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BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD  
AT KARACHI

DOUBLE BENCH-I

APPEAL NO. AT-15/2022

M/s Albaraka Bank Limited(SNTN: S2554922-7)  
162, Banglore Cooperative Society,  
Shahrah-e-Faisal Karachi, Sindh.....Appellant

**Versus**

Assistant Commissioner, (Unit-11) SRB,  
Sindh Revenue Board,  
02<sup>nd</sup> Floor, Shaheen Complex  
Karachi.....Respondent

Date of filing of Appeal 07.03.2022  
Date of hearing 17.03.2022  
Date of Order 18.04.2022

Mr. Mohsin Waheed, FCA for appellant.  
Mr. Imran Ali, AC-(Unit-09), 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.01/2022 dated 07.01.2022 passed by the Commissioner (Appeals) in Appeal NO. 381/2019 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 713/2019 dated 10.10.2019 passed by Mr. Abdul Majeed, Assistant Commissioner, (Unit-09) SRB Karachi.

02. The facts as stated in the OIO were that the appellant was registered with Sindh Revenue Board (SRB) under the category of services provided or rendered by banking companies covered under

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Tariff Heading 9813.4000 read with sub-headings thereof of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) chargeable to Sindh Sales Tax (SST) at the rate of 16% under Section 3, 8,9 and 17 of the Act read with Rule 30 of the Sindh Sales Tax on Services Rules, 2011 (the Rules).

03. It was alleged in the OIA that scrutiny of the monthly sales tax returns filed with SRB viz-a-viz reconciliation with financial statements for the tax periods from January-2012 to December-2012 (12 tax periods) the discrepancy of value of services short declared & short payment of SST was found as mentioned below:-

| Description                                  | Amount (Rs.) |
|--|--------------|
| Fee, Commission and brokerage income         | 243,006,000  |
| Income from dealing in foreign currencies    | 154,520,000  |
| Rent on property/ lockers                    | 4,239,000    |
| Financial Advisory/ facility arrangement fee | 1,250,000    |
| Total Value of Services                      | 403,015,000  |
| Less: Revenue Declared as per SRB Returns    | (70,908,034) |
| Short declared value of services             | 332,106,966  |
| Short paid amount of Tax @ 16%               | 53,137,115   |

04. The above discrepancy regarding short declaration and short payment of SST was communicated to the appellant vide notice dated 24<sup>th</sup> December, 2018 but the appellant had failed to file any response.

05. The appellant was served with a Show-Cause Notice (SCN) dated 29.01.2019 to explain as to why the SST liability of Rs.53,137,115/- should not be assessed and recovered under section 23 (1) and section 47 (1A) of the Act alongwith default surcharge under section 44 of the Act. The appellant was also required to explain as to why penalties under Serial No.2, 3, & 6(d) at the rate of the Table under section 43 of the Act should not be imposed.

06. The appellant through its representative filed written reply on 08.02.2019 taking the plea that the proceedings were time barred and that the retention and production of documents was for five years and such period had already expired. The appellant filed further written

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*In Reply,*

reply on 22.04.2019 claiming that the income from dealing in foreign exchange was not a taxable activity.

07. The Assessing Officer (AO) however determined the SST of Rs.5,512,495/= under section 23 of the Act alongwith default surcharge under section 44 of the Act. The AO also imposed penalty of Rs.120,000/= under Serial No.2 of the Table under section 43 of the Act for not filing true and correct monthly SST Returns for 12 tax periods, penalty of Rs.275,625/= under Serial No.3 of the Table under section 43 of the Act for not depositing the tax due as prescribed, and penalty of Rs. 50,000/= under Serial No. 6(d) 2 of the Table under section 43 of the Act for not depositing the actual tax as prescribed. Therefore the total penalties imposed amounted to Rs.445,625/-.

08. The appellant challenged the said OIO by way of filing of appeal under section 57 of the Act before Commissioner (Appeals), SRB who dismissed the appeal for non-prosecution relying on the reported case of Abdul Wahid versus Haji Abdul Wadood reported as 1997 SCMR, 1338. It was observed that the appellant had failed to appear in person or through pleader despite fixation of appeal for 13 times. The Commissioner (Appeals) thus upheld the addition on account of SST at Rs.5,512,495/-, including the default surcharge and the penalties as imposed in the OIO.



Resultantly the instant appeal was filed by the appellant before this Tribunal.

09. The learned representative of the appellant submitted before the Tribunal as under:-

- i. The appeal was dismissed for non-prosecution without considering that another appeal No. 388/2019 filed by the appellant involving same issues and grounds was also pending and instead of dismissing the appeal for non-prosecution the same should be decided on merits alongwith other appeal.
- ii. That in response to notice issued for compliance by 07.01.2022, an application for adjournment was e-mailed to

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Commissioner (Appeals). However he failed to consider the same and passed order on account of non-prosecution.

- iii. The appellant had already placed on record sufficient material for deciding the appeal on merits.
- iv. The facts of the case law cited in the OIA were distinguishable and the Commissioner (Appeals) was not at par with Honorable Supreme Court and could not dismiss the appeal for want of specific provision in the Act and without considering the adjournment application

10. The learned representative of the respondent submitted as under:-

i. That the department fully supported the OIA as the same was passed properly after providing sufficient opportunity of hearing to the appellant who had failed to appear before Commissioner (Appeals). Resultantly the order for non-prosecution was rightly passed.

ii. The appeal No. 388/2019 was still pending and would be decided on its merits accordingly.

iii. The appellant had already availed several adjournments and the Commissioner (Appeals) rightly ignored the adjournment application received in response to notice.

iv. The material placed was not sufficient to decide the appeal on merits and verbal submissions were necessary.

v. The facts of the reported case as mentioned supra was fully applicable to case of the appellant and was rightly relied upon.

11. We have heard the learned representative of the parties on point of dismissal of appeal for non-prosecution and perused the available record. However we have decided to first hear the parties on the point of non-prosecution and if required we would subsequently hear the parties on the merits of the case.

12. The appeal was dismissed for non-prosecution ignoring the adjournment application filed by the appellant and after considering the

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previous adjournments. The previous adjournments once granted should be considered to be granted on showing sufficient cause and could not be considered for refusing further adjournments. In the reported case of Raheem Steel Rerolling versus Karim Aziz Industries, 1988 CLC 654 it was held as under:-

*"The learned judge was to a great extent influenced by the previous lapses of defendants in the civil suit. It was further held that in deciding whether sufficient cause was made out for further adjournment, previous defaults, if any, were not to be taken note of.*

13. The Commissioner (Appeals) fell in error in considering the previous adjournments for dismissing the appeal for non-prosecution. The OIA is silent with regard to filing of the adjournment by the appellant. The AC has not denied that such adjournment application was filed. The Commissioner (Appeals) vest with the discretion to accept or refuse the adjournment but as being quasi-judicial authority could not ignore the adjournment application if filed by any of the party.

14. The Commissioner (Appeals) in para 02 of the OIA had stated that total number of 764 days had lapsed. However the lapse of time was not only due to the appellant, but the Commissioner (Appeals) was equally a party to such delay since he was giving long dates. This fact is evident from the Notice for hearing issued on 30.07.2021 fixing the case for 15.10.2021 (hearing was to be held after 77 days). The Notice for hearing was issued on 15.10.2021 fixing the case for hearing on 07.01.2022 (hearing was to be held after 84 days). In this way only two dates of hearing consumed 164 days (five months and sixteen days).

15. The law does not provide any specific provision under which the appeal could be dismissed for non-prosecution. However if a party is negligent and does not appear despite issuance of notices for the hearing the Commissioner (Appeals) could dismiss the appeal for non-prosecution. It is to be noted that if there is no specific provision permitting the disposal of appeal for non-prosecution there is also no provision prohibiting the disposal of appeal for non-prosecution. It is now well established that the any permissible procedure not prohibited

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by law could be adopted for dispensation of justice. The discretion available to the Commissioner (Appeals) had to be exercised fairly, justly, reasonably, judicially and not arbitrarily. The purpose of giving discretion to the officials was to dispense justice and not to frustrate the right of the parties.

16. The reliance of the Commissioner (Appeals) on case reported as 1997 SCMR 1338 was not proper. The application for adjournment sent to the Supreme Court through fax was not acceptable as notified by the Supreme Court in the cause list. No such notification was issued by Commissioner (Appeals).

17. It is apparent from the arguments of the representatives of the parties that sufficient material was available with the Commissioner (Appeals) to decide the same on merits. The principles of equity, justice and fair play required that as far as practicable the cases should be decided on merits. The superior Courts in various pronouncements have held that law favors adjudication on merits and dismissal for non-prosecution is an exception and not a rule. Furthermore another appeal of similar nature was pending before the Commissioner (Appeals) and the instant appeal could had been very conveniently decided with that appeal. In the reported case of Muhammad Haleem & others versus H. Muhammad Naim & others: PLD 1969 SC 270, it was held as under:-



*"The consensus of judicial opinion appears to be in favour of the view that if it is possible for a Court to base a decision on merits upon the materials already brought on the record; it should proceed under rule 3 of Order XVII and not under rule 2. This appears to us also to be sound on principle. Every party who has instituted a cause or matter in a Court has a right to have his case decided on merits. A dismissal for non-prosecution should, therefore, be an exception and not a rule.*

18. In another reported case of Inamur Rehman versus Jalal Din, 1992 SCMR, 1895 it was held as under:-

*"Normally Courts should adjudicate the matters placed before them on merits and deviate from this course only if they find that the process of*


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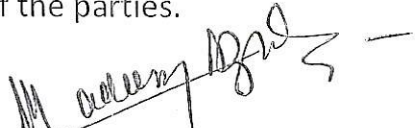
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*the Court is being abused. The dismissal of cases for non-prosecution should normally be the exception and not rule”.*

19. In view of the above discussions the OIA is set aside and it is held that the instant appeal is deemed to be pending before the Commissioner (Appeals). The case is remanded to the Commissioner (Appeals) and he is directed to decide the same on merits after hearing the parties and considering their submissions. The instant appeal may be decided alongwith another appeal No.388/2019 filed by the appellant involving same issues and grounds within the time allowed by sub-section (5 ) and (6 ) of section 59 of the Act.

20. The appeal is disposed of accordingly. Copy of order may be supplied to the learned representatives of the parties.

  
(Imtiaz Ahmed Barakzai)  
Member Technical

  
(Justice® Nadeem Azhar Siddiqi)

CHAIRMAN

Certified to be True Copy

Karachi: Dated: 18.04.2022

Copies supplied to:-

1. The Appellant through Authorized Representative.
2. The Assistant Commissioner, SRB, Karachi.

Copy for information to:-

- 3) The Commissioner (Appeals), SRB, Karachi.
- 4) Office copy
- 5) Guard file.

  
REGISTRAR  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD

Order issued on

19/04/2022

Order Dispatched on

19/04/2022  
Registrar  
Registrar