

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD, AT KARACHI

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APPEAL NO. AT-132/2022

M/s PGP Consortium Limited,

(SNTN: S724990-2)

Associated House-7, Egerton Road,

Lahore.Appellant

Versus

The Assistant Commissioner (Unit-32),

Sindh Revenue Board, (SRB),

02nd Floor, Shaheen Complex Building

M.R. Kiyani Road Karachi.....Respondent

Date of filing of Appeal 01.08.2022

Date of hearing 07.09.2022

Date of Order 12.09.2022



Mr. Shahid Hussain, advocate for appellant.

Mr. Irfan Waheed, AC-(Unit-32), SRB for the respondent.

ORDER

Justice ® Nadeem Azhar Siddiqi: This appeal has been filed by the appellant challenging the Order dated 29.06.2022 passed by Commissioner (Appeals), SRB by which the stay was not extended under section 58 (4) of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act).

02. The brief facts relating to the instant appeal were that the appellant was registered with Sindh Revenue Board (SRB) since 31st January, 2017 in the service category of "Terminal Operator" covered under Tariff Heading 9819.9090 of the Second Schedule to the Act.

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03. It was alleged in the OIO that during the scrutiny of the monthly Sindh Sales Tax Returns (SST Returns) filed by the appellant for different tax periods between March 2017 to September 2021, it was revealed that the appellant always made late payment of Sindh Sales Tax (SST) on its own accord.

04. The appellant was served with a Show-Cause Notice (SCN) dated 25.01.2022 with detailed working including days of default for each payment and the application of relevant KIBOR confronting an amount of Rs.49,582,546/= on account of payment of default surcharge under section 44 of the Act. The appellant despite many opportunities failed to file any response to the SCN and did not appear before the Assessing Officer (AO).

05. The AO passes Order in Original (OIO) determining default surcharge at Rs.49,582,546/= and directed the appellant to deposit the same.

06. The appellant challenged the OIO before Commissioner (Appeals) by filing Appeal No. 180/2022 along with an application for stay. The Commissioner (Appeals) initially granted stay on 02.06.2022, which was further extended on 13.06.2022 till 23.08.2022.

07. The Assistant Commissioner (AC)-SRB after being informed regarding extension of stay till 23.08.2022 filed an application dated 27.06.2022. Such application was heard by the Commissioner (Appeals) on 29.06.2022 in absence of the appellant and its representative and the stay was vacated by the Commissioner (Appeals) vide Order in Appeal (OIA) dated 29.06.2022. The operative part of the OIA is reproduced for ready reference as under:-

"...3. From perusal of the argument of rival parties and on basis of available record, I observed that C.P No. 580 of 2022 and interim order dated 31-01-2022 was against the Registration suspension order u/s 25(3) 104/2022 dated 25-01-2022 against which appeal before me was filed on 28-01-2022 which has already been decided by this forum vide order-In-Appeal No.111/2022 dated 22-04-2022. Hence, taken plea for stay in the instant case with reference to interim order against C.P No. 580 of 2022 has no validity in the instant appeal as the order u/s 44 dated 21-04-2022 is in field.

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4. In view of above circumstances and facts the stay granted and continued on hearing dated 02-06-2022 and 13-06-2022 is hereby vacated.

5. Both parties are directed to come upon 23-08-2022 for regular hearing”.

08. The AC on the same day i.e. 29.06.2022 attached the bank account of the appellant and withdrew an amount of Rs.49,582,546/= from the said bank account, hence this appeal.

09. The learned Advocate for the appellant Mr. Shahid Hussain, submitted as under:-

- i. The stay was vacated without providing proper right of hearing to the appellant and its representative.
- ii. The hearing of appeal was antedated from 23.08.2022 to 29.06.2022 without filing of proper application by the department. Furthermore no such notice was served upon the appellant and its representative as provided under section 75 of the Act.
- iii. The department on the same day i.e.29.06.2022 withdrew an amount of Rs.49,582,546/- from the bank account of the appellant without serving any notice to the appellant.
- iv. The amount was withdrawn from the bank account of the appellant in a fraudulent manner during pendency of appeal before Commissioner (Appeals).
- v. The recovery of amount during pendency of appeal before Commissioner (Appeals) without determination from an independent forum was depreciated by the superior courts.
- vi. The amount recovered in a deceptive manner during pendency of appeal may be ordered to be refunded to the appellant.

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

- i. The appellant was informed through e-mail about the change in date of hearing but no one appeared and consequently stay was rightly vacated on 29.06.2022.
- ii. The amount was rightly recovered after stay was vacated.

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- iii. The law does not provide for giving any notice to the appellant before attachment of bank account and withdrawal of amount.
- iv. The amount could not be refunded as the same was rightly and legally recovered after providing proper opportunity to the appellant vide SRB letter dated 04.03.2022.

11. The learned representative of the appellant in rebuttal submitted that the alleged e-mail was deliberately sent to the appellant on 28.06.2022 at 06:30 p.m. (after office hours) for hearing on 29.06.2022 at 09:30 a.m. to ensure that the appellant or its representative could not attend the hearing. The said e-mail was seen after the vacation of stay and attachment of bank account.

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

13. This appeal has been filed challenging the order of Commissioner (Appeals) for vacating the stay granted on 02.06.2022 vide order dated 29.06.2022. Since the appeal is still pending before Commissioner (Appeals) the merits of the OIO are not being considered in the instant appeal.

14. The instant case appears to be that of hardship. The appeal is still pending before Commissioner (Appeals), and during pendency of appeal the Commissioner (Appeals) vacated the stay without proper notice or proper right of hearing to the appellant or its representative. The statutory period for which the Commissioner (Appeals) could grant stay had not lapsed and no cogent reason was assigned for vacation of stay.

15. We find substance in the arguments of the learned representative of the appellant that the forced recovery without determination of dispute by an independent forum is against the principle of natural justice and due process of law. The appellant is entitled to protect its right during pendency of appeal. The Commissioner (Appeals) should be considerate to decide the appeals within a reasonable time to avoid such situation and should give due importance to the orders of the Tribunal. Non-adhering to the orders

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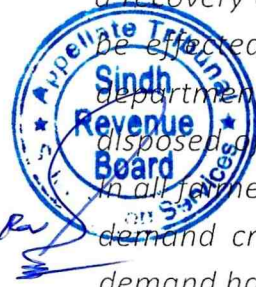
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of the Tribunal by Commissioner (Appeals) is unwanted and against good governance.

16. The vacation of stay during the pendency of appeal and leaving the taxpayer on the mercy of the department, and taking coercive action against the tax payer during pendency of appeal is highly objectionable and could not be approved. The Department should avoid such coercive action against the tax payer in the interest of justice, fair play and right to fair trial as ordained in the Constitution of Islamic Republic of Pakistan. Even if the stay is vacated or not extended the department should avoid taking coercive measure against the tax payer until the matter is heard by an independent forum which in the instant case is the Tribunal.

17. This point was considered by the Lahore High Court in case of ZN Exports Private Limited versus Collector Sales Tax and it was held as under:-

"2. Learned Counsel for the petitioner contends and I will agree that before a recovery created by an impugned order by a departmental authority can be effected, an assessee, appellant must be heard by a forum outside the departmental hierarchy. The Tribunal as a forum of first appeal having not disposed of the appeal, the Petitioner cannot be blamed on that account. In all fairness, equity and justice, an assessee should not be forced to pay a demand created by a Revenue Authority unless the order creating such demand has undergone the scrutiny of at least one independent forum".



In the reported judgment of M/s S.S. Tanneries Versus Assistant Collector (Audit and Enforcement Division-II) Sales Tax and Federal Excise Tax the Lahore High Court has observed that the Honorable Supreme Court of Pakistan in case of Mehram Ali V Federation of Pakistan reported as PLD 1998 SC 1445 has held that essential feature of fundamental right is the determination of any grievance or dispute by an independent Tribunal.

In the reported judgment of M/s Huawei Technologies Pakistan (Pvt) Ltd versus Commissioner Inland Revenue, 2016 PTD 1799 the Lahore High Court has held as under:-

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"6. In view of the aforementioned principle that has been consistently followed by this court in a number of decisions, no coercive measures are to be adopted for recovery of the disputed tax liability till the decision by an independent forum. Since the appeal, filed by the petitioner, is pending before respondent No.4, therefore, in light of the above principle, coercive measures for the recovery are not to be effected till its decision".

It was further held in the same judgment as under:-

"11. For the foregoing reasons, the instant petition is allowed and order dated 28.12.2015, attaching the accounts of the petitioner effective recovery is declared to be without lawful authority and no of legal effect. Consequently, the obtaining of pay orders by respondent No.2, from the banks of the petitioner, is also declared to be without lawful authority; therefore, amounts are to be credited back in the petitioners' accounts. Since the appeal filed by petitioner is pending before respondent No.4, therefore, the referred respondent is directed to decide the same within a period of sixty days from the receipt of this Order and meanwhile no coercive measure shall be adopted by the respondent department for the disputed tax liability".

The grant of stay is an equitable relief and could only be granted on showing prima facie case, balance of convenience or causing irreparable loss. The relief is discretionary in nature and the discretion has to be exercised judiciously and not arbitrary. After preliminary hearing the grant of stay by the Commissioner (Appeals) clearly reflected that the appellant had made out a prima facie case. The stay once granted could only be vacated on sound grounds and reasoning and not arbitrarily merely to penalize a tax payer or to provide an opportunity to the department to recover the tax during pendency of appeal. Furthermore the Commissioner (Appeals) before vacating the stay should call upon the appellant to deposit 25% of the SST due as provided under the first proviso to clause (f) of sub-section (1) of section 66 of the Act, which was also not done.

18. The vacation of stay on flimsy ground to provide an opportunity to the department to recover SST amount during pendency of appeal was against the judgments/orders of superior courts and the various orders of

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this Tribunal. The order vacating stay in this appeal was deceptive and without cogent reason and sound grounds. The vacation of stay was passed without serving proper notice to the appellant and its representative, as provided under section 75 of the Act nor right of hearing was provided to the appellant and is tainted with malafide.

19. The instant appeal was filed after recovery of tax dues during the pendency of the appeal before Commissioner (Appeals), SRB. Keeping in view the facts and circumstance of the case the request of the advocate for the appellant to order for refund of amount already recovered is not sustainable under law. Therefore we are unable to accede to the request.

20. The appeal is disposed of with the observations mentioned in para 18 and 19 above. The copy of the order may be provided to the learned representatives of the parties and to the Learned Chairman, SRB for taking necessary action at his end.


(Intiaz Ahmed Barakzai)
TECHNICAL MEMBER


(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN
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Karachi:

Dated:12.09.2022

Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
- 2) The Assistant Commissioner, (Unit-32), SRB, for compliance

Copy for information to:-

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


By REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on 13-09-2022


By Registrar

Order Dispatched on 13-09-2022


By Registrar