

(Covered file)

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD,
AT KARACHI

DOBLE BENCH-I

APPEAL NO. AT-161/2022

M/s Sky Canteen Contractor,
(NTN: 3371596-3)
5/15-A, Commercial Area,
Shah Faisal Colony, No. 05, Karachi. Appellant

Versus

The Assistant Commissioner (Unit-02), SRB
Sindh Revenue Board, 2nd Floor,
Shaheen Complex, M.R. Kayani Road Karachi..... Respondent

Date of filing of Appeal: 16.09.2022
Date of hearing: 29.08.2023
Date of Order: 13.09.2023

None present for the appellant.

Mr. Shareef Malik, DC-DR, SRB and Mr. Waqar Memon, AC, (Unit-02) 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. 113/2022 dated 19th July, 2023 passed by the Commissioner (Appeals) in Appeal No. 03/2019 filed by the Appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 1019/2018 dated 019.12.2018 passed by Ms. Nida Noor, Assistant Commissioner, (Unit-02) SRB Karachi.

02. Briefly the AC-SRB vide determined the SST liability at Rs.11,888,680/- with default surcharge and penalties of Rs.15,013,114/- out of which the appellant admitted its liability to pay SST of Rs.3,737,305/- from the date of its registration. We have examined the record with assistance of the learned AC-SRB. The appellant has not denied providing catering services to M/s Bosch Pharma (Pvt.) Limited.

03. Hearing in the instant appeal were held on various dates and on one such hearing dated 08.03.2023, the appellant in his reconciliation statement admitted SST liability of Rs.3,737,305/- and showed willingness to pay the same in 36 equal installments this request who made by the appellant on 15.12.2022 whereas, during hearing held on 26.10.2022, the AR admitted tax liability to the tune of Rs.1,611,776/-, who was directed to deposit the same in government treasury

within 15 days and conditional stay from further recovery was granted. However, the appellant failed to deposit the admitted amount of SST dues within the prescribed time, hence the conditional stay was vacated.

04. The contention of the appellant is that it was not liable to pay the SST before the date of registration. Whereas, the AC contended that since the appellant has provided services before its registration, it is covered under the definition of registered person provided under sub-section (71) of Section 2 of the Act and is liable to pay SST even before the date of its registration. Identical issue was examined by us in Para 19 of Appeal No. AT-18/2021, M/s WEB DNA versus AC (Unit-11) SRB vide our decision dated 16.11.2021. Detailed discussion was undertaken and the relevant provision of law and the reported judgment in M/s S.K. Steel Casting, Gujranwala, 2019 PTD 1493 was considered and it was concluded as under:-

“iv. The relevant provisions dealing with the assessment and registration are sub-section (1) of section 23, and sub-section (1) of section 24 of the Act. Moreover sub-section (71) of Section 2 of the Act provides that registered person means a person who is registered or is liable to be registered under this Act. Sub-section (1) of section 23 of the Act deal with the assessment of tax and contemplates that in case the registered person has not paid tax due on taxable services provided by him or has made short payment, the officer of SRB shall make an assessment order. Sub-section (1) of section 24 of the Act provided that registration will be required for all persons who are residents; and provide or render any of the services listed in the Second Schedule from their registered office or place of business in Sindh. If the above contention of the AC that the person liable to be registered was deemed to be registered person is accepted sub-section (1) of section 24 of the Act relating to registration and sub-section (1) of section 23 of the Act relating to assessment of registered person would become redundant which is legally not permissible. It is a cardinal principle of statutory interpretation that redundancy or superfluity must not be attributed to the Legislature, and that no part or word in a statute could be treated as superfluous.

i. The Commissioner (Appeals) on this issue has also passed numerous orders holding that SST cannot be demanded from a service provider prior to its date of registration, few of such OIA's are mentioned for ready reference hereunder:-

- a) Appeal No.73/2018, OIA No.97/2020 M/s Sinopec International vs. Assistant Commissioner (Unit-03), SRB dated 03.11.2020.



- b) Appeal No.308/19, OIA No.109/2020, dated 02.12.2020, and Appeal No.456/2018, OIA No.110/2020, dated 02.12.2020, M/s Fiber Link vs. Assistant Commissioner (Unit-01), SRB.
- c) Appeal No.303/2019, OIA No.95/2019, dated 28.10.2020, M/s Tracking World vs. Assistant Commissioner (Unit-01), SRB.

The above view of the Commissioner (Appeals) has been upheld in our various pronouncements. Few of such decisions are mentioned for ready reference hereunder:-

- a) Appeal No. AT-47/2020 dated 15.02.2021 – AC (Unit-04) vs. M/s MYN Pvt. Ltd.
- b) Appeal No.AT-234/2015 dated 26.11.2019 – Nasir Khan & Sons vs. Commissioner (Appeals) & DC (Unit-13), SRB.
- c) Appeal No.AT-30/2019 dated 05.03.2021, TCS Logistics vs. The Commissioner, SRB.
- d) Appeal No. AT-18/2021 dated 16.11.2021 M/s WEB DNA Works vs. Assistant Commissioner, SRB.

- ii) The Orders of the Tribunal passed as mentioned above are final as provided under sub-section (8) of section 62 of the Act and are still holding the field and have not been set aside by the Honorable High Court in referential jurisdiction and are binding upon the Assessing Officers as well as on the Commissioner (Appeals). Any order/decision of the Assessing Officer and the Commissioner (Appeals) cannot sustain if the same is against the order/decision of Tribunal.

05. The responsibility of withholding agent is provided under sub-rule (4) of the rule 3 of the Rules, 2014 i.e. "a withholding agent having Free Tax Number (FTN) or National Tax Number (NTN) or Sindh sales tax registration number (STN) and falling under sub-rule (2) of rule 1, shall, on receipt of taxable services from unregistered persons, deduct the amount of sales tax, at the tax rate applicable to the taxable services provided or rendered to him, from the amount invoiced or billed or demanded or charged by such unregistered service provider and unless otherwise specified in the contract between the service recipient and the service provider, the amount of sales tax for the purpose of this rule, shall be worked out on the basis of gross value of taxable services {under the tax fraction formula)".

06. It is evident from reading of the above provisions framed under section 13 of the Act that these have overriding effect over other provisions of the Act and it

is clear that the responsibility for payment of SST was shifted upon the recipient of taxable service who receive services from unregistered person.

07. In view of the above discussions we hold that the respondent being a service provider of taxable services was registered with SRB on 12.04.2017. Thus it was not liable to pay/deposit SST before the date of its Registration during the tax periods from July-2016 to March-2017. However the responsibility for payment of tax from July-2016 to March-2017 was on the recipient of service to deduct and pay under sub-rule (4) of rule 3 of the Withholding Rules, 2014.

08. In the OIO the AC has imposed penalties under Serial No. 2, 3 and 6(d) of the Table under section 43 of the Act. The penalty under serial No. 6(d) of Section 43 of the Act was imposed without establishing tax fraud and *mensrea* on the part of the appellant. The penalty under Serial No. 6 (d) of Table under section 43 of the Act can be imposed if the department establish that the offence was committed knowingly and fraudulently which element is missing. Merely not paying the SST does not amounts to tax fraud. In the reported case of Al-Hilal Motors 2004 PTD 868 (DB SHC) it was held that the initial burden is upon the department to show that an assessee, knowingly, dishonestly or fraudulently and without any lawful excuse has done any act or has caused to be done or has omitted to take any action or has caused the omission to take any action in contravention of duties or obligations imposed under this Act or rules or instructions issued thereunder with the intention of avoiding or under paying the tax liability.

In our opinion the department has failed to prove the element of fraud. Furthermore in par 9 of the reported case of Collector Customs v. Nizam Impex, 2014 PTD 498 (SHC DB) it was held that 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 willful 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 willful as held by the Hon'ble Supreme Court of Pakistan in the case of D.G. Khan Cement and others. 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).** In the same judgment is para 10 it was held that in the light of case-law discussed above it is clear that imposition of penalties under section 34 of the Act was not

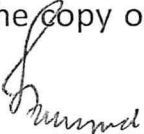
proper and legal. It is not mandatory and the authorities have discretion to allow such concession. The important issue which needs to be examined is as to whether the evasion or nonpayment of tax by the respondent was willful or mala fide.

In para 11 it was held that 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.

10. It is evident from case record furnished before us that the appellant was engaged in taxable activity prior to his registration w.e.f 16.07.2016 whereas, the appellant was registered on 12.04.2017. The appellant even after registration did not bothered to discharge his tax liability despite having full knowledge of his responsibilities as a Registered Person. The act of the taxpayer and his admission of the deliberate omission in discharging tax liability in indicative of willful default.

11. In view of the above the appeal is partly allowed. The appellant is directed to pay the admitted liability of Rs.3,737,305/- along-with default surcharge. The AC has unjustly imposed excessive penalties of Rs.15,013,114/- under serial No. 2, 3 and 6(d) of Table under section 43 of the Act which is set-aside.

12. The copy of the order may be provided to the learned representative of the parties.


(Syed Tahir Raza Zaidi)
Member Technical

Karachi

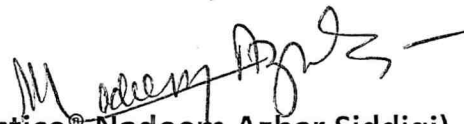
Dated: 13.09.2023

Copy for compliance:-

1. The Appellant through Authorized Representative.
2. The Assistant Commissioner, (Unit-02), SRB, Karachi.

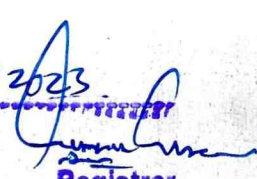
Copy for information to:-

4. The Commissioner (Appeals-I), SRB, Karachi.
5. Office Copy.
6. Guard file.


(Justice Nadeem Azhar Siddiqi)
CHAIRMAN

Certified to be True Copy


15/09/2023
REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on 15/09/2023

Registrar

Order Dispatched on 15/09/2023

Registrar