

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD AT
KARACHI

SINGLE BENCH-I

APPEAL NO. AT-31/2021

M/s H.A.H Muslim Gymkhana,
Aiwan-e-Saddar Road, Karachi.....Appellant

Versus

Assistant Commissioner (Unit-02)
Sindh Revenue Board,
M. R. Kiyani Road, Karachi.....Respondent

Date of filing of Appeal: 28.05.2021
Date of hearing: 24.06.2021
Date of Order 19.07.2021

Mr. Zia Ahmed Khan, ITP for appellant

Mr. Hunain Tariq, AC-SRB, Ms. Uzma Ghory AC-DR, SRB and Mr. Ahmed Mujtaba
SSTO, 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.32/2021 dated 17.04.2021 passed by the Commissioner (Appeals) in Appeal NO. 196/2018 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 803/2018 dated 25.09.2018 passed by the Mr. Junaid Haider Assistant Commissioner, (Unit-02) SRB Karachi.

02. The facts as stated in the OIO were that the appellant was registered with Sindh Revenue Board (SRB) under the service category of "Clubs" falling under

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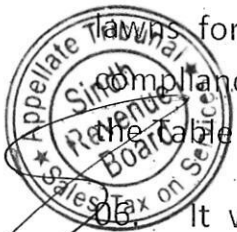
Tariff Heading (9801.4000) of the Second Schedule to the Sindh Sales Tax on Service Act, 2011 (hereinafter referred to as the Act) chargeable to Sindh Sales Tax (SST) at the standard rate under the provision of section 8 of the Act with effect from 1st July, 2011.

03. It was further stated in the OIO that In addition to services provided or rendered by Clubs, the appellant was also engaged in providing / rendering the taxable services of marriage halls and lawns as classified under Tariff Heading 9801.3000, of the Second schedule to the Act.

04. The appellant was served with letter dated 26.07.2018, wherein it was advised to apply online in terms of rule 7 of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules). This was to be done to cover the additional activities conducted by it relating to marriage hall and lawn under Tariff Heading 9801.3000 of the Second Schedule to the Act.

05. It was alleged in the OIO that the non-compliance of earlier letter dated 26.07.2018 was the gross violation of rule 7 of the Rules and the appellant was liable to pay penalty as provided under Serial No. 1A and 12 of the Table under section 43 of the Act. Therefore, a Show-Cause Notice (SCN) dated 15.08.2018 was issued to the appellant to explain as to why penal action under Serial No. 1A and 12 of the Table under section 43 of the Act should not be initiated for contravention of rule 7 of the Rules. The appellant was further asked to submit a true declaration about the events booked in their marriage/ functions lawns and the amounts of consideration received by them from the persons who booked the lawns for events under section 52 of the Act. The appellant in case of non-compliance was further asked to explain as to why action under Serial No.15 of the Table under section 43 of the Act should not be taken against it.

06. It was stated in the OIO that the aforesaid SCN was served upon the appellant but despite the lapse of considerable time, the appellant failed to apply for addition of the other taxable activities of marriage halls and lawns under Tariff Heading 9801.3000 in terms of rule 7 of the Rules. Moreover, the registered person also failed to submit any declaration about the events booked in their



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marriage/function lawns and amount of consideration received from the persons who booked the lawns for events as required in aforesaid SCN.

07. The Assessing Officer (AO) passed OIO and directed the appellant to deposit Rs. 210,000/- on account of penalty imposed under Serial No. 1A, 12 and 15 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. The Commissioner (Appeals) dismissed the appeal and observed as under:-

"...15. As regards appellant plea that requirements of Audi Alteram Partem were not met by the AC, the same is not agreed to. Although, as per established Court traditions and dictums, affording only two hearings opportunities to the defendant is generally disliked by the courts. However two hearing opportunities could also be deemed sufficient keeping in view the time (number of days allowed) the nature of dispute involved and the aspect of logistics involved etc. In the instant case, Appellant's place of business (HAH Muslim Gymkhana) is situated almost adjacent to the office building of SRB; Logistics are thus, not the problem here. The nature of dispute involved is simply the 'addition of another tariff-heading/ service category' into Appellant's SRB Profile. Since appellant has not denied in principal, that he is actually involved in rendering/ providing these 'additional taxable services', his task was simply to apply to SRB' concerned office online, to fill-in the prescribed Application Form, to append necessary information/documents therewith, if any and then log-out. SRB is then required to complete the entire process of adding-up the new category (as 'other services') online and to advise all concerned within the prescribed 'turn-around' time. In case of any question/ query SRB wield a vigilant Call Center, where queries are addressed/ answered generally, within 24 hours. Keeping this position of facts in view, it is safe to say that the time allowed to the instant Appellant from 27.08.2018 (i.e. successful service of hearing notice) and 25.09.2018 (when the impugned OIO was passed) was a reasonably good time for the Appellant to complete the needful action, in this matter as explained above and which time was actually squandered by the instant Appellant for no cogent reasoning. Since, the 'needful action' as identified in the impugned SCN did not required any 'tax-assessment' per se nor did it involve sharing of any record nor examination/



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scrutiny thereof nor was any third-party verification etc., required, Appellant plea about non-observance of the principal of Audi Alteram Partem in this matter is baseless and in fact misleading. Had the Appellant desired to get the needful action completed, he could have done that very easily at that point in time. Rest of the arguments advanced by the Appellant and/ or case-law cited by him in support of those arguments, is utterly of no help to the instant Appellant and is dismissed accordingly.

16. In view of the foregoing scenario, Appellant's mens rea in this matter having been proved beyond a shadow of doubt, I have no hesitation in upholding the impugned OIO, in toto, without any modifications. Accordingly, the instant Appellant shall pay the penalty amount of Rs. 210,000/- as held against him in the impugned OIO. Concerned ACSR (operations) may take further necessary action the matter as per law and rules. This Appeal stand disposed of in the same terms".

The said OIA was challenged before this forum, hence this appeal by the appellant.

09. The learned representative of the appellant Mr. Zia Ahmed Khan, ITP submitted as under.

i) The appellant was penalized for non-insertion of services rendered on account of marriage halls and lawns in the registration profile without considering the fact that the appellant was not engaged in such service.

ii) There was no provision in the Act which made any change in the registration profile mandatory and compulsory.

iii) The appellant was not engaged in the business of Marriage Hall and the alleged SCN was issued without any material available with the AC in this regard.

iv) The appellant had let out on rent open ground to an individual for carrying on the business of "Marriage Hall". However such business was closed after the directions issued by the Honorable Supreme Court of Pakistan.

v) No SCN was served upon the appellant, and the OIO was passed in unnecessary haste without providing proper right of hearing to the

appellant. Since only one hearing notice dated 30.08.2018 was served, before passing the OIO.

vi) The OIA was passed after an unexplained long delay.

vii) The AC failed to produce the proof of services of two notices dated 26.07.2018 and 15.08.2018 despite the directions of the Tribunal. Moreover he passed the OIO without serving SCN and without proper hearing. Thus such order was no order in the eyes of law.

viii) The penalties were imposed under three independent and separate provisions of Section 43 of the Act without establishing mensrea on the part of appellant.

10. The learned AC-SRB Mr. Hunain Tariq submitted as under:-

i) The appellant had not only failed to comply with rule 7 of the Rules but had also failed to submit the required information and details asked under section 52 of the Act.

ii) Serial No. 1A of the Table under section 43 of the Act provided that where any person fails to intimate any change in particulars of registration and other particulars such person shall be liable to pay a penalty which may extend to Rs.100,000/= subject to a minimum of Rs.10,000/=

iii) The appellant has failed to establish that it was not engaged in providing or rendering service of marriage halls.

iv) The letting out of open ground on rent for using the same as marriage halls is a taxable activity liable to SST under Tariff Heading 9806 3000 which was effective from July, 2015.

v) The appellant was served with two notices and it had not taken the ground of non-service of notices before the Commissioner (Appeals).

vi) The OIO was passed after providing sufficient opportunity of hearing to the appellant, who failed to avail the same and at this stage it could not blame others for its own negligence.

vii) The appellant failed to comply with the SCN and concocted a false story that the SCNs were issued in the name of Pink Panther.



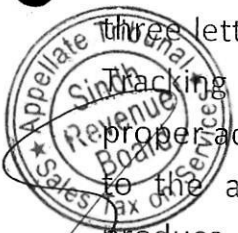
- viii) The OIA was passed within the time allowed by law after providing proper right of hearing to the appellant.
- ix) The matter is old and for that reason the Courier Receipts could not be traced.
- x) The penalties were rightly imposed under the relevant provisions of law after providing proper right of hearing to the appellant.

11. The learned representative of the appellant in rebuttal submitted that non-service of notice in terms of section 75 of the Act made the whole exercise doubtful and illegal. He further submitted that issuance of SCN without any material available with the AC made the entire exercise a fishing and roving enquiry which was not permissible in law in view of the various pronouncements of the superior courts.

12. I have heard the learned representatives of the parties and perused the record made available before me.

13. The issue involved in the matter is whether the insertion of change of material particulars in the registration profile of a tax payer was mandatory and compulsory and its violation could be punished under section 43 of the Act.

14. The appellant had denied to have received two Notices dated 26.07.2018 and 15.08.2018. The said ground was specifically taken before Commissioner (Appeals) which is mentioned in Para 10 of the OIA. The appellant addressed three letters dated 25.05.2019, 09.07.2019 and 01.10.2019 to the AC asking the Tracking ID of the Notices sent to the appellant duly delivered to SRB under proper acknowledgement, but apparently the said Tracking ID was not provided to the appellant. The Commissioner (Appeals) neither directed the AC to produce the Courier Receipts under cover of which SCNs were sent to the appellant nor directed the AC to provide Tracking ID to the appellant. Once the appellant has denied to have received the SCNs it was the duty of the Commissioner (Appeals) to examine the merit of the same. It appears that the Commissioner (Appeals) was impressed with the facts that the appellant had admitted that the SCN was addressed to M/s Pink Panther which was returned



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by it, and that the appellant accepted receipt of hearing Notice dated 30.08.2018.

15. The foremost requirement of natural justice is that no adverse action can be taken against a person without providing him with proper right of hearing and fair trial. Article 4 read with Article 10-A of the Constitution clearly stipulates that no action can be taken against a person without due process of law and the right of proper hearing.. which is one of the components of fair trial. In the case of Osman Abdul Karim versus Collector of Customs, reported as PLD 1962 Dacca 162 it was held as under:-

"...But in exercising a judicial or quasi-judicial function, he decides a judicial Issue and must, therefore, act in a judicial spirit and manner in conformity to well-recognized principles of natural justice.

In another case of Commissioner Inland Revenue versus M/s Ali Hasan Metal Works, reported as 2018 PTD 108 (DB LHC) it was held as under:-

"Authorities exercising quasi-judicial powers under a statute were bound to conduct fair adjudication as to be dealt in accordance with law, due process and fair trial was unalienable Fundamental Rights guaranteed under the Constitution".

16. In the instant case the alleged SCN was issued on 15.08.2018 and after fixing the case for hearing on 27.08.2018 and 05.09. 2018 the OIO was passed on 15.09.2018 within 31 days (not 41 days as mentioned in para 6 of the OIO) from the date of issuance of SCN. There was no specific finding recorded by the AO regarding service of SCN. Apparently the OIO was passed in unnecessary haste without providing adequate right of hearing to the appellant in violation of principles of natural justice.

17. The violation of the principles of natural justice was equated with the violation of law and no order could be maintained which was suffering from violation of principal of natural justice. In the reported case of Anisa Rehman versus PIAC, 1994 SCMR 2232 it was held as under:-

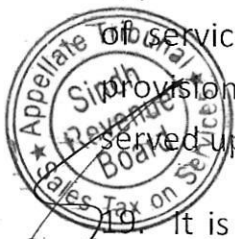
"...As argued by Mr. Sharifuddin, the learned Advocate for the respondent and indicated by the learned Judges of the High Court the above rule of justice is not confined to proceedings before Courts but extends to all proceedings, by whosoever held, which may affect the person or property or other right of the parties concerned in the dispute. As a just decision in such controversies is possible only if the parties are given the opportunity of being heard, there can be as regards the right of hearing, no difference between proceedings which are strictly judicial and those which are in the nature of a judicial proceeding though administrative in form".

In the above cited judgment it was further held as under:-

"...7. From the above stated cases, it is evident that there is judicial consensus that the Maxim audi alteram partem is applicable to judicial as well as to non-judicial proceedings. The above Maxim will be read into as a part of every statute if the right of hearing has not been expressly provided therein. In the present case respondent No. 1 in its comments to the writ petition (at page 41 of the paper book) admitted the fact that no show-cause notice was issued to the appellant nor she was heard before the impugned order dated 6th August, 1991 reverting her Grade VI from Grade VII was passed. In this view of the matter, there has been violation of the principles of natural justice. The above violation can be equated with the violation of a provision of law warranting pressing into service Constitutional jurisdiction under Article 199 of the Constitution,

18. The Commissioner (Appeals) as well as the AO have apparently failed to adhere to the basic principal of natural justice and also failed to consider and appreciate the provisions of section 75 of the Act which provide the procedure of service of orders, decisions and notices. Non-compliance of the statutory provisions have made the OIO and OIA illegal. I therefore hold that no SCN was served upon the appellant.

19. It is correct that the Act do not provide for intimating any change in the material particulars in the registration profile. However rule 7 of the Rules provide that in case of any change in the name, address, principal service activity and other business activities as stated in the profile the registered person shall intimate the proposed change to the Board. Sections 24 to Section 25A, Chapter IV of the Act deals with the registration. Chapter IV does not



provide for intimating change of material particulars in the profile. The compliance of the rule 7 of the Rules appears to be necessary on the ground of public policy and in case the same is not complied with it will entail penalty under Serial No. 1A of the Table under section 43 of the Act. The penalty could not be imposed until proper SCN is served upon the appellant and proper right of hearing was provided to it, which is lacking in this case.

20. Now I take up the question whether the appellant had indulged in economic activity of providing or rendering service of "Marriage Halls and Lawns". The appellant has denied such activity thus the burden was upon the Department to establish such activity which has wrongly been shifted upon the appellant. The AC candidly admitted that no material was available with him to establish that appellant was providing or rendering services of "Marriage Halls and Lawns". In absence of proof that the appellant was providing such service it could not be penalized for non-intimating the change in the material particulars in the profile.

21. The Department had issued SCNs without possessing any material to establish any change in the material particulars in the profile. The AC due to this reason had directed the appellant in the SCN to submit a true declaration about the events booked in its marriage/function lawns and the amount of consideration received. It was incumbent upon the Department that they should possess such material which, establish the allegation against the tax payer before issuance of SCN. The AC was merely shooting in dark and was making a roving enquiry. The issuance of SCN without any material available with the officers has been deprecated by the superior courts and it has been held that roving enquiries in tax matters were not admissible. In the reported judgment of Assistant Director Intelligence & Investigation, Customs, Karachi versus B. R. Herman, PLD 1992 SC 485 it was held as under:=-

"The authority cannot make a roving inquiry or issue a notice by merely shooting in dark in the hope that it will be able to find out some material out of the same".

22. In another reported judgment of Caretex versus Collector, Sales Tax, 2013 PTD 1536 it was held as under:-

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"Show cause notice" was not a casual correspondence or a tool or license to commence roving inquiry into the affairs of the tax payer based on assumption and speculations but was a fundamental document that carried definitive legal and factual position of the department against the tax payer".

23. The appellant was penalized for non-intimating the change in material particulars in the profile under Serial No. 1A (fails to intimate any change in particulars of registration) of the Table under section 43 of the Act and serial No. 12 (where any person contravenes any provision of the Act or the Rules made thereunder for which no penalty has specifically, been provided in this section) of the Table under section 43 of the Act. In the instant case Serial No. 1A of the Table under section 43 of the Act was not applicable as the Department had failed to establish that there was any change in the material particulars in the profile which was not intimated. The appellant could not be penalized on the whims and desire of the Department and its Officers and penalty could only be imposed after establishing mensrea, which is lacking in this case. Serial No. 12 of Table under section 43 of the Act was not applicable in this case and could only be invoked if no penalty was specifically provided in section 43 of the Act. Specific penalty under Serial No. 1A of the Table under section 43 of the Act was provided but both these provisions could not be invoked simultaneously.

24. The appellant was also penalized under Serial No. 15 of the Table under section 43 of the Act for non-compliance of provisions of section 52 of the Act. A separate SCN was issued to the appellant and the information and documents were asked through SCN dated 15.08.2018 without assigning any reason and without mentioning the relevant provision of section 52 of the Act. Clause (a) of sub-section 1 of section 52 of the Act provides "produce for examination, such documents or records which the officer of the SRB considers necessary in relation to any matter under this Act or relevant to the audit, inquiry, or investigation in the Act". No specific purpose as provided in the section has been mentioned in the Notice. In terms of clause (a) of sub section (1) of section 52 of the Act the documents could only be asked for specific purpose and not for roving inquiry. The imposition of penalty in the OIO under

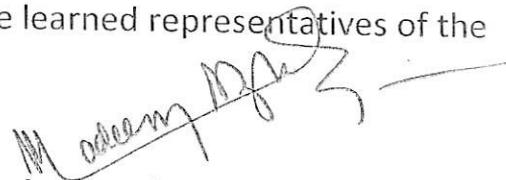


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Serial No. 15 of the Table under section 43 of the Act was without assigning any reason. It is well settled principle that any authority dispensing judicial or quasi-judicial function is required to give reasons in support of the decision/order. It is also settled law that the public functionaries are duty bound to decide the controversy within the parameters as provided by Section 24-A of the General Clauses Act and where the order does not contain any reason such order is not sustainable in the eyes of law.

25. In view of the above discussions I allow this appeal and set aside both OIO and OIA. However, keeping in view the facts and circumstances of the case the department is at liberty to issue fresh SCN to the appellant if sufficient material is available with it connecting the appellant with the economic activity of "service of marriage halls and lawns.

26. The copy of this order may be provided to the learned representatives of the parties.


(Justice® Nadeem Azhar Siddiqi)

CHAIRMAN

Certified to be True Copy

Karachi:

Dated: 19.07.2021


REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
- 2) The Assistant Commissioner (Unit-02), SRB, Karachi.

Copy for information to:-

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

Order issued on


05/08/2021
Registrar

Order Dispatched on


05/08/2021
Registrar