

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD AT KARACHI
SINGLE BENCH-I

APPEAL NO. AT-160/2022

Assistant Commissioner, (Unit-33),
Bungalow No.A4, Jaffria Housing Society,
Opposite Magsi Kanta,
Main Shikarpur Road Sukkur.....
Appellant

Versus

M/s G.T Road Restaurant,
(SNTN: S74922589-8) Taj 68, Filling Station,
National Highway Rohri, Sukkur.....Respondent

Date of filing of Appeal: 12.09.2022
Date of hearing: 01.11.2022
Date of Order: 24.11.2022

Mr. Muhammad Yasir, AC-SRB, Sukkur for the appellant.
Mr. Shoab Noor, Advocate for the respondent.



ORDER

Justice @ Nadeem Azhar Siddiqi: This appeal has been filed by the Assistant Commissioner (Unit-33), SRB, Sukkur challenging the Order-in-Appeal (hereinafter referred to as the OIA) No. 112/2022 dated 18.07.2022 passed by the Commissioner (Appeals) in Appeal in Appeal No. 154/2022 against the Order-in-Original (hereinafter referred to as the OIO) No. 467/2022 dated 03.03.2022 passed by Mr. Vickey K. Dhingra, Assistant Commissioner, (Unit-33) SRB, Sukkur.

02. The facts as stated in the OIO were that the services provided or rendered in respect of Restaurant are chargeable to Sindh Sales Tax (SST) at

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the rate of 13%, under section 3 and 8 read with Tariff Heading 9801.2000 and 9801.6000 of the Second Schedule to the Sindh Sales Tax On Services Act, 2011 (hereinafter referred to as the Act) effective from 01.07.2011. The term "Restaurant" is defined under section 2(74) of the Act, 2011.

03. It was further stated in the OIO that as per section 24 of the Act read with rule 42 of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred to as the Rules) every service provider in respect of "Restaurant" shall be required to get registered with SRB.

04. It was alleged in the OIO that the respondent holding NTN 7492589 were engaged in providing or rendering taxable services of restaurant and that providing or rendering taxable services without getting registration is tantamount to tax fraud under section 2(94) of the Act and the offense was punishable under Serial No. 8 of the Table under section 43 of the Act.

05. A notice dated 23.12.2021 was duly served upon the respondent, but it had failed to get registration with SRB and continued to charge PRA sales tax at the rate of 16%.

06. The respondent was served with a Show-Cause Notice (SCN) dated 15.02.2022 under sub-section (2) of section 24B of the Act to explain as to why it should not be compulsorily registered and as to why the penalty under Serial No.1 and 8 of the Table under section 43 of the Act should not be imposed.

07. The respondent filed written reply dated 22.02.2022 and submitted that it had recently started business and had not charged PRA Sales Tax and using the software of another restaurant on trial basis. The respondent vide letter dated 02.03.2022 informed the appellant (AC) that it had decided to get registration with SRB and request for four week time to complete the process. The AC instead of allowing the time to the respondent to complete the registration process passed OIO dated 03.03.2022.

08. The Assistant Commissioner (AC) passed OIO for compulsory registration of the respondent under section 24B of the Act and imposed

penalty of Rs.100,000/- under Serial No.01 and penalty of Rs.500,000/- under Serial No. 08 of the Table under section 43 of the Act.

09. The AC also advised the respondent in its own interest to e-file all the monthly SST Returns and deposit monthly SST The respondent was further directed to correct its invoice/bill and bring it compliance to rule 29(1) the Rules and send the copy of original bills within one week of receipt of this order.

10. The respondent had challenged the said OIO by way of filing of appeal under section 57 of the Act before Commissioner (Appeals), SRB who upheld the compulsory registration and reduced the penalty to Rs.10,000/= imposed under Serial No. 1 of the Table under section 43 of the Act and waived the penalty imposed under Serial No. 8 of the Table under section 43 of the Act.

11. The DC, SRB Mr. Vickey Dhlngra and thereafter Mr. Muhammad Yasir, AC-SRB Sukkur submitted as under:-

i. The Commissioner (Appeals) without any legal justification and proper reasoning has reduced the penalty imposed under Serial No.1 of Table under section 43 of the Act from Rs.100,000/- to Rs.10,000/- and similarly waived the entire penalty imposed under Serial No.8 of the Table under section 43 of the Act.

ii. The respondent despite compulsory registration did not provide necessary details for registration purpose i.e. details of owner/partner of respondent, bank accounts and other details were also not provided.

iii. The respondent by not providing the necessary details had not complied with the order of compulsory registration

iv. The necessary details for completing the registration process were taken from the FBR profile of the respondent.

v. The respondent despite charging SST @ 16% without registration had failed to deposit the same with SRB, hence



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committed tax fraud and was liable to pay the penalty imposed in the OIO.

vi. The assessment proceedings against the respondent were separately initiated and are pending for adjudication.

12. The learned advocate for the respondent Mr. Shoaib Noor submitted as under:-

i. The respondent had not charged SST @ 16% and charging of same was a misprint due to using the software of another restaurant.

ii. The Serial No.8 of Table under section 43 of the Act was not applicable and the Commissioner (Appeals) has rightly waived the same.

iii. The respondent deposited penalty of Rs.10,000/= under Serial No.1 of Table under section 43 of the Act vide CPR dated 23.07.2022 in compliance of OIA dated 18.07.2022 and placed on record the CPR.

iv. The respondent after compulsory registration has not only filed SST returns from November-2021 to September-2022, but also deposited the due SST with SRB.

v. The respondent was not liable to file SST returns and pay SST before the date of compulsory registration. However, to show compliance of compulsory registration the returns were filed and SST was paid.

vi. The appellant is intending to close the business from Sindh.

vii. The advocate for appellant relied upon a) M/s Fumicon V/s AC-SRB, 2020 PTD (Trib.) 1980, b) AC-SRB V/s M/s Falcon-I, 2020 PTD (Trib.) 141 I on the point of the conditions for imposing penalty.

13. The AC-SRB Mr. Muhammad Yasir in rebuttal submitted that the respondent despite providing taxable services did not apply for registration which was covered under tax fraud and the penalty under serial No.1 and 8 of Table under section 43 of the Act was rightly imposed and wrongly waived by Commissioner (Appeals).



14. The respondent was engaged in the business of restaurant and was compulsorily registered under section 24B of the Act. The AC while compulsory registration of the respondent imposed penalty of Rs.100,000/- under Serial No.01 and Rs.500,000/- under Serial No. 08 of the Table under section 43 of the Act. In appeal the Commissioner (Appeals) reduced the penalty from Rs.100,000/- to Rs.10,000/- and waived the penalty of Rs.500,000/- which was challenged by the Department before this forum.

15. The respondent during the adjudication proceedings vide its letter dated 02.03.2022 showed its intention (which intention was mentioned in the OIO) to get registration from SRB and request four weeks-time and the AC-SRB instead of allowing reasonable time passed OIO on the next day i.e. 03.03.2022. Apparently the OIO was passed in unnecessary haste to impose unwarranted penalties upon the appellant who agreed to get itself registered with SRB.

16. I have gone through the OIO and noticed that the elements of mensrea, malafide and willful default is missing, which according to various pronouncements of the Superior Courts are necessary ingredients of imposing penalties.

17. The penalty for committing tax fraud was also imposed. No proof of tax fraud was available on record. The commission of fraud cannot be presumed rather same must be proved as a positive act which is lacking in this case. Where the allegation of tax fraud was made, the onus of proof was on department which the department has failed to discharge. In the reported case of Saleem Ahmed V Federation of Pakistan, 2021 PTD 1813 a learned DB of High Court of Sindh had held as under-

"It is very important to keep in mind that in the tax jurisprudence the initial burden to prove tax fraud lies on the department. The Hon'ble. Supreme Court has upheld this view in numerous cases including Fancy Foundation v. Commissioner of Income Tax, Karachi (2017 SCMR 1395) and a bench of this High Court has also expressed similar views in the case of Al-Hilal

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Motors Stores v. Collector Sales Tax and Central Excise East (2004 PTD 868). Hence once again we reach to the conclusion that provision of due process of law must always be read in section 21".

18. I have also gone through the OIA and of the opinion that the Commissioner (Appeals) for valid reasons have reduced penalty under Serial No.01 and waived the penalty under Serial No. 08 of the Table under section 43 of the Act. The discretion in this regard available with Commissioner (Appeals) has been properly exercised I do not find any illegality and infirmity in the OIA and maintained the same.

19. The appeal is dismissed having no merits. The copy of this order may be provided to the learned representatives of the parties.


(Justice[@] Nadeem Azhar Siddiqi)
Chairman

Certified to be True Copy

Karachi:

Dated: 24.11.2022

Copy Supplied for compliance:

- 1) The Assistant Commissioner, (Unit-33), SRB, Sukkur.
- 2) The Appellant through Authorized Representative.

Copy for information to:-

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

Order issued on 25/11/2022


Registrar

Order Dispatched on 25/11/2022


Registrar