

Ground file

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD, AT
KARACHI
DB-I
APPEAL NO. AT-16/2022

M/s AWT Investment Limited. Appellant
(SNTN: S3835738-7), 1st Floor,
Kavish Court, A-35, Block 7 & 8,
KCHSU, Shakra-e-Faisal, Karachi

Versus

The Assistant Commissioner (Unit-11) Respondent
Sindh Revenue Board, 2nd Floor, Shaheen
Complex, M.R. Kayani Road, Karachi.

Date of filing of Appeal 08.03.2022
Date of hearing 18.04.2022
Date of Order 12.08.2022

Mr. Muhammad Waqas Hasan, FCAAC for appellant.

Mr. Sania Anwar, AC-(Unit-11), SRB Karachi for respondent.

ORDER

Imtiaz Ahmed Barakzai: This appeal has been filed by the appellant challenging the Order-in-Appeal (hereinafter referred to as the OIA) No. 03/2022 dated 13.01.2022 passed by the Commissioner (Appeals) in Appeal No. 193/2021 filed by the Appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 670/2021 dated 19th November, 2021 passed by Mr. Irfan Sohu, Assistant Commissioner, (Unit-11) SRB Karachi.

02. The brief facts as stated in the OIO were that M/s AWT Investment Limited having SNTN: 3835738-7 was providing or rendering taxable services covered under Tariff Heading 9825.0000 (Management Services including fund and assets management services) of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act). The above mentioned services were chargeable to Sindh Sales Tax (SST) under Tariff Heading 9825.0000 of the Second

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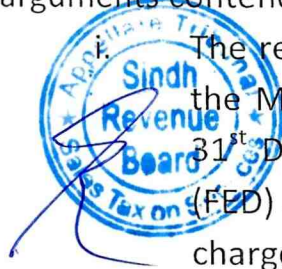
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Schedule read with Section 3, 8, 9 & 17 of the Act read with Rule 30 of the Sindh Sale Tax on Services Rules, 2011 (hereinafter referred to as the Rules).

03. Whereas, during the scrutiny of audited financial statement and the monthly Sindh sales tax returns for the years ended December 31, 2015 and December 31, 2016, it was revealed that the registered person had not discharged its due SST liability during the tax periods from January, 2015 to December, 2015 and January, 2016 to December, 2016. Such details are as under:-

Description	Jan-16 to Dec-16	Jan-15 to Dec-15
Sindh Sales Tax declared in FS	13,795,033	11,336,271
Less: Output Tax declared in SRB	(12,850,037)	(9,706,512)
Short-Payment of SST	944,996	1,629,759
TOTAL	Rs.2,574,755/-	

04. Consequently, the registered person was called upon to show cause vide Show Cause Notice (SCN) dated 20th April, 2021. No one appeared on due date of hearing i.e. 03.05.2021. However on 06.05.2021 Mr. Noman Amin Khan from M/s Yousuf Adil Chartered Accountant appeared and submitted request for extension of time to provide the documents and record. He also submitted written arguments contending that:



The registered person has only accrued the Sindh sales tax charge on the Management fees in the Financial Statement for the year ended 31st December, 2015 and 2016 by including the Federal Excise Duty (FED) amount in the fees because various appeal against applicability/chargeability of FED were pending before the appellate forums due to passing of the 18th amendment to the Constitution i.e. as to whether or not FED as per Federal Excise Act, 2005 would also be applicable on the management fees of the company (in addition to the Sindh Sales Tax on Services). Further, they submitted that Sindh High Court (SHC) in case reported as 2017 PTD 1 has already held that due to the 18th Amendment in the Constitution of Islamic Republic of Pakistan 1973 (hereinafter referred to as the Constitution) that FED was no more

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applicable with effect from 1st July, 2011, in relation to the province of Sindh.

- ii. That the registered person submitted that due to controversy and pending litigations, the company has deposited the Sindh Sales Tax amounts with Sindh Revenue, Board (SRB) on monthly basis without including the FED amounts in the Management fees. The registered person submitted the following reconciliation after excluding the FED amounts from the Sindh Sales Tax amounts accrued in the financial statements:

	31 st December, 2016 (Rs.)	31 st December 2015 (Rs.)
Sindh Sales Tax charge booked by the company in its Financial Statements	13,795,033	11,336,271
Less: Sales Tax on Federal Excise Duty (FED)	(970,700)	(1,564,291)
Sindh Sales Tax charges without including FED	21,82,333	9,771,980
Less: Sindh Sales Tax declared in the Returns difference (refundable)/ payable	(12,850,037)	(9,706,512)
Difference (refundable)/ payable	(25,704)	(65,468)
Sindh Sales Tax charge booked by the company in its Financial Statements	13,795,033	11,336,271
Less: Sales Tax on Federal Excise Duty (FED)	(1,006,653)	(1,563,626)
Sindh Sales Tax charges without including FED	12,788,380	9,772,645
Less: Sindh Sales Tax declared in the Returns difference (refundable)/ payable	(12,850,037)	(9,706,512)
Difference (refundable)/ payable	(61,657)	66,133

05. It was alleged in the OIO that the appellant failed to provide the copy of invoices and ledger accounts in support to their contention that it had looked FED only in the account on accrual basis in the financial statement besides being provided with sufficient time. Moreover ten opportunities were provided to the appellant but it failed to provide any supporting details to validate their contention that they had booked the provision of FED in the financial statement for the years ended December 31st, 2015 and December 31st, 2016 and the same has not been collected or deposited with FBR. The appellant relied on Sindh High Court decision vide CP No.354/2013 in which question was raised "as to whether or not FED was leviable on their services in view of 18th Amendment" registered person claimed that the court declared such levy of FED as ultravires.

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Furthermore the registered person has itself referred to the decision of Honorable High Court in CP No.3614/2016, whereas FED was held as not liable to be charged nor collected (nor booked by the appellant).

06. It was held in the OIO that the appellant had failed to justify the reason for including the SST amount levied on FED in the SST amount declared in the audited financial statements. Moreover, no declaration regarding the inclusion of FED amount was made in the Management Fee for the purpose of calculating the SST in the audited financial statements. Therefore Assessing Officer (AO) determined SST of Rs.2,574,755/- with default surcharge under section 44 of the Act (to be worked out at the time of payment). The AO also imposed penalty of Rs.128,738/- under Serial No.3 of the Table under Section 43 of the Act.

07. The appellant challenged the OIO by way of filing of appeal before the Commissioner (Appeals) who dismissed the appeal, directing the appellant to pay the SST, default surcharge and penalties.

Resultantly the appellant filed this appeal before the Tribunal.

08. The learned representative of the appellant Mr. Waqas Hassan, FCA submitted as under:-

i) The Assessing Officer has erroneously confirmed the Sindh Sales Tax demand of Rs.2,574,755/- along with a penalty of Rs.128,738/- without considering the information / details submitted by him and available on the records.

ii) The SST demand of Rs.2,574,755/- was confirmed without considering the fact that the alleged short payment of the SST was due to non-inclusion of disputed Federal Excise Duty (FED) in the value of taxable services while discharging the monthly SST liability for the tax periods under consideration.

iii) That the FED amounts were neither received by the appellant from its customers nor paid to the FBR.

iv) That the judgment of SHC reported as 2017 PTD 1 was ignored and the Appellate Tribunal Inland Revenue's decision dated April 16, 2021 (in the appellant own case) wherein it has already been held that due

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to the 18th Amendment to the Constitution, FED is no more applicable on the Appellant's services with effect from July 1, 2011 in relation to the province of Sindh.

- v) That FED is no more applicable on the services rendered by the appellant in view of the Sindh High Court's judgment reported as 2017 PTD 1, and the department was in agreement with such contention.
- vi) That department's action of levying default surcharge and penalty without establishing mens rea and malafide intention to evade the tax on the part of appellant.

09. The learned AC Ms. Sania Anwar submitted for the respondent as under:-

- i) That in the Honorable Sindh High Court's judgment bearing 'CP No.D-152/2012' reported as '2014 PTD 284', wherein the question was raised as to whether or not FED can be levied on the services post – 18th Amendment. Accordingly, it was held that FED was not liable to be charged nor collected (nor booked) by appellant.
- ii) The appellant failed to provide the copy of the invoices and ledger accounts pertaining to the periods under consideration, in order to validate their contention that they have booked the provision of FED amount in the financial statements for the year ended December 31, 2015 and December 31, 2016 on accrual basis and the same is not collected and deposited with FBR. Furthermore, the appellant resubmitted the same reply on numerous occasions without producing any concrete documentary evidence.
- iii) The inclusion of FED with the management fee in the value of services is irrelevant in the instant case and the same had not been a part in the instant SCN. The reference of the appellant towards section 16 of the Act, it is submitted that the same pertains to the 'Collection of Excess Sales Tax', which is irrelevant in the instant case.
- iv) The contention of appellant that they have incorporated the FED into the Value of services in order to reach upon the amount of SST booked in the financial accounts. Such contentions of appellant are

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misleading, self-contradictory and purposely confused, and have been raised only to thwart the course of law in their matter.

- v) That appellant has violated multiple provisions of the law and has observed ignorance of law which shows that the mala fide intention is present and attracts default surcharge and penalties which Assessing Officer has rightly imposed under section 43(3) and 44 of the Act, and the same have been rightly upheld by Commissioner (Appeals).
- vi) That the appellant has no case on the existing grounds nor it does deserve to be allowed to plead additional ground.

10. We have heard the learned representatives of the parties and perused the record and written submission which were made available before us.

11. It will be pertinent to examine the profit and loss account of the appellant for the year ending 31st December, 2015 wherein income has been shown at Rs.107,308,242/- and Management Fee as per Note 18 to the accounts has been shown at Rs.67,428,411/-. Similarly for the year 31st December 2016 the income has been shown at Rs.129,056,636/- and Management fee as per Note 18 to the account has been shown at Rs.94,880,714/-. Further breakup of Management fee has been shown as under:-

	31 st December, 2016 (Rs.)	31 st December 2015 (Rs.)
PIML Income Fund	67,899,249	63,235,090
PIML Asset Allocation Fund	23,048,518	
PIML Strategic Multi Asset Fund	7,991,579	6,467,512
PIML Value Equity Fund	5,976,195	4,816,311
PIML Islamic Equity Fund	5,740,225	3,815,592
PIML Daily Reserve Fund	4,111,296	9,958,198
PIML Islamic Money Market Fund	<u>1,099,065</u>	<u>1,258,191</u>

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	115,866,121	89,550,894
Less: Sindh Sales Tax	(13,795,033)	(11,336,271)
Less: Federal Excise Duty	<u>(7,190,373)</u>	<u>(10,788,212)</u>
	<u>94,880,714</u>	<u>67,246,411</u>

It is evident from above that the appellant has directly deducted Federal Excise Duty from Management Fee at Rs.10,878,212/- for assessment year ending December 31, 2015 and at Rs.7,190,373/- for the assessment year ending December 31, 2016. It was stated therein that this was done as a matter of abundant caution. This treatment of SST meted out by the appellant in its Account is not based on the best accounting principles and is not legal.

12. That during scrutiny of above financial statements viz-a-viz SST returns for the year ended 31.12.2015 and 31.12.2016 the short payment was worked out by the department on the basis of financial statement as under:-

Description	Jan-16 to Dec-16	Jan-15 to Dec-15
Sindh sales tax declared in FS	13,795,033	11,336,271
Less: Output Tax declared in SRB	(12,850,037)	(9,706,512)
Short Payment of SST	944,996	1,629,759
Total	Rs.2,574,755/-	

It is evident from above short payment of SST for the period from January 2015 to December 2015 was Rs.1,629,759/- and short payment of SST for the period from January 2016 to December 2016 was Rs.944,996/- resulting in total addition in this account at Rs.2,574,755/-.

13. The contention of the appellant that it had booked FED only on accrual basis in the financial statements is against the judgment of Sindh High Court reported as 2014 PTD 284. The Honorable Sindh High Court vide CP No.3614/2016 has also held that FED was not liable to be charged nor collected (nor booked) by the appellant. Thus the appellant has not complied with the judgment of Sindh High Court mentioned supra.

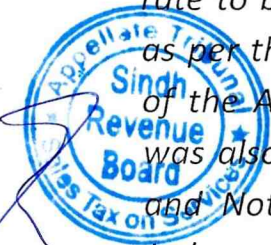
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14. The appellant was asked by the AO to supply documentary proof, legal justification or evidence including copy of invoices and ledger accounts for the tax periods under assessment with regard to their submission on the provision of FED amount in the audited financial statements for the year ended 31st December 2015 and 31st December 2016 but the same could not be produced besides repeated opportunities.

15. The Commissioner (Appeals) in OIA NO.3/2022 dated 13.01.2022 has held as under:-

"...4. I have heard the parties and have gone through the relevant Note of the Accounts and have also read the relevant provision of Act as well as the Act, 2005. Section 5 of the Act provides for Value of Taxable Services to be 'the consideration in money including all Federal Provincial duties and taxes, if any, which the person providing a service receives from the recipient of the services but excluding the amount of sales tax under this Act.....'. Section 10 of the Act, 2005 speaks of value and rate of FED to be the 'value, retail price and tariff value' as the case may be, in the matters of goods or services and the rate to be the 'applicable rate'/. The appellant has calculated the SST as per the Accounts on the basis of value determined under section 5 of the Act, which obviously included the FED as well, and the same was also booked in the Accounts, as is mentioned in the above Table and Note -18 of the Accounts. I have generally gone through the Judgment reported in 2017 PTD 1 and find that there is no question of law involved or arising out of the judgment, pertaining to the valuation of services but only to the extent of applicability or otherwise of the FED. It is also clear to me after reading the Act, 2005 that there is no implication as such even after discharging the asset management companies from FED. It is not legal or valid under any provision of law, rather frivolous to adopt such a methodology of calculation of the Sindh Sales Tax on FED, provision of which is booked in the Accounts. The appellant has calculated the Sindh Sales Tax on the basis of self assessment and has also booked the same in the



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Accounts. Therefore, there is no reason to short pay any of the amount on its own and without any legal basis. As far as the penalties and default surcharge are concerned, the AR has not contended on imposition of the same”.

16. The Citi Bank case relates to payment of FED for the period January to June, 2007 prior to enactment of the Act and it was held that services specified only in First Schedule to the Federal Excise Act, 2005 was liable to excise duty, while other unspecified services were not liable to pay excise duty.

17. Section 5 of the Act deals with the value of services and clause (a) of sub-section (1) of section 5 of the Act provides that the consideration in money including all Federal and Provincial duties and taxes, if any, which the person providing a service receives from the recipient of the service but excluding the amount of Sales tax under this Act. The provision is very clear that the value includes all Federal and Provincial taxes.

18. In view of above discussion we hold that the treatment meted out in OIO and OIA relating to short payment of SST at Rs.2,574,755/- is confirmed and the appeal is dismissed.

19. The penalty in this case has been imposed at Rs.128,738/- under Serial No.3 of the Table under Section 43 of the Act and default surcharge under Section 44 of the Act without establishing mensrea. We have considered it as obligatory on the part of department that before imposition of penalty and default surcharge it had to prove that the tax payer had acted deliberately in defiance of law or was guilty of contumacious dishonesty or had acted in conscious disregard of its legal obligation. In case of non-payment of tax it has to be seen whether the same was deliberate or not. Furthermore the levy of penalty is a matter of discretion which must be exercised by the authorities judiciously on consideration of relevant circumstances and facts of the case. Penalty should not be imposed merely because it is lawful to do so. However for ready reference some of the decisions are quoted as under:-

- a) In the reported case of DG Khan Cement Company Limited versus Federation of Pakistan, 2004 SCMR 456 relating to imposition of penalty/additional tax it was held as under:-

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"Each and every case is to be decided on its own merits as to whether the evasion or non-payment of tax was wilful or malafide, decision on which would depend upon the question of recovery of additional tax. In the facts and circumstances of this case, we find that non-payment of the sales tax within tax period was neither wilful nor it could be construed to be malafide evasion or payment of duty, therefore, the recovery of additional tax as penalty or otherwise was not justified in law".(Emphasis supplied)

- b) In the reported judgment of Dy. Collector Central Excise and Sales Tax versus ICI Pak. Ltd. Lahore, 2006 SCMR 626 the Supreme Court of Pakistan has held as under:-

"...In an appropriate case of default in payment of sales tax, a manufacturer or producer of goods could be burdened with additional sales tax under section 34 of the Act as well as the penalty under section 33 of the Act. However, it does not necessarily follow that in every case such levy was automatic. It was further held that "...In case of failure of a registered person to pay the sales tax within time, he shall also be liable to pay additional tax and surcharge. The liability being not automatic would be determined by the appropriate authority as to whether or not there was any reasonable ground for default in payment of Sales Tax which could be considered to be wilful and deliberate".(Emphasis supplied)

- c) In the reported judgment of Collector of Customs versus Nizam Impex), the Honorable DB of Sindh High Court while considering the imposition of default surcharge under section 34 of the Sales Tax Act, 1990 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

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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)

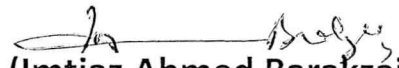
Considering the above discussion the penalty and default surcharge is deleted.

20. In view of above discussion the appeal is disposed of in terms of para 18 and 19 supra. The copy of this order may be supplied to the learned representative of the parties.


(Justice[®] Nadeem Azhar Siddiqi)
CHAIRMAN

Karachi:

Dated: 12.08.2022


(Imtiaz Ahmed Barakzai)
TECHNICAL MEMBER

Certified to be True Copy


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APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
- 2) The Assistant Commissioner, (Unit-21), SRB, for compliance

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

Order Issued on 17/08/2022

Order Dispatched on 17/08/2022