BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD, AT KARACHI

DB-I

APPEAL NO. AT-06/2022

M/s MCB Arif Habib Savings & Investment Ltd. ..... Appellant
(SNTN: 1183370-0), 2nd Floor, Adamjee House,
I.I. Chundrigar Road, Karachi

Versus

The Assistant Commissioner (Unit-11) ..... Respondent
Sindh Revenue Board, 2nd Floor, Shaheen
Complex, M.R. Kayani Road, Karachi.

Date of filing of Appeal	15.02.2022
Date of hearing	17.03.2022
Date of Order	10.08.2022

Mr. Ghazanfar Siddiqui, Advocate along-with Mr. Adnan Mufti, FCA and Mr. Muhammad Zahoor, ITP and attended for appellant

Mr. Irfan Ahmed Sohu, AC-(Unit-11), SRB Karachi for respondent

Appellate Tribunal Sindh Revenue Board Sales Tax on Services

ORDER

Imtiaz Ahmed Barakzai: This appeal has been filed by the appellant challenging the Order-in-Appeal (hereinafter referred to as the OIA) No.10/2022 dated 02.02.2022 passed by the Commissioner (Appeals) in Appeal NO. 11/2022 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 966/2021 dated 13.12.2021 passed by the Mr. Irfan Ahmed Sohu, Assistant Commissioner, (Unit-11) SRB Karachi.

02. The brief facts as stated in the OIO were that the appellant having (SNTN: 1183370-0) was providing or rendering taxable services covered under Tariff Heading 9825.0000 (Management Services including fund and assets management services) of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act). The abovementioned services were chargeable to Sindh Sales Tax under Tariff Heading 9825.0000 of the Second Schedule to the

Act read with Section 3, 8, 9 & 17 of the Act read with Rule 30 of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules).

03. It was alleged in the OIO that during the scrutiny of audited financial statements vis-à-vis the monthly Sindh sales tax returns for the year ended June 30, 2016, it was revealed that the registered person had not discharged its due Sindh sales tax liability during the tax periods from July, 2015 to June, 2016. Such details were as under:-

Description	Jul-15 to Jun-16
Sindh Sales tax declared in FS	114,256,216
Less: Output Tax declared in Returns	(104,280,805)
Short-payment of SST	9,975,411

04. The appellant was called upon to Show Cause Notice (SCN) bearing No: SRB-COM-1/UNIT-11/MCB/2938 dated 15.04.2021 as to why the tax liability of Rs.9,975,411/- should not be assessed & recovered under the provisions of Section 23(1) of the Act along with the amount of default surcharge under section 44 of the Act (to be calculated at the time of payment). Moreover it was called upon to explain as to why penalties should not be imposed under Sr.No.2, 3 and 6(d) of the table under Section 43 of the Act for contravention of Section 3,8,9,17 and 30 of the Act read with Rules, 11, 12, 13, 14 and 30 of the Rules.

05. It was alleged in the OIO that the representative of the appellant appeared and stated that the written submissions were provided vide letter dated 15.10.2021. He was asked to provide the copies of sample invoices for the tax period under assessment to verify the amount of value of taxable services and sales tax charged thereon in addition to recovery of revenue on which SST was charged. The tax payer failed to produce this evidence besides repeated opportunities. Moreover it was contended by the Assessing Officer (AO) that the SCN was not time barred as contended by the tax payer since the time limitation prescribed vide sub-section(2) section 23(1) of the Act which was amended from 5 years to 8 years vide Finance Act 2016 and was held to be retrospective by the department.

06. The appellant had contended that it had booked FED on accrual basis in the Financial Statement and reliance was placed on judgment of Sindh High Court reported as 2014 PTD 284 wherein it was held that FED was not liable to be

charged nor collected by the appellant. It also claimed that the Honorable High Court has held that the levy of FED post 18th Amendment was ultravires. However the appellant had violated the said judgment which was binding upon it by booking the provision on accrual basis in the audited accounts which was illegal. The appellant has failed to justify the reason for including the SST amount levied on FED in the SST declared in the Audited Financial Statement, and such plea was contradictory to its own submissions.

07. It was alleged in the OIO that the appellant failed to provide the copy of invoices or any other transaction document for the period under consideration nor could mention any provision or standard under which it had booked FED on accrual basis. However in order to validate their contention it was submitted that they had booked Provision of FED amount in the financial statements for the year ended June 30, 2016 on accrual basis and the same have not been collected and deposited with Federal Board of Revenue (FBR). Rather, the registered person re-submitted the same reply on numerous occasions without producing any concrete documentary evidence.

08. The appellant was only assessed on the amount of SST declared in their audited financial statements; however throughout the proceedings, the registered person failed to justify the reason for including the SST amount levied on FED in the SST amount declared in the audited financial statements. The pleas of the registered person supra that "considering the legal status of the case" they have disclosed the FED amount is contradictory to their own submissions.

09. The Assessing Officer (AO) determined the SST of Rs.9,975,411/- alongwith default surcharge under section 44 of the Act (to be worked out at the time of payment of principal tax). The AO also imposed penalty of Rs.498,771/- under Serial No.3 of Section 43 of the Act.

10. The appellant challenged the said OIO before Commissioner (Appeals) by way of filing appeal under section 57 of the Act. The Commissioner (Appeals) decided the OIA holding as under:-

> *"....12. In view of the above mentioned position the OIO is maintained to the extent of principal amount of tax and the default surcharge.*

However, I take a lenient view regarding penal amount. The appellant is directed to pay the tax and default surcharge within a period of 30 days of the receipt of this order. in the event of the failure of the Appellant to pay the amount of tax and the default surcharge within the stipulated time, the penalty shall also be payable. Order accordingly".

Resultantly the instant appeal was filed before this Tribunal.

11. The learned Advocate for the appellant submitted as under:-

i) That the allegation of short SST of Rs.9,975,411/- was erroneously framed on the basis of SST amount as declared in the Sales Tax Returns for the year 2015-2016 and sales tax amount mentioned at relevant notes to financial statement of same year.

ii) The SST mentioned in the financial statement was calculated having FED merely for the purpose of booking / provision of the account for reporting purpose. Note 7.1 and 18.2 of the Audited Account show that it was merely booked as a matter of abundant caution and such FED was never collected from the customers by the appellant. Levy of FED, as disclosed by the appellant in financial statements, was contested by the appellant at honorable Sindh High Court which was ultimately declared by the August Court in its favor.

iii) It was stated that in a recent order of the Sindh High Court, all notices, proceedings taken or pending, orders made, recovered or actions taken under the Federal Excise Act, 2005 in respect of the rendering or providing of services (to the extent as challenged in any relevant petition) have been set aside. However, as a matter of abundant caution, the accrual made till June 30, 2016 in respect of FED on management fee has not been reversed as the management believes that the Federal Government retains the right to appeal against the said order in the Supreme Court within the prescribed timeline. However with effect from July 1, 2016, FED on services provided or rendered by non-banking financial

institutions dealing in services which were subject to provincial sales tax have been withdrawn by Finance Act, 2016.

iv) The Assessment Order No.150/2017 dated 26.05.2017 passed by AC-SRB on identical matter for earlier tax years 2014 and 2015 was submitted by the appellant whereby it was held that no FED was payable as the same was provisioned / booked as contingent liability by Appellant.

v) The learned AC and Commissioner (Appeals) with utter disregard to the Appellant's submissions and documentary evidences, passed the impugned OIO and OIA and established sales tax liability of Rs.9,975,411/- together with default surcharge and penalty under Section 43 and 44 of the Act.

vi) The appellant had calculated the SST as per the Accounts, and its basis were also booked in the Accounts, as is mentioned in Notes – 20 read with explanation of note 18.2 of the Accounts. Thus, for the purpose of value of services in the matter of SST the treatment has to be same i.e. the consideration in money, including federal and provincial taxes, in earlier decisions, by the Honorable Supreme Court as the case may be. That the Judgment reported in 2017 PTD 1 there is no question of law involved or arising out of it, pertaining to the valuation of services. However to the extent of applicability or otherwise of the FED, SST could not be reduced in any case, even if the Judgment of the Honorable Supreme Court appears to be in favour of the FED.

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

i) The AO has only assessed the SST declared in audited account of appellant and their comparison with SST returns filed by the appellant for tax periods July-15 to June-16. Whereas the appellant has separately discussed 'SST' in Note No.20.4 and Note No.18.2 which has no relevance. Moreover, Honorable Sindh High Court's Judgment in 'CP No.D-152/2012' reported as '2014 PTD 284', wherein it was held that FED was not liable to be charged nor collected (nor booked) by appellant. Thus the appellant has

admitted that the Honorable court had declared the levy of FED post-18th amendment as ultra vires in their own submissions. Thus the appellant has violated the provisions of the judgment of the Sindh High Court, which was binding upon it.

ii) The reference of the appellant towards the previous order in appeal No.150/2017 dated 26.05.2017 is irrelevant in the instant case because the same pertained to the Value of Taxable Services, Input Tax amount and the assessment made thereon, whereas in the instant case, the appellant has been assessed on the basis of SST amount declared, therefore, the inclusion of FED is irrelevant in the instant case. Moreover, the order is not binding on respondent as the appellant has not relied upon the judgment of the higher appellant forums.

iii) The respondent had rightly and judiciously passed the OIO No.966 of 2021 since it was established in the same that the appellant was a willful defaulter of legitimate government dues and had not paid due SST, which was held as recoverable under the above mentioned OIO.

iv) That sufficient time was provided to the appellant to defend its position before the Honorable forum and all the documentary evidences provided during proceedings of the case were considered on merit. The appellant's claim is without any cogent proof.

v) The appellant had itself stated that it had incorporated the Federal Excise Duty into the Value of services in order to reach upon the amount of SST booked in the financial accounts. For the sake of clarity, appellant's written submission was reported in sub-para (ii) of para 14 of the order in original dated 13.12.2021.

vi) The appellant has repeatedly stated in their written and oral submissions as mentioned in OIO dated 13.12.2021 that they have booked the provision of FED amount in the financial statements for the year ended June 30, 2016 on accrual basis and the same were not collected and deposited with FBR

vii) That the contention of the appellant pertaining to "principles laid down at International Accounting Standards" have been rebutted in para 8, 9 and 10 of the OIA thus the contention of the appellant are liable to be dismissed.

13. We have heard the learned representatives of the parties and perused the record and written submissions which were made available before us.

14. It will be pertinent to examine the Profit and Loss Account of the appellant for the year ended June 30, 2016 wherein income / Revenue has been shown at Rs.760,337,020/- Management Fee / investment advisory fee is part of such Revenue and has been claimed at Rs.703,548,128/-. The working of this fee has further been elaborated at Note 20 of the audited account as under:-

Total Management Fee / Investment Advisory Fee	Rs.930,372,044
Less: Indirect taxes and duties	
(a) Sindh Sales Tax	Rs.114,256,216
(b) Federal Excise Duty	Rs.112,567,700
Net Management Fee / Investment Advisory Fee Taken as Income / Revenue	Rs.703,548,128

It is evident from above that the appellant has directly deducted Federal Excise Duty from the Revenue. However in Note 18.2 it has been mentioned that Sindh High Court had set aside the Federal Excise Duty and all notices, proceedings taken or orders made, duty recovered or actions taken under Federal Excise Act, 2005 have been set aside. Yet the appellant has deducted FED directly from its income / Revenue stating that this was done as a matter of abundant caution. This treatment of SST meted out by the appellant in its Account is not based on the best accounting principles and is not legal.

15. The short payment was worked out by the Department on the basis of Financial Statement as under:-

	Working as per Financial	
	A	
A1	Management Fee / Investment Advisory Fee	703,548,128
A2	FED 16% (A2=A1*16%)	112,567,700
A3	Total value including FED	816,115,828
A4	Sindh Sales Tax @ 14% (A3*14%)	114,256,216

The respondent have established short SST liability by including the amount of FED into value of services whereby the SST at 14 percent works out to Rs.114,256,216/- whereas in the working as per Sales Tax returns filed by appellant the FED was taken as zero and Sindh Sales Tax was worked out at Rs.104,280,805. The short liability thus worked out at Rs.114,256,216 – Rs.104,280,805 = Rs.9,975,411/-.

16. The Citi Bank case relates to payment of FED for the period January to June, 2007 prior to enactment of the Act and it was held that services specified only in First Schedule to the Federal Excise Act, 2005 was liable to excise duty, while other unspecified services were not liable to pay excise duty.

17. Section 5 of the Act deals with the value of services and clause (a) of sub-section (1) of section 5 of the Act provides that the consideration in money including all Federal and Provincial duties and taxes, if any, which the person providing a service receives from the recipient of the service but excluding the amount of Sales tax under this Act. The provision is very clear that the value includes all Federal and Provincial taxes.

18. The appellant was asked to provide copy of sample invoices for the tax periods under assessment to verify the amount of value to taxable services and sales tax charged thereon in addition to summary of revenue on which SST has been charged but the appellant failed to provide the same. Moreover the appellant was confronted at para 15 and 16 of OIO to provide the copy of invoices or any other transaction documents for the period under consideration or any provision or standard under which they had booked the provision of FED amount in the Financial statements for the year ending 30th June 2016 on accrual basis. However no such documents could be produced.

19. The Commissioner (Appeals) in OIA No.10/2022 dated 02.02.2022 has held as under:-

> *"...7. Further to be seen that section 5 of the Act provides that 'value of taxable services' to be 'the consideration in money including all Federal and Provincial duties and taxes, if any, which the person providing a service receives from the recipient of the services but excluding the amount of*

sales tax under this Act.....' Section 10 of the Act, 2005 speaks of value and rate of FED to be 'value retail price and tariff value' as the case may be, in the matters of goods or services and the rate to be the 'applicable rate'. The appellant has calculated the SST as per the Accounts on the basis of value determined under section 5 of the Act, which obviously included the in FED as well, and the same was also booked in the Accounts, as is mentioned in the above table and Note -20 read with explanation note 18.2 of the Accounts. So therefore, for the purpose of value of services in the matter of SST the treatment has to be same i.e. the consideration in money, including federal and provincial taxes, in either decisions, by the Honorable Supreme Court as the case may be. I have also generally gone through the Judgment reported as 2017 PTD 1 and find that there is no question of law involved or arising out of the judgment, pertaining to the valuation of services but only to the extent of applicability or otherwise of the FED, SST could not be reduced in any case, even if the judgment of Honorable Supreme Court appears to be in favor of the FED.

8. Further to that International Accounting Standard IAS – 37 allows the businesses to book provisions to "accrued revenues" if impugned in the court cases and stay is granted by the Honorable Courts, or in the event of the accrual being the "contingent liability". No accounting and financial standard asks the businesses to book as contingent liability, the due amounts payable against a tax liability (being the absolute liability) created under a law, incidence of which has taken place i.e. the services thereof have been provided. Notwithstanding with the fact that there is no provision booked in the Accounts relating to the SST, it is to be specifically noted that the liability under a taxing statute is an "absolute liability" and not a "contingent liability" (Emphasis supplied). A matter pertaining to income tax liability came before the Honorable Lahore High Court, in the case titled as M/s Associated Cement Companies Ltd. versus Pakistan through IHE Commissioner Income Tax, Lahore; reported in PLD 1972, page 201. The Honorable Court, when determining the nature of liability of the income tax payable / paid by the petitioner / non-resident alien enemy, at para 12 held as under:-

> *"12. Another point argued by the learned counsel for the petitioner was that the subject matter of the present writ petition was the determination of the liability of the petitioners to the income tax*

involved herein.....Liability under the Income Tax Laws is not a contingent liability, but is an absolute liability and all that has to be done in the instant case is that only the quantum and extent of the tax is to be fixed. This is, therefore not a case of contingent liability in that sense of the term. A perusal of the vesting notification shows that the price which was to be realized by the non-resident alien enemy, as a result of the purchase of the acquisition of his properties, was vested in the Custodian and now he was to receive the relevant payments in that behalf. The said price was and could be called a property. How the net figure of that price was to be arrived at and calculated is a different matter and merely because for finally assessing the same, certain tax, charges and dues, were to be paid, does not deter from vesting which was vested by the relevant notification in the Custodian. The last two notifications are very wide and vest all or any other property of the petitioner in the Custodian and this will include amount or amounts which were to be set apart from tax purpose so that he may pay them off to the authorities concerned....."

9. Without digging into the fact that there is no clear provision relating to the SST in the Accounts, and also without digging into the fact that values inclusive and exclusive of tax (FED and SST) has been booked in an ambiguous manner, the provisions relating to SST treating it to be "contingent liability", and for being "absolute liability" is unlawful. Further to that, in absence of any evidence to the contrary, per the Appellant's AR, the amount of "accrued revenue" or the "tax" has not been received by the Appellant. So therefore, either the legally due tax is either with the appellant or with the recipients of services, as the case may be. In such a case, it is clear that the amount of tax owing to the Government / Public Exchequer is being retained against the law, in the wake of IAS-37, which is not applicable in the present case and even cannot be equated in authority with the Act. Such Retention of the amount of tax also constitutes unjust-enrichment within the meaning of established principal of law by the Honorable Supreme Court of Pakistan in their Judgment pronounced by them in the case of M/s Facto Belarus Tractor Limited versus Govt. of Pakistan through Ministry of Finance on 11th May, 2005. The Honorable Sindh High Court also dealt with a similar issue of retention of tax, wherein

M/s Independent Media Corporation (Pvt.) Ltd. raised a question to the effect that whether the tax on services under Sindh Sales Tax on Services Ordinance, 2000, collected and retained by it, was to be paid to either FBR or to the SRB. The Honorable Court in such case, reported in 2018 PTD 1869 held that retention of the due tax, amount to unjust-enrichment, which is not allowed under the law. if a taxing event / incidence has taken place, and amount has, by a provision of law become due, then collection and payment shall become the duty of the registered person. Under section 9(1) read with section 3(1) of the Act it is the primary liability of the appellant, being a service provider / registered person, to pay the tax in the event of taking place of incidence of tax [having provided the services read with section 17(2)(i)], irrespective of the fact that such tax has been collected as yet or not.

10. As far as the Order passed by the predecessors of the Respondent in the matter of appellant's earlier proceedings of identical nature is concerned, it is to be seen in light of the above discussion that such order was passed in express disregard and by not taking into discussion the express provisions of the Act and not taking into consideration the principles established by the Higher forums. And obviously, when the OIO did not consider the entries of those Audited Financial Accounts as taxable, there was no reason with the predecessor Commissioner (Appeals) to discuss the issue at the appellate level. An order of an equal forum is binding only, if it discusses the merits of an identical case and also if, the Order has not been passed in disregard of law and established principles. Therefore, such order is not binding us.

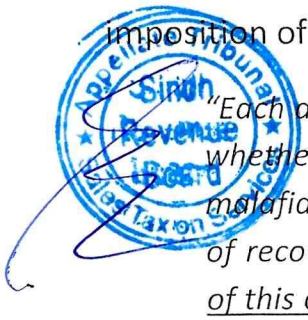
11. In view of the above circumstances and legal positions, the treatment of SST meted out by the appellant in its Accounts read with sales tax returns is not legal and the establishing of such liability, in the OIO to pay the differential amount of SST is legal and valid and liable to be upheld. The appellant has calculated the Sindh Sales Tax on the basis of self-assessment and has also booked the same in the Accounts. Therefore, there was no reason left with the appellant to short pay any of the amount on its own and without any legal basis. The appellant is at fault for not disclosing the differential amount of SST in the sales tax returns, but however, has disclosed the amount of SST payable in the Accounts. Therefore, I take a lenient view against the penalty imposed. As far as the

default surcharge is concerned, section 44 is clear, which asks registered person making late payments, to pay the same, in either cases, if the default of late payment was willful or was otherwise. Therefore, this forum is left with no discretion to interfere in the same."

20. In view of the above discussion and the contentions raised by the Commissioner (Appeals) in the OIA we find ourselves in agreement with the same. Thus the OIO and OIA are maintained to the extent of the principal amount of tax.

21. The default surcharge and penalty in this case has been imposed at Rs.498,771/- under Section 44 of the Act without establishing mensrea. We have considered it as obligatory on the part of department that before imposition of default surcharge it had to prove that the tax payer had acted deliberately in defiance of law or was guilty of contumacious dishonesty or had acted in conscious disregard of its legal obligation. In case of non-payment of tax it has to be seen whether the same was deliberate or not. Furthermore the imposition of default surcharge is a matter of discretion which must be exercised by the authorities judiciously on consideration of relevant circumstances and facts of the case. Default surcharge should not be imposed merely because it is lawful to do so. However for ready reference some of the decisions are quoted as under:-

a) 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 wilful 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 wilful 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".(Emphasis supplied)

b) 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".*(Emphasis supplied)

c) In the reported judgment of Collector of Customs versus Nizam Impex), the Honorable DB of Sindh High Court while considering the imposition of default surcharge under section 34 of the Sales Tax Act, 1990 held as under:-

"9. It is well settled law that provisions of Section 34 are attracted when there is a deliberate failure to pay the sales tax. In the present reference the perusal of the show-cause notices, order-in-original and order in appeal reveal that there was no allegation against the present respondent in respect of deliberate or wilful default, or to defraud the Government. We are, in agreement with the learned counsel for respondent that ample law is available on the point that imposition of penalty was illegal where the evasion of duty was not wilful as held by the Hon'ble Supreme Court of Pakistan in the case of D.G. Khan and others. Further reliance is placed upon the case of Messrs Lone China (Pvt.) Ltd. v. Additional Secretary, Government of Pakistan decided by the Hon'ble Lahore High Court, reported as PTCL 1995 CL 415 wherein it has been held that if the party did not act mala fide with intention to evade the tax, the imposition of penalty of additional tax and surcharge was not justified. In another case Additional Collector Sales Tax Collect-orate of Sales Tax Multan v. Messrs Nestle Milk Pak Ltd., Kabirwala and another, 2005 PTD 1850, it has been held that in such circumstances the Tribunal has discretion to waive/remit additional tax and penalties. (Emphasis supplied)

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In view of above discussion the default surcharge and penalty are deleted.

22. The appeal is disposed of in terms of para 20 and 21 supra. 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

Karachi:
Dated: 10.08.2022

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-21), SRB, for compliance

Order issued on 11/08/2022

Registrar

Copy for information to:-

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

Order Dispatched on 11/08/2022

Registrar