

(Guard file)

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD KARACHI

APPEAL NO. AT- 53 OF 2021  
(ARISING OUT OF APPEAL NO. 28/2017)

M/s seventh Sky Entertainment.....Appellant

Versus

Assistant Commissioner, Unit 32, SRB, Karachi.....Respondent

Appeal Filed On: 27.03.2017  
File Received by Transfer: 14.12.2021  
Date of Return of File: 20.12.2021

**ORDER**

**Imtiaz Ahmed Barakzai**: This appeal was transferred by Commissioner (Appeals) to the Tribunal under sub section (7) read with sub-section (8) of section 59 of the Sindh Sales Tax on Services Act, 2011 (the Act).

02. It is evident from the Report submitted by the Commissioner (Appeals) it appears that the Appeal was filed by the appellant (tax payer) on 27.03.2017 under sub-section (1) of section 57 of the Act against the Order-In-Original (OIO) No. 62 of 2017 dated 17.03.2017 determining the tax liability of Rs.39,242,368/= alongwith default surcharge and penalty of Rs.45,589.261/=.

03. As per the above report the appeal was lastly fixed for hearing on 20.10.2020 when the time for passing of Order-in-Appeal (OIA) was expired. The total days consumed in finalizing the appeal from the date of filing of appeal till last date of hearing i.e. 20.10.2020 were 1373 days out of which it was alleged that the adjournments of 1185 days were obtained by the appellant (tax payer). However after exclusion of adjournments, 188 days were left for passing OIA.

04. The statutory time for deciding the appeal was 120 days as provided under sub-section (5) of section 59 of the Act, and such time limit could be extended for further sixty days under the above provision of law. In this way

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the total days available with the Commissioner (Appeals) for deciding the appeal were 180 days.

05. The Commissioner (Appeals) can transfer undecided appeal to the Tribunal under sub-section (7) of section 59 of the Act, which provides as under:-

*"...(7) Where the Commissioner (Appeals) has not made an order under sub-section (1) before the expiration of the period prescribed under sub-section (5), read with sub-section (6), the Commissioner (Appeals) shall transfer the undecided appeal to the Appellate Tribunal which shall decide the undecided appeal as if it has been filed against the order of the Commissioner (Appeals):*

*Provided that while transferring the un-decided appeal to the Appellate Tribunal, the Commissioner (Appeals) shall give due intimation, in this regard, to the appellant and his agent or authorized representative and also to the Chairman of the Board".*

06. It is evident from the bare reading of the above provision that in case the Commissioner (Appeals) has not made an order under sub-section (1) of the Act before the expiration of the period prescribed under sub-section (5), read with sub-section (6) of section 59 of the Act, he shall transfer the undecided appeal to the Appellate Tribunal under sub-section (7) of section 59 of the Act. The appeal was to be decided or transferred to the Tribunal within total 180 days (120+60) which has not been done in instant case.

07. We could not lay our hands on any case law interpreting sub-section (7) of section 59 of the Act. However, case laws are available under the provisions of Sales Tax Act, 1990 on the point that the time for passing the order provided in law is mandatory and order should be passed with the original 90 days (in this case 120 days after excluding the adjournments sought by the tax payer) or within extended period of 90 days (60 days in this case).

08. The relevant case laws are as under.

(i) M/s Abbasi Enterprises versus Collector of Sales Tax, Peshawar, 2008 PTD 2025, (DB-Islamabad High Court). It was held as under:

*"...The order of extension in our view can be passed by the Collector even after the expiry of the ninety days at any time before 180 days of the show cause notice".*

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(ii) M/s Tanveer Weaving Mills versus Deputy Collector Sales Tax, 2009 PTD 762 wherein it was held as under:-

"...3. As is clear from the language of the above proviso, it has limited the scope of exercising of the jurisdiction after issuance of notice to basically 90 days or such extended period as the Collector after duly recording proper reasons in writing has fixed. However, it is again subject to the limitation in the manner that the said extension also cannot be for more than 90 days. The period for deciding the order-in-original after issuance of a notice under section 36(1) and (3) thus is maximum 180 days including earlier 90 and extended 90 days. Obviously if the extension has been given by the Collector before the expiry of the earlier 90 days.

(iii) Abbasi Enterprises versus Collector of Sales Tax and Federal Excise, 2019 SCMR 1989 wherein it was held as under:-

".... 9. Since the Collector's order was invalid and inoperative in law, it followed that there had been no lawful extension of time, which meant that the order-in- original ought to have been made by the Additional Collector within ninety days of 13.06.2005, i.e., by 12.09.2005. Since it was admittedly made beyond that date it was invalid and non est in law. It ought therefore to have been quashed and the forums of appeal, including the High Court in tax reference, erred materially in failing to do so..."

09. It is evident from the above case laws that the extension order could be passed before expiry of original 120 days or at the best before the expiry of subsequent 60 days. The decision of transferring the appeal to the Tribunal was to be taken before expiry of original 120 days or at the best before the expiry of subsequent 60 days, which has also not been done in the instant case.

10. We have perused the Appeal proceedings and Diary Sheets maintained by Commissioner (Appeals) and it is evident that the Diary Sheets for various dates were not available in the file and in absence of Diary Sheets the adjournments even if sought by the taxpayer could not be attributed towards him. Moreover the adjournments were wrongly attributed towards the appellant (tax payer) for some dates. The details furnished in this regard were

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found to be incorrect and thus the same could not be relied upon. The adjournments were found to be wrongly attributed towards the appellant (tax payer) and if the same were excluded the consequence was that the department had taken more time than admitted by it.

11. The decision for transferring of the appeal to the Tribunal was taken on 25.03.2021. Whereas the period of 120 days as per the Commissioner (Appeals) was expired on 20.10.2020. As per the Report no time for passing of the OIA was extended. The period for passing OIA was expired much before the decision of transferring the appeal to the Tribunal.

12. In our opinion after the expiry of total 180 days (120+60) the Commissioner (Appeals) had become *functus officio* and could not pass any order either under sub-section (5) (extension of 60 days) of section 59 of the Act or under sub-section (7) (transferring the Appeal to Tribunal) of section 59 of the Act.

13. The law is now clear on the point that once period prescribed by law for recovery of money was lapsed, recovery is not enforceable in law. In the reported case of Federation of Pakistan versus Ibrahim Textile, 1992 SCMR 1898 it was held as under:-

“4. Due consideration was given as to whether the respondents should not pay the short-levied duty and whether the State should suffer in public finance. But the cardinal principle of law is that all are equal before law, whether citizen or State. Secondly if a law prescribes period of time for recovery of money, after its lapse recovery is not enforceable through Courts (emphasis supplied). Thirdly, while construing a financial statute, its terms are strictly to be followed.

15. The time provided in law for passing the order is mandatory and the officer is bound to follow the same. In the reported case of Collector Sales Tax versus Super Asia M. Din and Sons, 2017 SCMR 1427 it was held as under:-

“...7. From the plain language of the first proviso, it is clear that the officer was bound to pass an order within the stipulated time period of forty-five days, (120 days in this case) and any extension of time by the Collector could not in any case exceed ninety days (sixty days in this case). The Collector could not extend the time according to his own choice and whim, as a matter of course, routine or right, without any

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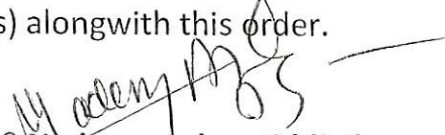
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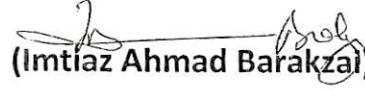


limit or constraint; he could only do so by applying his mind and after recording reasons for such extension in writing”.

16. In the light of above discussions it is evident that the decision for transferring the appeal was taken at a belated stage when the recovery had already become time barred. Therefore no purpose was served in transferring the appeal to the Tribunal in view of sub-section (7) of section 59 of the Act which provides that the Tribunal shall decide the appeal as if it has been filed against the order of the Commissioner (Appeals). Thus legally no purpose would be served in hearing this appeal by the Tribunal against the time barred order of Commissioner (Appeals).

17. In view of the above facts the record may be returned to Commissioner (Appeals) alongwith this order.

  
(Justice<sup>®</sup> Nadeem Azhar Siddiqi)  
Chairman

  
(Imtiaz Ahmad Barakzai)  
Member Technical  
Certified to be True Copy

  
REGISTRAR  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD

Karachi:

Dated: 20.12.2021

Copy Forwarded to:

1. The Chairman, Sindh Revenue Board, Karachi
2. The Commissioner (Appeals), SRB, Karachi alongwith Record of the appeal.

Order issued on 21/12/2021

Order Dispatched on 21/12/2021

  
Registrar

  
Registrar