

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD, AT KARACHI

SB-1

APPEAL NO. AT-154/2022

M/s Alhamd-Bulk Storage (Pvt.) Ltd.
(SNTN: S1334812-4),
Plot No. 21, Oil installation Area, Keamari,
Karachi. Appellant

Versus

The Assistant Commissioner (Unit-06),
Sindh Revenue Board (SRB) ,
2nd Floor, Shaheen Complex,
M.R. Kayani Road Karachi..... Respondent

Date of filing of Appeal: 18.08.2022

Date of hearing: 06.02.2023

Date of Order: 28.02.2023

Mr. Shoaib Noor, advocate for appellant.

Mr. Shareef Malik, DC-DR, SRB and Mr. Mujahid 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. 97/2022 dated 22.06.2022 passed by the Commissioner (Appeals) in Appeal No. 145/2022 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 330/2022 dated 16.02.2022 passed by Syed. Hasan Abbas, Assistant Commissioner, (Unit-06) SRB Karachi.

02. The facts as stated in the OIO were that appellant is a registered person having SNTN: S1330250-7 and was engaged in providing or rendering "Stevedore" services covered under Tariff Heading 9805.2000, of the Second Schedule to

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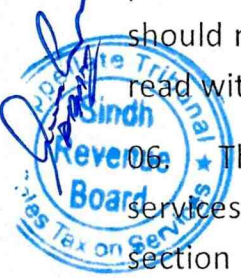
Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) read with sub-section (89) of section 2 of the Act. Accordingly, the registered person is liable to charge, collect and pay due Sindh Sales Tax on services (SST) at the prescribed rate [being @ 13% during the tax periods involved] under section 3, 8, 9 and 17 of the Act read with Rule 38 of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred as "Rules, 2011").

03. It was further stated in the OIO that the appellant was selected for Audit under section 28 of the Act vide SRB letter No. SRB/Com-Audit/2019-2020/2233 dated 29th July, 2019. During course of Audit proceedings, certain discrepancies were detected and intimated to the appellant and it was provided several opportunities for hearing, but the appellant failed to justify its position.

04. It was alleged in the OIO that the appellant has provided services to Peshawar Particle Board Industries Private Limited (PPBI) involving SST of Rs.4,310,455/= which was not deposited with SRB. It was also alleged that appellant received services involving SST of Rs.370,743/= out of which an amount of Rs.151,715/= was deposited leaving a balance of Rs.219,028/=.

05. The appellant was served with Show-Cause Notice (SCN) dated 19.05.2021 to explain as to why the SST of Rs.4,308,765/- on the provision of services amounting to Rs.33,157,334/- shall not be assessed and recovered under section 23(1) read with section 47(1A) of the Act along-with the default surcharge under section 44 of the Act. The appellant was also called upon to explain as to why penalties prescribed under Serial No. 3 of the Table under Section 43 of the Act should not be imposed for contravention of sections 3, 8, 9, 17 and 30 of the Act read with rule made thereunder.

06. The appellant was also confronted as to why the SST of Rs.219,028/- on the services received by the appellant shall not be assessed and recovered under section 23(1) and section 47(1B) of the Act, 2011 along-with default surcharge under section 44 of the Act. The appellant was also called upon to explain as to why penalties prescribed under Serial No. 3, 11A and IA of the Table under Section 43 of the Act should not be imposed for contravention of section 3, 13, 17 and, 30 of the Act, 2011 read with rule made thereunder.



07. The appellant in its initial reply date 11th June, 2021 submitted that service recipient PPBI has withheld the SST of Rs.4,308,765/- and since the service recipient has its office at KPK (Non-resident), therefore it had deposited the withheld SST amount of Rs.4,308,765- with KPRA and submitted the copies of CPR. The appellant requested SRB to directly collect the SST from KPRA, in case, tax lies under the SRB's jurisdiction.

08. The Assessing Officer (AO) determined the SST of Rs.4,308,765/= payable under section 23(1) read with sections 9(1) and 18 of the Act along-with default surcharge under section 44 of the Act. The AO also imposed penalty of Rs.10,951/- under Serial No.3 of the Table under section 43 of the Act, Rs.50,000/- under Serial No. 11A of section 43 of the Act and Rs.10,000/- under Serial No. 1A of Table under section 43 of the Act.

09. The appellant challenged the OIO before Commissioner (Appeals), SRB by way of filing Appeal under section 57 of the Act which was dismissed. The operating part of the OIA is reproduced as under:-

"7. Therefore, in view of foregoing discussion, I did not find any illegality in the impugned order, whereby, it was rightly adjudged that appellant is liable to deposit 100% withholding Sindh sales tax amount on taxable services provided to (non-resident Company) PPBIPL amounting to Rs.4,308,765/- and withholding Sindh Sales Tax amount of Rs.219,028/- is also recoverable along-with default surcharge u/s 44 and penalties Rs.50,000/- u/s 43(11A) (in relation to non-payment of withholding tax and contravened rules made thereunder) and Rs.10,000/- u/s 43(1A) (fails intimate change in particulars of registration) of the Act, 2011. The appeal stands disposed of accordingly".

The learned advocate for the appellant submitted as under:-

i. The services were provided to PPBI and SST at the rate of 13% amounting to Rs.4,308,765/- was charged but the recipient being non-resident withheld the entire (100%) SST and deposited the same with Khyber Pakhtunkhwa Revenue Authority (PKRA) and passing of the OIO and OIA in the same amount is tantamount to double taxation.

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ii. The service recipient after withholding the SST charged in the invoices deposited the same with KPRA instead of SRB and in this regard the appellant was not at fault.

iii. This is not the first case where the SST was inadvertently deposited with other revenue authority and the SRB instead of penalizing the appellant could recover/adjust the amount from KPRA.

iv. The appellant vide Letter dated 09.01.2023 requested the KPRA to adjust the amount of SST inadvertently deposited with KPRA and placed reliance on an unreported Order of Sindh High Court in CP No.1161/2017 (M/s Air Arabia versus Deputy Commissioner Inland Revenue).

v. The appellant has provided evidence for deposit of SST inadvertently deposited with KPRA which was ignored by the forums below and relied upon the unreported Order of the Lahore High Court in WP No. 32535/2017 (Air Arabia versus Punjab Revenue Authority).

vi. The matter relating to receiving services was reconciled and no SST in this regard was found payable.

vii. The SST was not payable on renting of premises by KPT to the appellant in view of Honorable Sindh High Court judgment in the case of Young's Private Ltd. versus SRB, 2019 PTD 389 confirmed by the Honorable Supreme Court in its unreported Order in CA No. 2133 to 2152 of 2017 Province of Sindh versus Young's Private Limited and others.

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

i. The appellant being service provider to a non-resident and non-sign up person was liable to deposit/pay entire SST to the SRB and refer to sub-section (1) of section 9 of the Act and sub-rule (4) of Rule 4 of Sindh Sales Tax Special Procedure (Withholding Rules) 2014, which provides that in case the service provider allows withholding by a person not covered under the definition of Withholding Agent, the service provider shall be liable to pay the tax involved along-with default surcharge thereon.

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ii. The OIO and OIA alongwith default surcharge and penalties were rightly passed as the appellant has failed to pay the SST to SRB.

iii. The services were originated from Sindh and the SST is required to be deposited with SRB.

iv. The SRB has no agreement or understanding with KPRA for adjustment of SST if inadvertently deposited with KPRA.

v. The deposit of SST with KPRA is a matter between the appellant and its service recipient and the appellant being a service provider to a non-resident person was liable to deposit the SST with SRB and clam the refund from KPRA.

12. I have heard the learned representatives of the parties and perused the written submissions filed by them and the record made available before me.

13. The allegation against the appellant was that it had provided services in Sindh to PPBI a non-resident and non-e-signup person, but the SST was not deposited with SRB. The contention of the appellant was that it had charged SST in the invoices which was entirely withheld by PPBI but inadvertently deposited the same with KPPRA.

14. The appellant is a registered service provider and sub-section (1) of section 9 of the Act provides that "where a service is taxable by virtue of sub-section (1) of section 3 of the Act the liability to pay the tax shall be on the registered person providing the services". The provision is very clear and unambiguous and without any doubt fixed the responsibility of payment of SST on registered service provider. The services were provided in Sindh and the appellant charged the SST in the invoices which was withheld by the service recipient but the same was not deposited with SRB.

15. The Act fixed the responsibility of payment of SST on the registered service provider and mere charging of SST in the invoices was not sufficient and the appellant could not be absolved from its liability of payment of SST. It is true that the appellant had discharged its primarily duty by charging the SST in the invoices, but the fact remain that SST was not pass on to the appellant who without any

objection or protest continuously provided services to PPBI. Under law it was the responsibility of the appellant to collect and deposit the SST with SRB. In case the service recipient declined to pass on the SST to the appellant for depositing the same with SRB the appellant should deposit the SST with SRB or should stopped providing the services to PPBI.

16. The contention of the appellant that passing of the OIO and OIA were tantamount to double taxation has no force. The appellant has to act in accordance with the provision of the Act. The deposit of SST with KPRA could not be considered as valid deposit. The SST was to be deposited in accordance with the provision of the Act with SRB. The deposit of SST by service recipient of the appellant erroneously or deliberately with KPRA could not be considered as valid deposit and the OIO and OIA to the extent of principle amount of SST were rightly passed and could not be treated as double taxation.

17. The next contention of the appellant was that instead of passing of the OIO and OIA the SRB should adjust the SST with KPRA. I found no substance in this argument. The AC has clearly stated that the SRB has no agreement or understanding with KPRA for adjustment of SST erroneously or deliberately deposited with KPRA. The responsibility of payment of SST is upon the appellant being a registered service provider and the appellant could not escape his responsibility of depositing SST with SRB.

18. The appellant vide Letter dated 09.01.2023 requested the KPRA to adjust the amount of SST inadvertently deposited with KPRA. The letter is not sufficient to absolve the appellant from its liability. The appellant should have taken all efforts to get the refund of SST from KPRA and to deposit the same with SRB as early as possible.

19. The AC imposed default surcharge as well as penalties. Both the forums below have failed to consider that the mensrea and malafide is lacking and the department also failed to establish the same. Apparently the appellant has no intention to evade the SST and is a victim of circumstances.

20. The default surcharge and penalties could not be imposed in this case as the service recipient after withholding the SST had inadvertently deposited the

same with KPRA. The deposit of SST with KPRA by the service recipient of the appellant is apparently without carrying any patent contumaciousness and obvious willfulness to disregard statutory provisions. Once it was found that the tax payer having been out of pocket to the extent of such erroneous, but bonafide, deposit could not be treated as defaulter. The word "default" necessarily imports an element of negligence or fault and means something more than mere non-compliance of statutory provisions. To establish default one must show that the non-compliance of statutory provisions had been due to some unavoidable cause. Mere wrong or delay in deposit of tax amount without element of willfulness, malafide and mens rea could not entail default surcharge and penalties. In the reported case of Collector Customs, Sales Tax and Central Excise, Karachi versus Nizam Impex (Pvt) Ltd., 2014 PTD 498 a learned DB of High Court of Sindh held as under:-

"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 non-payment 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 willful 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.

12. As a sequel of above discussion, we are of the considered view that the Tribunal has rightly held that the Department has failed to show that the default was willful or to defraud the Government, therefore, has justifiably remitted the payment of additional tax (emphasis supplied).


21. In view of the above discussions the appeal is allowed only to the extent of payment of default surcharge and penalty, which is remitted. The appellant is granted three months- time to deposit the SST with SRB, failing which the appellant is also liable to pay default surcharge from the date of this order till the payment of SST to SRB.

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

Karachi: -

Dated: 28.02.2023


(Justice® Nadeem Azhar Siddiqi)
CHAIRMAN

Copy Supplied for compliance:


- 1) The Appellant through Authorized Representative.
- 2) The Deputy Commissioner, (Unit-06), SRB, for compliance


Copy for information to:-

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

Certified to be True Copy


08-03-2023
REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

08-03-2023
Order issued on-----

08-03-2023
Registrar

08-03-2023
Order Dispatched on-----

08-03-2023
Registrar