

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT KARACHI

DB-I

APPEAL NO. 47/2022  
(ARISING OUT OF APPEAL NO. 46/2017)

M/s N.J Team,  
Proprietor Md. Nadeem Jafri,  
(SNTN: S2062566-9),  
17<sup>th</sup> Street, Khayaban-e-Rahat, Phase-V,  
DHA, Karachi..... Appellant

**Versus**

Assistant Commissioner (Unit-20),  
Sindh Revenue Board (SRB), i  
2<sup>nd</sup> Floor Shaheen Complex,  
M.R. Kiyani Road, Karachi..... Respondent

Date of Filing Appeal Before Commissioner Appeals  
Date of Transfer of Appeal by Commissioner (appeals) 29.04.2022  
Date of Hearing 01.07.2022  
Date of Order 18.07.2022

Mr. Kamal Aftab, Finance Manager for the appellant.

Mr. Waqar Memon, AC-SRB, Karachi for respondent.



ORDER

Justice ® Nadeem Azhar Siddiqi: This appeal was filed by appellant challenging the Order-in-Original (hereinafter referred to as the OIO) No. 03/2017 dated 30.03.2017 passed by Mr. Abdul Rauf, Deputy Commissioner, SRB Karachi. However the instant appeal has been transferred by the Commissioner (Appeals) to the Tribunal vide Report dated 18.05.2022 under sub-section (7) read with sub-section (8) of Section 59 of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act).

*M. A. S.*

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02. The brief facts of the case as stated in the OIO were that the appellant was engaged in providing business support services Tariff Heading 9805.9200 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) and was subjected to 13% (previously 14%, 15% and 16%) Sindh Sales Tax (SST).

03. It was alleged that from the scrutiny of the SST returns profile of different services recipients filed with SRB revealed that they had claimed input tax of Rs.4,953,218/- against the purchase invoices issued by the appellant during the period tax periods July-2014 to October-2016. Whereas the appellant failed to declare and pay the SST against these invoices in the monthly Sales Tax returns filed with SRB which was in violation of Section 3, 4, 6, 9, 17 and 30 of the Act.

04. The appellant was served with a Show-Cause Notice (SCN) dated 19.01.2017 to explain as to why SST liability of Rs.4,953,218/- may not be assessed and recovered under section 23 and 47(1A) of the Act alongwith default surcharge section 44 of the Act. The appellant was also required to explain as to why penalties under serial No. 2, 3, 5, 6(d), 11, 12 and 13 of the Table under section 43 of the Act, should not be imposed upon it for contravention of various provisions of the Act.

05. The appellant filed written reply dated 13.03.2017 through its representative. It was stated in the reply that initially the business was carried out under sole proprietorship but in 2014 a private limited company was formed with the name and style of M/s N.J Media (Pvt.) limited. It was further stated in respect of nine payments identified by the Assistant Commissioner (AC) that none of the payments escaped taxation and statedly such details were also provided to the AC.

06. The Assessing Officer (AO) passed OIO determining SST of Rs.4,953,218/= and ordered its recovery under section 47(1A) read with Section 23 of the Act alongwith default surcharge (to be calculated at the time of payment) under section 44 of the Act. The AO also imposed penalty of Rs.247,660/- under serial No. 3 of the Table under section of Act.

07. The appellant challenged the said OIO by filing appeal under section 57 (1) of the Act before Commissioner (Appeals), SRB who instead of hearing and deciding the appeal himself within the time provided in law transferred the same after sufficient delay to the Tribunal under section 57





(7) of the Act for decision treating the same as appeal filed against the order of Commissioner (Appeals).

08. The Commissioner (Appeals) in his report stated that 36 hearings were fixed but the matter was not reconciled as ordered. It was further stated that in all 1838 days were lapsed out of which the appellant obtained adjournments of 937 days and after lapse of 901 statutory days, the appeal stood expired (time barred) on 27.03.2020.

09. The learned representative of the appellant submitted that the appellant had discharged all its liabilities and the determination of SST in OIO was not correct. He referred to the Reconciliation Report dated 24.06.2019 prepared by the AC for Commissioner (Appeals) wherein only Rs.759,610/= was shown as payable.

10. The learned AC-SRB submitted that against the determined amount of Rs.4,953,218/- the SST payable was Rs.81,000/- as per the Final Reconciliation Report dated 24.06.2019 and consequently the penalty and default surcharge were also reduced. He further submitted that the appellant was required to correct the SST Returns for October, 2014 accordingly.

11. The representative of the appellant in rebuttal submitted that without prejudice he would approach the AC-SRB for correction of SST Return for October, 2014 and would also consider to deposit the reduced SST as worked out by the AC. The representative of the appellant also challenged the imposition of default surcharge and penalty on the ground that mensrea was not established and no wilful default was committed by the appellant. The representative of the appellant placed on record CPRS showing payment of SST of Rs.81,334/=. The AC furnished Reconciliation Report dated 05.07.2022 wherein SST payable was shown as Rs.71,977/=.

12. We have heard the learned representatives of the parties and perused the record made available before us.

13. The allegation in the SCN and OIO was that appellant was liable to pay SST of Rs.4,953,2018/= which was denied by the appellant. In the Final Reconciliation Report dated 05.07.2022 submitted before us the liability was worked out to Rs.71,977/= which was also disputed by the appellant. However the appellant deposited Rs.81,334/= as pointed out by the AC.



14. In this appeal the question was "Whether the Transfer Reference was time barred or not?" None of the parties in the instant appeal have provided proper assistance to the Tribunal in this regard. This point was also raised in other appeals transferred to the Tribunal, and the same would be decided on merits accordingly.

15. The appeal before Commissioner (Appeals) was filed on 05.05.2017 and by Report dated 18.05.2022 (Transfer Reference) the appeal was transferred to the Tribunal for decision. Apparently the appeal was belatedly transferred to the Tribunal. In our earlier decision dated 30.03.2021 in Appeal No.AT-19/2021, Alim Transport versus AC, SRB-Unit 23 we had held that the decision for transfer of appeal was taken at a belated stage and no purpose is served in transferring the appeal to the Tribunal and returned the file to Commissioner (Appeals). We have been informed that SRB had filed Spl. STRA No.91/2021 before the High Court of Sindh and our order was suspended. We are conscious of the fact that the suspension order operates between the parties to the list as held by the Sindh High Court in the case of Pakistan Mobile Communication versus Federation of Pakistan, 2022 PTD 266. However, the said order of the High Court required highest respect. Therefore this point has not been discussed in the instant of case.

16. The appellant has paid Rs.81,334/= which has covered the entire demand of SST therefore no further discussion is required on this issue.

17. The AO also imposed default surcharge under section 44 of the Act and penalty of Rs.247,660/- under serial No. 3 of the Table under section of Act. The same was imposed 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. The purpose of imposing penalty was to create deterrence for the tax payers to avoid default in payment of due tax and not for enrichment of the department and to meet its target of collection of SST. The penalty imposed should not be harsh and exemplary. In the instant case the SST determined in SCN and OIO at Rs.4,953,218/= was found to be incorrect and was determined without any lawful basis. However the same was reduced by the Department in final Reconciliation Report to Rs.71,977/-



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which speaks volumes of the department's efficiency. 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:-

*"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)*



*MOS*

- 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 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/remmit additional tax and penalties. (Emphasis supplied)*

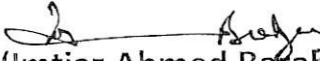



18. In view of the above reported judgments we hold that the default surcharge and penalty were imposed without establishing mensrea, wilful default and malafide on the part of the appellant, which was a necessary ingredient for penalizing the appellant thus the same are deleted.

19. Considering the fact that the SST of Rs.81,334/- was deposited by the appellant against the determined liability of SST of Rs.71,977/= the appellant is discharged from the payment of SST and excess amount of Rs.9357/= deposited by the appellant should be returned to it or adjusted in the future liability of the appellant.

20. In view of the above discussions this appeal is partly allowed and the OIO is maintained to the extent of payment of Rs.71,977/=, which was already discharged by the appellants.

21. The appeal is disposed of accordingly. The copy of the order may be provided to the learned representative of the parties.

  
(Imtiaz Ahmed Baraizai)  
TECHNICAL MEMBER

  
(Justice<sup>®</sup> Nadeem Azhar Siddiqi)  
CHAIRMAN

Karachi:

Dated: 18.07.2022

Certified to be True Copy

  
REGISTRAR  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD

Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
- 2) The Assistant Commissioner, (Unit-20), SRB, for compliance

Copy for information to:-

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

Order Issued on 19/07/2022

  
Registrar

Order Dispatched on 19/07/2022

  
Registrar