

**BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD, AT
KARACHI**

APPEAL NO. AT-111/2022

M/s Alle Nora by Aliya Tipu,
(SNTN: 1458867-6,
D-80, E-Street Block, 04, Clifton,
Karachi.....Appellant

Versus

The Assistant Commissioner (Unit-19),
Sindh Revenue Board (SRB),
02nd Floor, Shaheen Complex Building
M.R. Kiyani Road, KarachiRespondent

Date of filing of Appeal: 19.07.2022
Date of hearing: 01.09.2022
Date of Order: 08.11.2022

Mr. Nadeem Iqbal, Advocate for appellant.
Ms. Umi Rabbab, DC-SRB for the 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. 65/2022 dated 24.05.2022 passed by the Commissioner (Appeals) in Appeal No. 129/2016 filed by the Appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 214/2016 dated 06.04.2016 passed by Syed Rizwan Ali, Deputy Commissioner, (Unit-19) SRB Karachi.

02.The facts as stated in the OIO were that the appellant was compulsory registered with SRB on 20.09.2013 under the service category of beauty parlor, classified under Tariff Heading 9810.0000 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act)

for providing or rendering taxable service in Sindh province. It was further stated that the appellant under section 30 of the Act was required to furnish not later than the due date a true and correct return in the prescribed form.

03. It was alleged in the OIO that the appellant failed to file monthly Sales Tax Returns (SST Returns) for the tax periods January-2015 to January-2016 and the appellant was served with a Show-Cause Notice (SCN) dated 25.02.2016 to explain as to why penal action under Serial No. 2 of Table under section 43 of the Act should not be taken against it for contravening the provision of section 30 of the Act. The appellant had not submitted any written reply.

04. The Assessing Officer (AO) after providing right of hearing to the appellant passed OIO imposing penalty of Rs.130,000/= under serial No. 2 of the Table under section 43 of the Act for failing to file monthly SST Returns for the tax periods January-2015 to January-2016 in contravention of the provision of section 30 of the Act.

05. The appellant challenged the said OIO by way of filing of appeal under section 57 (1) of the Act before Commissioner (Appeals), SRB who instead of hearing and deciding the appeal on merits dismissed the same for non-prosecution via OIA dated 112/2018 dated 28.-6.2018.

06. The appellant challenged the said OIA by way of filing of appeal NO. AT-53/2018 before this Tribunal. After hearing the Tribunal set aside the OIA and the case was remanded to the Commissioner (Appeals) for deciding the same on merits.

07. The appeal after remand, as per the OIA was fixed for 17 times for hearing, but the appellant and its advocate failed to appear on the dates of hearing. The appellant was served with a Notice to ensure its appearance either in person or via Skype on the given date and time, but to no avail. Finally vide OIA 24.05.2022 the appeal was dismissed for non-prosecution. Hence this appeal.



08. Mr. Nadeem Iqbal, the learned Advocate for appellant submitted as under:-

- i. The Commissioner (Appeals) has no power to dismiss the appeal for non-prosecution and refer to unreported decision of Honorable Supreme Court of Pakistan in the case of Farrukh Raza Sheikh versus The appellate Tribunal, Inland Revenue, CP NO. 1417 of 2022.
- ii. The adjournment application in time with the notice was sent to Commissioner (Appeals) through email which was not considered.
- iii. The element of mensrea is missing and in absence of mensrea the penalty could not be imposed.
- iv. The appellant has not caused any loss of revenue and in absence of loss of revenue imposing penalty was illegal. He relied upon the reported case of Commissioner IR Zone-III versus General Tyre & Rubber Company, 2013 PTD 387.

09. The learned AC-SRB Ms. Umi Rabbab submitted as under:-

- i. The appeal before Commissioner (Appeals) was fixed for seventeen times but the case was adjourned for 15 times on the request or due to absence of the appellant and its advocate.
- ii. The appellant and its advocate were negligent throughout and despite remand by the Appellate Tribunal the attitude remained the same.
- iii. The appellant was compulsory registered vide OIO No. 213/2013 dated 24.09.2013 and the appeal was dismissed vide OIA No. 156/2014 dated 03.12.2014. Despite this the appellant has failed to discharge its statutory obligation.
- iv. At the time when SCN in this appeal was issued the appellant was neither paying tax nor filing SST returns.
- v. The appellant was served with multiple show-cause-notices but to no avail. The appellant reflected a non-compliant attitude.
- vi. The appellant being a registered person providing or rendering taxable services is neither paying SST nor filing SST Returns.
- vii. The mensrea in this case is evident on record. The non-compliant attitude is sufficient to establish mensrea.

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

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11. The charges against the appellant was that even after compulsory registration the appellant failed to e-file the SST Returns as prescribed during the tax periods from January-2015 to January-2016 (13 tax periods and penalty was imposed @Rs.10,000/= per tax return). The appellant as per the provision of section 30 of the Act read with Chapter III (Filing of Returns) of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules) was required to file SST Returns as prescribed.

12. It is evident from the Registration and Tax Profile of the appellant that despite providing taxable services it had not got voluntarily registration and was compulsory registered and its appeal was also dismissed and despite that neither it had filed monthly tax returns nor paid due SST. It is also evident that despite the OIO the appellant neither filed SST Returns nor paid due tax.

13. The Commissioner (Appeals) had provided sufficient opportunity of hearing, but the appellant and his advocate failed to avail the same and for their negligence could not blame others. The advocate for the in support of his contention that the Commissioner (Appeals), SRB has no jurisdiction to dismissed the appeal for non-prosecution has relied upon the unreported decision of Honorable Supreme Court of Pakistan in the case of Farrukh Raza Sheikh versus The Appellate Tribunal, Inland Revenue, CP NO. 1417 of 2022. The said case pertains to the interpretation of section 132 (2) of the Income Tax Ordinance, 2001 (ITO, 2001) read with Rule 22 (1) of the Income Tax Rules (IT Rules). Section 132 (2) of the ITO, 2001 provides that in case of default by any of the party on the date of hearing the Tribunal may proceed ex parte to decide the appeals on the basis of available record. No such provision is available in the Act. Furthermore the above provision is available in the ITO Ordinance for the Tribunal and not for the Commissioner (Appeals). In contrary to the above provision Rule 22 (1) of the IT Rules provides that the Tribunal may if it deems fit, dismiss the appeal or application in default or may proceed exparte to decide the appeal or application on



the basis of the available record. The Honorable Supreme Court after examining the above provisions of law concluded as under:-

"10. For the reasons elaborated above, hold and declare that Rule 22 (1) of the Rules to the extent whereby it allows the Tribunal to dismiss an appeal in default is ultra vires Section 132 (2) of the Ordinance and is, therefore, struck down to that extent".

It is clear that no such provisions are available in the Act or the Rules and the ratio decidendi is not applicable in this case.

14. The appellant has also challenged the penalty on the plea that in absence of mensrea penalty could not be imposed. The conduct of the appellant is material in establishing the mensrea. From its not-compliant attitude the appellant showed that it has no respect of law. The appellant despite providing or rendering taxable services had failed to get voluntarily registration with SRB. The appellant after compulsory registration and dismissal of its appeal failed to pay tax and failed to e-file SST Returns. The appellant despite the OIO passed in this case failed to e-file the monthly SST Returns and had also failed to deposit the SST Returns. The appellant despite having various opportunities failed to appear before Commissioner (Appeals) for hearing. The conduct of the appellant clearly reflects that it only want to delay and drag the proceedings to avoid filing of returns and payment of SST. I am fully satisfied that the mensrea is available and established and the penalty was rightly imposed.

15. The appellant also contended that since there was no loss of revenue the imposition of penalty was not justifies and relied the reported case of Commissioner IR Zone-III versus General Tyre & Rubber Company, 2013 PTD 387 a DB Judgment of High Court of Sindh. In the reported case section 182 of the ITO, 2001 was considered which read as under:-

"182. Penalty for failure to furnish a return or statement.-(1) Any person who, without reasonable excuse, fails to furnish, within the time allowed under this Ordinance, return of income or a statement as required under



subsection (4) of section 115 or wealth statement for any tax year as required under this Ordinance shall be liable to a penalty equal to one-tenth of one per cent of the tax payable for each day of default subject to a minimum penalty of five hundred rupees and a maximum penalty of twenty-five per cent of the tax payable in respect of that tax year”.

16. The Sindh High Court has held as under:-

“4. From perusal of hereinabove provisions, it appears that the penalty has been provided by the legislature in cases where any person who, without reasonable excuse, fails to furnish return of income or wealth statement for any tax year within the time allowed under the Ordinance, 2001, whereas the amount of penalty is required to be calculated on the basis of tax payable in respect of that tax year. 6. In view of hereinabove facts and on examination of the legal provision as referred to hereinabove, it has come on record that since there was no tax payable along with return thus the provision of section 182 was not applicable to the facts of this case. While confronted with such factual and legal position, the learned counsel for the applicant has candidly conceded to the legal position as stated hereinabove”.

17. The facts of the reported case are distinguishable from the facts of the case in hand. Section 182 of the ITO, 2001 provides imposition of penalty on the basis of tax payable. In that context it was held that “since there was no tax payable along with return thus the provision of section 182 was not applicable to the facts of this case”. In the case in hand fixed penalty was provided and the penalty was not linked with the tax payable.

18. The appellant was provided with sufficient opportunities by Commissioner (Appeals), but the appellant failed to avail the same. In the reported case of Rai Muhammad Ashraf versus Additional Sessions Judge, Nankana Sahab, PLD 2022 Lahore 409 it was held as under:-

“9. The conduct of party is a relevant fact in the administration of justice. A party cannot be allowed to play hide and seek with the Court and to prolong the matter unnecessarily as well as to engage the machinery of the State department unnecessarily as per his whims and caprice besides wasting precious time of Court. The Rules of Procedure are enacted to

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regulate the safe administration of justice in accordance with law and to check unnecessary delay in resolving the dispute between the parties. The golden maxim that "law aids the vigilant and not the indolent", provides that helpful hand could not be extended to a litigant having gone into deep slumber on having on having become forgetful of his/her rights. Those who sleep over their right, stand estopped from getting their enforcement thought their right continues. Reference can be made to Rehmat Din and other v. Mirza Nasir Abbas and others (2007 SCMR 1560), Muhammad Javed v. Managing Director Sui Northern Gas and others (2013 CLC 1276), Mian Abdul Karim v. Province of Punjab through District Officer (Revenue) Lodhran and 5 others (PLD 2014 Lahore 158), Gaman and others v. Mureed Hussain and others (2020 MLD 1211) and Rana Muhammad Ilyas v. Lahore Supply Company and others (2021 PLC 75).

19. The position in this case is same as in the above reported case. The appellant continuously avoiding to comply with the statutory provisions and has also avoided to proceed with its appeal before Commissioner (Appeals) and the Commissioner (Appeals) has rightly dismissed the appeal for non-prosecution.

20. In view of the above discussions the appeal having no merits is dismissed. The copy of the order may be provided to the learned representatives of the parties.

Karachi.

Dated: 08.11.2022

(Justice[®] Nadeem Azhar Siddiqi)

Chairman

Certified to be True Copy

Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
- 2) The Deputy Commissioner, (Unit-19), SRB, for compliance

Copy for information to:-

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

Order issued on

10/11/2022

Order Dispatched on

10/11/2022

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Registrar