appeals) was barred by time. However the delay could be condoned as the OIO was passed without jurisdiction, and was void and illegal. Furthermore, as per clause (b) of sub-section (1) of section 67 of the Act a director or a manager or secretary or accountant or any similar officer of the company could act as agent of the appellant being a private limited company. The



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order in accordance with clause (a) of sub-section (2) of section 75 of the Act was required to be served upon the agent of the appellant. In the instant case the OIO was served on one Saeed, Chowkidar of the appellant and the service of OIO was thus not proper and a plausible ground for condoning few days delay.

16. The Commissioner (Appeals) had not considered the legal grounds mentioned in para 13 supra. We have held in our various decisions that no SST could be levied prior to the date of registration of the taxpayer. The Commissioner (Appeals) has also held in his various orders that no SST could be levied before the date of registration. In para 1 of the OIA the Commissioner (Appeals) mentioned the date of registration as 08.01.2014 and stated that the tax periods (July-2013 to January-2020) were involved in the appeal. However he has failed to take note of the fact that the tax periods from July-2013 to 07th January, 2014 was prior to date of registration and the SST could not be levied during this period. In our earlier decision dated 23.09.2021 in the case of Cyber Tech versus SRB, Appeal No. ST-21/2021 we have held as under:-

“vi. In the instant case the SCN was issued 18.04.2019 under section 23 of the Act for the recovery of principal amount of SST of Rs.7,225,775/-. As discussed above the assessment order could be passed only against a registered person and not against a non-registered person or person liable to be registered”.

vii. The Commissioner (Appeals) in his various OIA have held that SST cannot be demanded from a service provider prior to its date of registration, few of such OIA's are mentioned for ready reference as under:-

- a) Appeal No.73/2018, OIA No.97/2020 M/s Sinopec International vs. Assistant Commissioner (Unit-03), SRB dated 03.11.2020.
- b) Appeal No.308/19, OIA No.109/2020, dated 02.12.2020, and Appeal No.456/2018, OIA No.110/2020, dated 02.12.2020, M/s Fiber Link vs. Assistant Commissioner (Unit0-01), SRB.

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c) Appeal No.303/2019, OIA No.95/2019, dated 28.10.2020, M/s Tracking World vs. Assistant Commissioner (Unit-01), SRB.

viii. The above view of Commissioner (Appeals) has been upheld in our various pronouncements. Few of such decisions are mentioned for ready reference as under:-

- i. AT-47/2020 dated 15.02.2021 – AC (Unit-04) vs. M/s MYN Pvt. Ltd.
- ii. AT-234/2015 dated 26.11.2019 – Nasir Khan & Sons vs. Commissioner (Appeals) & DC (Unit-13), SRB.
- iii. c) AT-30/2019 dated 05.03.2021, TCS Logistics vs. The Commissioner, SRB.

ix. In our earlier decision dated 16.11.2021 passed in the case of WEB DNA versus SRBV after considering the relevant provision of law and we had held as under:-

“The contention of the AC-SRB that “all persons providing taxable services within Sindh are deemed to be registered persons” if accepted than there was no need to enact section 24, 24A and 24B of the Act. The acceptance of contention of the AC-SRB in this regard will make these provisions of the Act redundant and nugatory. Redundancy or superfluity of an Act of Parliament and a provision of law cannot be readily accepted.

In view of the above discussions it is held that the appellant was not liable to pay/deposit SST before the date of its registration with SRB and the OIA is maintained in this regard”.

17. Considering the discussions at para 16 supra it is held that the appellant was not liable to pay/deposit SST before the date of registration with SRB.

18. The fact of levying of SST on the component of goods alone is sufficient to hold that the OIO was without jurisdiction, illegal and void and no limitation runs

against such an order and the Commissioner (Appeals) should had condoned the few days delay in filing of appeal before him.

19. The second point in issue as mentioned in para 13 supra is "Whether the tax could be levied on the component of goods if supplied alongwith services?" In our earlier decision in the case of Falcon-I, Appeal No. AT-65/2018 decided vide our Order dated 25.01.2021, we after considering the relevant provisions of law and the case laws available on the subject had held as under:-

"...23. Initially the description of the Tariff Heading 9812.9490 was "vehicle tracking services" and the said description was amended/alterd vide Sindh Finance Act, XXXVI of 2015 effective from 10th July, 2015 and after alteration the description read as "vehicle [and other] tracking services". From the above it is apparent that for the tax periods from July, 2011 to June, 2015 only the vehicle tracking service was taxable and not the other services even if provided or rendered by the appellant. A Service could be subjected to SST under a provision of law, which is un-ambiguous and clear. There is no room for any intendment and there is no presumption as to tax. The revenue is required to establish that a transaction fell within the parameters of taxable service listed in the Second Schedule to the Act in furtherance of any economic activity, failing which the SST levied on the basis of some assumption or presumption was not warranted in law".

In the same Order it was also held as under:-

"36. The most important provision is enumerated in section 8 of the Act which provides for scope of tax. This provision provides that subject to the provisions of this Act, there shall be charged, levied and collected a tax known as sales tax on the value of a taxable service at the rate specified in the Schedule in which the taxable service is listed. Subsection (2) of section 8 of the Act then provides the authority to the Board or the Government for fixing a higher or lower rate of tax as may be specified through Notification. This provision also does not provide for taxing the goods if used in providing taxable services.



37. The charging section is a most important provision and has to be construed strictly and does not provide for inclusion of the cost of goods if the same is used in providing taxable services. Regarding pith and substance the Supreme Court in the reported case of SRB V CAA as quoted supra held as under:-

“37.....The pith and substance of the legislated subject is to be examined to determine in whose legislative sphere a particular subject comes under. And above all a reasonable interpretation which does not produce impracticable results should be adopted”.

The pith and substance of the matter is that if there are two taxing powers both cannot exercise their powers simultaneously and they have to act in their own jurisdiction. Thus demanding SST by SRB on the cost of goods is not legally justifiable”.

20. In view of the discussions at para 19 supra and relying on our earlier decision in the case of Falcon-I Appeal No.AT-65/2018 we are of the view that SRB is not entitled to demand tax on the component of goods or supplies even if the same are part of taxable service.

21. The AO in the OIO determined the SST at Rs.46,474,572/=. In this amount the SST on sale of tracking devices and the SST for the tax periods from July-2011 to June-2014 amounting to Rs.9,152,757/= was also included which was part of earlier OIO. We are of the view that the SST which was already charged could not be claimed or charged subsequently.

22. The AC prepared the Reconciliation for the tax periods from July-2014 to January-2020 and after deducting the SST on sale of tracking devices and the SST already charged vide OIO No. No.812/2016 dated 18.10.2016, the SST was worked out at Rs.27,777,807/=. The learned advocate for the appellant has signed Annexure “C” to the said report in token of acceptance of such Report and submitted that his client had agreed to pay/deposit the said amount with SRB.

23. The imposition of several types of penalties were also challenged. We have noticed that all possible penalties were imposed without establishing mensrea

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and malafides on the part of the appellant. The main reason for non-payment of due tax was that excess SST was charged in the OIO and inapplicable penalties were also imposed. Thus the appellant could not be blamed for non-payment of due tax. The law provides for penalizing the taxpayers who have failed to discharge their legal obligations but the law is silent regarding dealing with the cases where the Officers of SRB have passed faulty orders and imposed penalties without just cause and justification. Rather section 82 of the Act provides protection to the officers of SRB and the Government of Sindh from filing of suits, prosecutions and other legal proceedings.

24. It is now well settled law that for imposition of penalties the establishment of mensrea is essential. In reported case of Pakistan versus Pak Hard Castle Waud versus Relied PLD 1967 SC 1, it was held as under:-

“Even in the case of a statutory offence the presumption is that mens rea is an essential ingredient unless the statute creating the offence by express terms or by necessary implication rules it out. The mere omission of the word "knowingly" or "intentionally" is not sufficient to rebut this presumption for all that such words do is 'to say expressly what is normally implied. Thus where the words used in the statute are not clear or unambiguous an examination of the general scheme and object of the statute becomes necessary to determine whether the general rule of liability has been departed from. In some cases even the quantum of the punishment has been taken into account for determining this question, though this by itself cannot, in my view, be conclusive”.

25. It is statutory obligation of the department that before imposing penalty it has to prove that the assessee had acted deliberately in defiance of law or was guilty of contumacious dishonesty or acted in conscious disregard of his legal obligation. In case of non-payment of tax it has to be seen whether the same was deliberate or not. The purpose of penalty is to avoid payment of due tax and it will serve its purpose only if the same is reasonable and if it crosses that limits, it will increase the litigation. Penalty should not be harsh and where several penalties were provided imposing all penalties is not necessary. Furthermore the

levy of penalty is a matter of discretion which must be exercised by the Authorities judiciously on consideration of relevant circumstances. Penalty should not be imposed merely because it is lawful to do so.


26. In the reported case of DG Khan Cement Company Limited versus Federation of Pakistan, 2004 SCMR 456 relating to imposition of penalty/additional tax it was held as under:-

"Each and every case is to be decided on its own merits as to whether the evasion or non-payment of tax was willful or malafide, decision on which would depend upon the question of recovery of additional tax. In the facts and circumstances of this case, we find that non-payment of the sales tax within tax period was neither willful nor it could be construed to be malafide evasion or payment of duty, therefore, the recovery of additional tax as penalty or otherwise was not justified in law".

27. In the reported judgment of Dy. Collector Central Excise and Sales Tax versus ICI Pak. Ltd. Lahore, 2006 SCMR 626 the Supreme Court of Pakistan has held as under:-

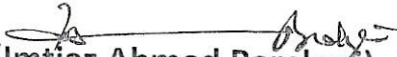
"...In an appropriate case of default in payment of sales tax, a manufacturer or producer of goods could be burdened with additional sales tax under section 34 of the Act as well as the penalty under section 33 of the Act. However, it does not necessarily follow that in every case such levy was automatic. It was further held that "...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 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".

28. The AO has failed to consider whether the default if any was willful, deliberate and malafide and further the same could not be imposed without first establishing mensrea, which was lacking.



29. In view of the above discussions the appeal is partly allowed. The OIO and OIA are maintained to the extent of payment of SST of Rs.27,777,807/= alongwith payment of default surcharge under section 44 of the Act. The appellant is liable to pay/deposit the SST within one month from the date of receipt of copy of this order failing which it would also be liable to pay penalty as prescribed under Serial No. 3 of the Table under section 43 of the Act.

30. The appeal is disposed of as above. The copy of the order may be provided to the learned representatives of the parties.


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER


(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi:

Dated: 31.12.2021

Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
- 2) The Assistant Commissioner, (Unit-22), SRB, for compliance

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

Order issued on-----03/01/2022

Order Dispatched on-----03/01/2022


Registrar