

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD, AT KARACHI
(SB-I)

APPEAL NO. AT-147/2022

M/s Soil Mechanics (Private) Limited,
(SNTN: 0712181), 2B, 5th Central Lane,
Phase-II DHA, Karachi, Sindh.Appellant

Versus

The Assistant Commissioner (Unit-25),
Sindh Revenue Board, (SRB),
2nd Floor, Shaheen Complex,
M.R. Kayani Road
Karachi.....Respondent

Date of filing of Appeal: 12.08.2022
Date of hearing: 15.11.2022
Date of Order: 30.11.2022

Mr. Arsalan Siddiqui, ACMA and Mr. Junaid Siddiqui, CIMA for appellant.

Mr. Mukhtiar Ali Memon, 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. 82/2022 dated 11.06.2022 passed by the Commissioner (Appeals) in Appeal No. 396/2018 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 929/2018 dated 02.11.2018 passed by Ms. Rafia Urooj, Assistant Commissioner, (Unit-25) SRB Karachi.

02. The facts as stated in the OIO were that the appellant having (SNTN: S0712181) was registered with SRB under the category of "services provided or

rendered by laboratories other than services relating to pathological, radiological or diagnostic tests of patients“ Tariff Heading 9817.9000 of the Second Schedule to Sindh Sales Tax on Services Act, 2011 (hereafter referred to as the Act) and was subject to levy of Sindh Sales Tax (SST) at the rate of 13% for 2016-17 and 14% for 2015-16.

03. It was further stated in the OIO that the appellant was required to charge and collect the SST on all their taxable services in terms of sections 3, 8, 9 and 17 of the Act read with rule 14 of Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules) and required to furnish true and correct monthly SST Returns in the form (SST-03) by the 18th day of the month following the tax period to which it relates as mentioned under section 30 of the Act read with rule 13 of the Rules.

04 It was alleged in the OIO that from scrutiny of tax profile of the appellant maintained with SRB and perusal of financial statement for the year ended 30th June, 2017 (2016-17) revealed that the appellant has provided the services during tax period from July-2015 to June-2016 and from July-2016 to July-2017 but failed to make payment of SST and also failed to declare the same in their SST Returns and on the contrary file returns as “Null” showing no economic activity which was in violation of section 8, 9, 17 and 30 of the Act read with rule 11, 12, 13 and 14 of the Rules . The details are as under:

Periods	Revenue	Rate	Sindh Tax
2015-16	15,360,065	14%	2,150,409
2016-17	792,711	13%	103,052
Total			2,553,461

05 The appellant was served with a Show-Cause Notice (SCN) dated 06.03.2018 to explain as to why SST amounting to Rs.2,253,461/- should not be assessed under section 23 of Act and recovered under section 47 of the Act. The appellant was further called upon to explain as to why the default surcharge under section 44 of Act and penalties under Serial No 2 and 3 of the Table under section 43 of Act should not be imposed.



[Handwritten signature]

06. The representative of the appellant Mr. Noman Ahmed, Accountant appeared before the Assessing Officer (AO) on 17.04.2018 and submitted that the appellant was provided construction services under Tariff Heading 9824.0000 at PAF BASE BHOLARI project. The representative of the appellant further submitted Written Arguments vide reply Ref. No. "Nil dated "NIL" The appellant highlighted its principal activity and Geotechnical Program, gist of which is as under:-

"6. We M/s Soil Mechanics (Pvt.) Ltd Civil and Geotechnical Engineers, geotechnical engineers design foundations for structures (collaborating with structural engineers), sub-grades for roadways (collaborating with transportation and roadways engineers), embankments for water storage and flood control (collaborating with construction engineers, mangers and planners) and containment systems for hazardous materials (collaborating with environmental engineers and scientists)."

We had rendered services to Pakistan Air Force for their PAF BASE BHOLARI (Geotechnical Investigation Program attached).

Geotechnical Program is an integral part of construction and specially in such projects. The project is based on PAF Base and all his work had done in cantonment area/PAF Base.

We request you to consider above facts as our business activity is under SRB Tariff Heading 9824.0000 which is exempt from services tax. Moreover, we have winded up our business and need SRB clearance as well".

07. The AO for justification and verification purpose asked the appellant to submit (i) Contract Agreements (ii) Invoices (iii) Exemption Certificate or any other document. The appellant submitted reply on 23-04-2018 along-with copies of contract and bills i.e. (i) Notification of SRB regarding exemption of SST on Construction Services (ii) Details of project. However, failed to submit exemption certificate of worked done in US consulate due to shortage of time.

Year	Site Work	Gross Amount
2016	US Consulate Work	513,000
2016	US Consulate Work	513,000
2016	US Consulate Work	1,026,000
		2,052,000
2016	PAF Bholari Site	9,919,305
2016	PAF Bholari Site	3,000,000
		12,919,305
2017	PAF Bholari Site	792,711

08. The Assessing Officer (AO) after going through the record passed OIO determining the SST at RS 2,253,461/- under section 23 read with section 47 of the Act alongwith default surcharge under section 44 of Act. The AO also imposed penalties under section 43 of the Act. The operative part of the OIO is reproduced as under:-

*"13 Therefore, after going through the case, it is held that confronted Sindh sales tax amounting to RS 2,253,461/- is required to be assessed under section 23 Act, 2011 and recoverable under section 47 of the said Act, 2011. Thus, undersigned has decided the case and registered person to deposit Sindh sales tax amount of Rs.2,253,461/- along-with default surcharge under section 44 of Act, 2011 in Government of Sindh's head of Account "B-02384". Furthermore, I hereby also imposed penalty of RS 112,673/- (2,253,461/-*5%) under SR. No. 3 and Rs.395,400/- till the date of order i.e. 05-11-2018 (to be recalculated till the date of filling at RS 10,000/- per month or a fraction thereof at RS 300 per day till date of filling of Sindh sales tax return for tax period July, 2015 to June, 2017)".*

09. The appellant challenged the said OIO by filing appeal under section 57 (1) of the Act before Commissioner (Appeals), SRB who had dismissed the appeal. The operating part is read as under:-

6.....However, what is required to be seen is that the owner of the Appellant Company, who is 90 years of age, is willing to comply with the OIO and to pay the tax as well as the default surcharge thereon. I have also perused the OIO and find that it does not establish malafides on the part of Appellant but flatly imposes penalty for such omissions.

8 (6) In view of the above reasons the OIO is maintained to the extent of principal amount of tax and the default surcharge. The Appellant is directed to pay the amount of tax and the default surcharge duly calculated, within 3 weeks of the receipt of this order. In the event of failure to act such, it shall be presumed that the Appellant is willfully failing to comply with its own undertaking given before me and the therefore the penalties shall also become payable. And in that case the respondent shall be at liberty to recover the amounts accordingly as per law.

10. Mr. Arsalan Siddiqui, ACMA and Mr. Junaid Siddiqui, CIMA for appellant submitted as under:-



- i. The appellant was engaged in the activity of Soil Testing and the same was not covered under Tariff Heading 9817.9000 (services provided or rendered by laboratories other than the services relating to Pathological, radiological or diagnostic tests patients).
- ii. The appellant had applied for registration under service category of Geotechnical Engineering Consultancy and the SRB wrongly registered it under Tariff Heading 9817.9000. He placed on record the photocopy of application for registration.
- iii. The appellant had performed soil Investigation activities outside Sindh and no specific Tariff Heading for such activities is available in Second Schedule to the Act.
- iv. The activities were related to construction services and without which no construction activity was possible.
- v. The services were provided to PAF Bholari for construction of runway and to United States Embassy, Karachi which were exempted from payment of SST and relied upon the Notification dated 18.06.2013.
- vi. The definition of technical testing and analysis provided under sub-section (96B) of section 2 of the Act does not related to Tariff Heading 9817.9000 (Services provided or rendered by laboratories other than the services relating to Pathological, radiological or diagnostic tests patients) but the same relates to Tariff Heading 9819.9400 (technical testing and analysis services).
- vii. The appellant before Commissioner (Appeals) did not agreed to pay default surcharge and the consent was wrongly recorded.
- viii. The ground not taken in SCN could not be adjudicated and the OIO or QA could not be based on such ground.
- ix. The appellant had winded up its business and had applied for de-registration which was not considered despite reminder.

11. Mr. Mukhtiar Ali Memon, AC-SRB submitted as under:-

- i. The appellant applied for voluntarily registration by mentioning its services as Geotechnical Engineering Consultancy. Since no such classification and Tariff Heading was available under the Second Schedule to the Act it was registered under Tariff Heading 9817.9000 which was near to the services provided or rendered by the appellant.



- ii. The respondent from the date of registration never objected to the Tariff Heading and filed "NULL" returns under the same Tariff Heading under which it was registered.
- iii. The laboratories services are the correct tariff heading for the services provided by the appellant. The main job of the appellant was testing of soil which cannot be performed without a laboratory.
- iv. The testing of soil is not covered by construction service and is a separate taxable service to be performed by experts.
- v. The exemption was available to those institutions that were exempted from payment of Income Tax and no such exemption was available to appellant.
- vi. The appellant before the Commissioner (Appeals) had agreed to pay the principal amount of SST alongwith default surcharge. However, the appellant instead of complying with the OIA filed this appeal.
- vii. The appellant in its appeal has not denied its intention to pay SST and default surcharge.
- viii. The ground not taken the grounds of appeal could not be raised at this stage.
- ix. The Note No.1 of the Audited Account shown that the major activity of the appellant was assessment of soil which was covered under Tariff Heading 9817.9000.

12. I have heard the learned representative of the parties and perused the record made available before me.

13. The appellant applied for voluntarily registration on 28.04.2016 describing its activity as "geotechnical engineering consultancy". Since no such activity was available under the Second Schedule to the Act it was registered on 29.04.2016 under Tariff Heading 9817.9000 (Services provided or rendered by laboratories other than the services relating to Pathological, radiological or diagnostic tests of patients), which activity according to the AC was near to the services provided by the appellant.

14. The tax periods involved were from July-2015 to June-2017 and SST levied was Rs.2,253,461/= alongwith default surcharge and penalties. The providing of services to PAF Base Bholari and US Consulate and its value were not denied or

disputed by the appellant. The nature of service provided was denied by the appellant.

15. The claim of the appellant was that its activity was part of construction service has no basis. The soil testing may be necessary for construction and raising buildings and structure on the earth but in no way was consider being the part of construction service. The Second Schedule to the Act contained separate Tariff Headings for construction, laboratory testing and technical testing and analysis services and all these services were to be treated independent to each other.

16. The services provided by the appellant covered under Tariff Heading 9817.9000 added to the Second Schedule to the Act vide Sindh Finance Act 2015. The Tariff Heading covered all type of laboratory tests except relating to diagnostic tests of patients. The main job of the appellant was to test soil which could not be possible without the laboratory.

17. The representative of the appellant admitted before the Commissioner (Appeals) that the nature of services provided by the appellant was soil testing, has shown willingness to pay the SST with default surcharge. The relevant para of OIA is reproduced as under:-

"4. On final date of hearing the AR submitted before me that Appellant's activity is soil testing, whereas it is registered against the description of services reproduced in the para 1 above. And that despite of the fact that the activity is not properly covered under such description, the appellant wants to finish this case due to his old age and to pay the tax adjudged and the default surcharge. Against such contention the Appellant produced an agreement dated 26th July, 2015 entered into with Pakistan Air Force for the services provided. The AR further submitted that the malafide does not exist against the Appellant therefore the penalty may be remitted".

18. The representative of the appellant submitted that no admission of payment of default surcharge was made and the Commissioner (Appeals) has wrongly recorded the same. The above statement is part of OIA and was given by the representative of the appellant and the same was not denied or disputed by the appellant in the grounds of appeal filed before this forum. The representative of the appellant who had given the statement was expressly authorized by the appellant to be its agent for all purposes of this Act as provided under clause (h)



of sub-section (1) of section 67 of the Act. All acts taken by the representative/agent under the authority of the principal is binding upon the principal. The above statement was based on the factual controversy, which stand resolved on the basis of admission of the agent of the appellant. The making of statement before the court which was made part of the proceedings was considered in the case of Yasir Enterprises versus Model Customs Collect orate, Multan, 2009 PTD 18800 (SB-LHC).

"The statement of the learned counsel will not be of any help to the appellant. The presumption of correctness is attached to the Court proceedings. The Court proceedings cannot be nullified merely because the party or its counsel has recorded statement to the contrary or filed an affidavit. While observing so I am fortified by, the dictum to the Honourable Apex Court in case of Fayyaz Hussain v. Akbar Hussain and others (2004 SCMR 964) wherein it was held:--

"Learned counsel attempted to persuade us, accept the affidavit of Ch. Muhammad Afzal Kahloon Advocate over the judicial proceedings recorded in the Court of Additional District Judge in view of unfair reputation of the Presiding Officer but we are not inclined to adopt this course of action which may lead to a , large number of legal complications. In any event this being an essentially a disputed question of fact could neither be resolved by the High Court nor by this Court in the exercise of extraordinary Constitutional Jurisdiction."

19. The presumption of correctness is attached to all judicial and quasi-judicial proceedings. Mere denial of the representative that statement was not given is not sufficient in absence any tangible evidence.

20. The Commissioner (Appeals) imposed default surcharge under section 44 of the Act. The imposition of default surcharge under section 34 of the Sales Tax was considered by the Honorable High Court of Sindh in Commissioner Inland Revenue, Zone-IV versus M/s Byco Petroleum Pakistan Limited, SSTR 191 of 2018, vide order dated 06.05.2022. Section 34 of the Sales Tax Act, 1990 was materially not different in scope from section 44 of the Act relating to default and the levy of default surcharge. The relevant portion of the judgment is reproduced as under:-

*"7.....A Division Bench of this Court has maintained in China Power (China Power Hub Generation Company (Private) Limited vs. Pakistan & Others (CP, D 3532 of 2020); judgment dated 11.02.2021) that **default surcharge ought***

not to be imposed in a perfunctory manner and may only be warranted upon proper adjudication as to willful default (emphasis supplied) (R.C.D. Ball Bearing Limited vs. Sindh Employees Social Security Institution, Karachi reported as PLD 1991 SC 308; Masood Textile Mills vs. Ihsan ul Haq, CIT, Faisalabad reported as 2003 PTD 2653) and the presence of mens rea. It is imperative to mention that China Power has recently been maintained by the august Supreme Court (emphasis supplied) (CIR-III vs. China Power Hub Generation Company (Private) Limited vs. Pakistan & Others (CP 546-K of 2021); order dated 10.02.2022).

9. Even though China Power pertained to income tax, a Division Bench of this Court held in Tianshi International (Tianshi International Pakistan vs. CIR reported as 2018 PTD 900) that section 34 of the Sales Tax Act, 1990 was materially not different in scope from sections 161/205 of the Income Tax Ordinance 2001, relating to default and willful default and that the levy of default surcharge on a hypothetical basis, and without establishing willful default on the part of taxpayer, was illegal and a nullity in the eyes of law {Reliance was placed on 109 Tax 385 (ATIR); 1992 PTD 342 (SHC) and 2006 SCMR 626 (SC)}. It is imperative to denote that the decision in Tianshi International was rendered in 2017, therefore, much after the amendment in section 34 of the Sales Tax Act 1990 and the Court observed that the developed principles of law remained indistinguishable. *Emphasis supplied.*

Even though the honorable Islamabad High Court has been demonstrated to find otherwise (Attock Refinery Limited vs. Collector Sales Tax reported as 2021 PTD 1680), we remain bound by the enunciation of law expounded in Tianshi International in view of the Multiline principles.

10. The applicants' counsel suggested that default surcharge and penalties were civil liabilities (and not relatable to offences), however, then argued that they were consequent upon strict liability offences. Prima facie the submissions appeared to be rather incongruent inter se. It is settled law that penalties under fiscal laws are quasi criminal in nature (M. Muslim vs. Commissioner of Income Tax 1980 reported as 1980 PTD 227; Iram Ghee Mills (Pvt.) Ltd. vs. Customs, Central Excise, And Sales Tax (Appellate) Tribunal, Karachi reported as 2004 PTD 559; Commissioner of Income Tax vs. Kamran Steel Re-rolling Mills reported as 1989 PTD 521; Commissioner of Income Tax vs. Aasia Film Artist reported as 2001 PTD 678; Commissioner of Income Tax / Wealth Tax, Zone-B, Lahore vs. Makhdoom Zada Syed Hassan Mehmood reported as 2002 PTD 381) and warrant imposition in the presence of culpable intent. It is pertinent to reiterate that the assessment orders themselves attribute no culpable intent to the respondents.

13. In view of the reasoning and rationale contained herein, duly bound by the enunciation of law expounded by the earlier Division Bench judgments of this Court in Tianshi International (Tianshi International Pakistan vs. CIR reported as



MS

2018 PTD 900) read with China Power (China Power Hub Generation Company (Private) Limited vs. Pakistan & Others (CP D 3532 of 2020); judgment dated 11.02.2021) per the (Multiline Associates vs. Ardeshir Cowasjee reported as 1995 SCMR 362) principles, the question reframed for determination by this Court is answered in the negative, hence, in favor of the respondent/s and against the applicant department. These reference applications stand disposed of in the above terms”.

21. In another reported judgment in the case of Collector of Customs, Sales Tax and Central Excise versus M/s Nizam Impex (Pvt.) Ltd. Imposition of default surcharge without establishing deliberate and wilful default was considered and it was 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.

10. Thus in the light of case-law discussed above it is clear that imposition of penalty or additional tax under section 34 is not mandatory and the authorities have discretion to allow such concession. The important issue which needs to be examined is as to whether the evasion or nonpayment of tax by the respondent was willful or mala fide.

11. As mentioned earlier, nowhere it is case of department that the respondent had mala fide intention, or that default was wilful and that too to defraud the



government. In such circumstances when the imposition of sales tax has been made, the demand of additional tax appears to be harsh and unjustified.

22. Same is the position in this case. The default surcharge was imposed mechanically without establishing, malafide, willful default and mensrea on the part of the appellant which was a necessary ingredient to impose default surcharge. The liability to pay default surcharge is not a necessary consequence or corollary of non-payment of SST within the stipulated period, but is subject to establishing deliberate and willful failure of the tax payer to pay the same and while imposing default surcharge the facts and circumstances of each case and reason for non-payment should be kept in mind.

23. In view of the above the appeal is partly allowed to the extent of payment of default surcharge. Relying upon the judgment in the BYCO case supra and Nizam Impex case supra the default surcharge imposed in the OIO and OIA are waived and setaside. The appellant is directed to pay the SST of Rs. 2,253,461/- within thirty days from the date of receipt of receipt of copy of this order, failing which it will also require to pay default surcharge of Rs.200,000/=.

24. The appeal is disposed of. The copy of the order may be provided to the learned representatives of the parties.

Karachi.

Dated. 30.11.2022

(Justice® Nadeem Azhar Siddiqi)

CHAIRMAN Certified to be True Copy

Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
- 2) The Assistant Commissioner, (Unit-25), SRB, for compliance

Copy for information to:-

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

Order Issued on

02/12/2022

Order Dispatched on

02/12/2022