

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

APPEAL NO. AT-11/2022

M/s K.B. Panhwar & Co.
Govt. Contractor (SNTN: 3100444-0),
Village Arz Muhammad Panhwar,
Bilawal Taluka, District Dadu.....Appellant,

Versus

Assistant Commissioner (Unit-34),
Sindh Revenue Board, (SRB) Hyderabad
Bungalow, No. 14-A/1, Defense Housing
Society, Phase-I, Cantt.
Hyderabad.....Respondent

Date of filing of Appeal: 25.02.2022
Date of hearing: 19.05.2022
Date of Order: 16.06.2022

Mr. Muhammad Jibran, Advocate for the appellant.

Mr. Tashkeel Hussain, AC-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. 76/2021 dated 17.12.2021 passed by the Commissioner (Appeals) in Appeal No. 19/2021 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 45/2021 dated 18.02.2021 passed by Mr. Waleed Patoli, Assistant Commissioner, (Unit-34) SRB Hyderabad.

02. The brief facts of the case as stated in the OIO were that the appellant was registered with Sindh Revenue Board (SRB) for providing or

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rendering taxable services of "Contractor of Building including others" Tariff Heading 9814.2000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act). The appellant was required to charge and collect the Sindh Sales Tax (SST) on all its taxable services provided in Sindh at the applicable rate and deposit the same with SRB. The appellant had statedly provided taxable services to M/s Syed Abdullah Shah Institute of Medical Sciences, Sehwan Limited having NTN: 9030986-8 (Medical Institute).

03. It was alleged in the OIO that upon scrutiny of monthly sales tax withholding statement for the tax periods May, 2020 and June, 2020 e-filed by Medical Institute it was explicitly evident that it had withheld SST of Rs.642,515/ out of total SST of Rs.3,212,576/= against the value of taxable service of 40,157,191/=. However, remaining SST amount of Rs.2,570,061/- had not been deposited by the appellant with SRB, which were charged and collected by the appellant during the tax periods May, 2020 and June,2020. The appellant was served with Show Cause Notice (SCN) dated 12.08.2020 under Section 23(1) and (2) read with Section 47(1) of the Act as to why the SST of Rs.2,570,061/- should not be assessed and recovered. Furthermore it was confronted as to why penal action should not be taken under clause 3 of the Table under section 43 of the Act. Besides, the registered person was also liable to pay default surcharge under section 44 thereof, read with the Rules, 2011.

04. The appellant submitted written response to the SCN which was reproduced by the AC in Para 11 of the OIO. It was stated that that the work namely "Construction of indoor Block, Second Floor Abdullah Shah Institute Sehwan" was awarded to the appellant vide work order No.2640 dated 17.03.2020. It was further stated that the works of buildings, roads and bridges were generally exempted from Sindh Sales Tax upto 30.06.2020 and as per Cabinet decision taken in the meeting held on 24th December 2019(Agenda item No. 3) the SST on Sindh Government Development Scheme was exempted in the Financial Year, 2019-20.

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05. The Assessing Officer (AO) passed OIO determining the SST at Rs.2,570,061/= alongwith default surcharge. The AO also imposed penalty of 128,503/- (5% of the tax payable for that period) under Serial No.3 of the Table under section 43 of the Act, for non-payment of SST.

06. The appellant challenged the said OIO by way of filing of appeal under section 57 of the Act before Commissioner (Appeals), SRB who held as under:-

"...12. In view of the foregoing position of facts, it is transparent that the instant Appellant has conceded the charged framed against him in the impugned OIO and thereafter, deposited the due / adjudged principal defaulted amount of tax in the matter being Rs.2,570,061/- into the Sindh Government treasury, in the aforesaid manner, as confirmed by the respondent AC supra. As such, this appeal has become infructuous and stands disposed of accordingly."

"13. As regards the statutory amounts of default surcharge and the penalty amount that the Appellant is required to pay in terms of the impugned OIO, during Appeal proceedings, he has vehemently pleaded to the Appellate Authority that since Appellant is willing to pay the defaulted tax-amount in due discharge of Appellant's legal duty, a lenient view may be taken. Though Appellant's mens rea in this matter as evident from record, still taking a lenient view in order to mitigate his hardship, his plea regarding penalty is entertained. Accordingly, adjudged amount of Rs.128,503/- is remitted in toto, in line with the discretionary powers allowed by law in this regard. However, with respect to the unpaid default surcharge amount of Rs.430,018/- (as worked by the AC) section 44 does not confer any discretionary power on the Appellate Authority to enable him to reduce or remit the same. Default surcharge under the Act, 2011 is the 'time value of money' and it does not adduce any concept of 'mens rea' that

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is associated with 'legal penalty'. No relief is thus warranted to the Appellant on this count. Appellant must pay additional Rs.430,018/- in final discharge of his legal duty in this matter. Respondent AC may enforce such recover in line with the relevant provisions of the Act, 2011 and the Rules framed thereunder".

07. Resultantly, the appellant filed this appeal on 25.02.2022 but it failed to comply with the objection allowed by the Tribunal within time. The appellant or its representative also failed to appear on the dates of hearing fixed from time to time, consequently the appeal was dismissed for non-prosecution on 27.04.2022.

08. The appellant filed application for restoration of appeal on 09.05.2022, and the notice of the same was issued to the AC, Hyderabad. The ground taken by the appellant was that the date of hearing was not communicated to it and the same was sufficient cause for restoration/readmission of appeal. Moreover the AC, Hyderabad had no objection to the restoration/readmission of appeal. Thus the appeal was readmitted since the appellant had explained sufficient cause for its readmission, and the argument of both the learned representatives were heard on merits of the case.

09. The learned representative of the appellant submitted as under:-
i. The due SST of Rs.2,570,061/- was already paid during pendency of appeal before Commissioner (Appeals) on 07.12.2021 and the Commissioner while waiving the penalties ordered for payment of default surcharge against which this appeal was filed.

- i. The default surcharge was imposed without establishing mens rea and malafide on the part of appellant.
- ii. That since all the due taxes have been paid, the default surcharge should not be imposed. Reference was placed on a recent judgment of the High Court of Sindh in the case of Commissioner Inland Revenue versus Byco Petroleum Pakistan Limited, SSTR No. 191/2018 and it was submitted that the

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High Court had deleted the penalty and default surcharge on payment of due SST.

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

- i. The AC supported the OIO and OIA and submitted that the appellant had admitted that the due tax was not deposited as provided.
- ii. The default surcharge was properly imposed as due to non-payment of SST as prescribed the exchequer had suffered losses.
- iii. AC worked out the default surcharge at Rs.430,018/-.
- iv. In view of language of section 44 of the Act the default surcharge provided under section 44 of the Act could not be waived or condoned.

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

12. The amount of SST was not disputed thus such amount of Rs.2,570,061/= was paid during the pendency of the appeal before Commissioner (Appeals) and in consideration thereof the Commissioner (Appeals) had remitted the penalty of Rs.128,503/=. However, the Commissioner (Appeals) declined to waive the default surcharge of Rs.430,018/=.

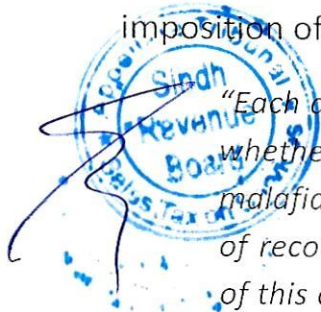
13. This appeal was only filed against the imposition of default surcharge under section 44 of the Act. The perusal of the OIO showed that the AO imposed penalty and default surcharge mechanically treating the same as necessary corollary of non-payment of SST without first establishing the mensrea and malafide on the part of the appellant. The perusal of OIO further showed that the AO even had not used the words "mensrea and malafide" in the entire OIO. The superior courts in its numerous pronouncements have held that the default surcharge and penalty could not be imposed without establishing mensrea and malafide on the part of tax payer.

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14. It is obligatory on the department that before imposition of penalty or default surcharge it has to prove that the tax payer had acted deliberately in defiance of law or was guilty of contumacious dishonesty or 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. The purpose of penalty and default surcharge is to create deterrence for the tax payers avoid default in payment of due tax and not for enrichment of the department and to meet its target of collection of SST. The penalty and default surcharge should not be harsh and exemplary. Furthermore the levy of penalty and 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. Penalty and 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 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".

- 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

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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".

- 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 willful 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 willful 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.

15. In view of the above decisions of superior courts it is evident that the default surcharge or penalty could not be imposed without first establishing

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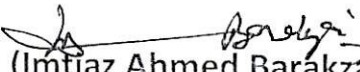
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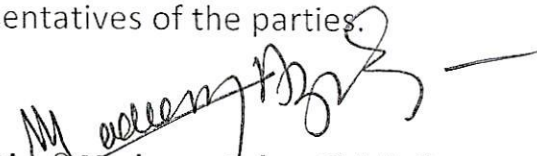
mensrea, which was lacking in the instant case. The Commissioner (Appeals) could have also waived the default surcharge on the basis of analogy on which the payment of penalty was waived by him.

16. Section 44 of the Act and Section 34 of the Sales Tax Act, 1990 are not materially different in scope, and both deal with imposition of default surcharge. Therefore in view of the similarity of language of two statutes the case law pertaining to the section 34 of the Sales Tax Act, 1990 could also be relied upon in cases pertaining to Section 44 of the Act.

17. Considering the above discussions the appeal is partly allowed. The OIO and OIA are maintained to the extent of payment of SST of Rs.2,570,061/=. The payment of SST had already been deposited by the appellants as far back as on 07.12.2021. However the default surcharge and penalty are deleted.

18. The appeal is disposed of in terms of para 17 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:16.06.2022


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-34), SRB, Hyderabad for compliance

Order issued on 20/06/2022

Copy for information to:-

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

Order Dispatched on 20/06/2022


Registrar