

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD  
AT KARACHI

SINGLE BENCH-I

APPEAL NO. AT-51/2022

M/s Mehran Electric Services  
(SNTN: 4308339-7),  
Muhalla Iqbal Colony Daharki..... Appellant

Versus

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

Date of filing of Appeal: 26.05.2022

Date of hearing: 19.12.2022

Date of Order: 30.12.2022

Mr. Tahir Mustafa Soomro, Advocate for appellant.

Mr. Muhammad Yasir, AC-SRB, Sukkur 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. 33/2022 dated 05.04.2022 passed by the Commissioner (Appeals) in Appeal No. Ni/2021 filed by the appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 285/2019 dated 15.04.2019 passed by the Mr. Muhammad Siddique Soomro, Assistant Commissioner, (Unit-33) SRB Sukkur.

02. The facts stated in the OIO were that the appellant was registered with Sindh Revenue Board (SRB) under service category of "Contractual Execution of Work or Furnishing Supplies" falling under Tariff Heading 9809.0000 of the Second Schedule to the Sindh Sales Tax on Services

Act, 2011 (hereinafter referred as the Act) and the appellant was liable to charge, collect and pay due Sindh Sales Tax (SST) on such services at the prescribed rate of 13% under sections 3, 8, 9 and 17 of the Act read with Sindh Sales Tax on Services Rules, 2011 (hereinafter referred as Rules).

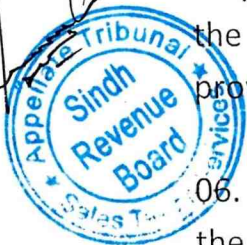
03. It was alleged in the OIO that on the scrutiny of the returns filed by M/s Engro Fertilizers Ltd (SNTN: 3378860-0) (Engro), it was found that appellant had provided the taxable service to Engro for the period from March-2015 to January-2019 amounting to Rs.6,669,139/- involving SST of Rs.900,974/- and Engro had deducted the sum of Rs.183,912/- according to the Sindh Sales Tax Special Procedure (Withholding) Rules-2014, (hereinafter referred to as the Withholding Rules).

04. It was further alleged in the OIO that on the assessment of the tax profile and declarations filed by the appellant it was found that it had failed to pay the due amount of SST of Rs. 717,062/- for the services provided to Engro. In addition to it the appellant also failed to file the monthly Sales Tax Returns (SST returns) since its registration with SRB.

05. The appellant was served with a Show-Cause Notice (SCN) dated 08.03.2019 to explain as to why the SST of Rs.717,062/- may not be recovered under section 23 of the Act alongwith default surcharge under section 44 of the Act. The appellant was also called upon to explain as to why penalties may not be imposed under Serial No. 2, 3, 6(c), and 6(d) of the Table under section 43 of the Act for contravention of the various provisions of the Act.

06. The appellant despite service of notice neither appeared before the Assessing Officer (AO) nor filed its reply to the SCN and the exparte Assessment Order was passed.

07. The Assessing Officer (AO) passed OIO determining the SST at Rs.717,062/- under section 23 of Act along with payment of default surcharge under section 44 of the Act (to be calculated at the time of



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payment). The AO also imposed penalty of Rs.470,000/- under Serial No. 2 of the Table under section 43 of the Act, Rs.470,000/- under Serial No. 3 of the Table under section 43 of the Act, and Rs.717,062/= under Serial No. 6d of the Table under section 43 of the Act for violation of the various provisions of the Act.

08. The learned advocate for the appellant submitted as under:-

- i. The appellant never denied to pay due tax to SRB. However, due to imposing of heavy default surcharge and the penalties the without establishing mensrea and willfulness on the part of the appellant the appeal was filed under compelling circumstances.
- ii. The AO while passing the OIO determined the SST at Rs.717,062/- alongwith payment of default surcharge (to be calculated at the time of payment) and imposed harsh penalties of Rs.1,657,062/-.
- iii. The Commissioner (Appeals) without serving of notice of the date of hearing dismissed the appeal for non-prosecution.
- iv. The due SST was already deposited.
- v. The penalty and default surcharge was imposed without establishing *malafide*, willful default and *mensrea* on the part of the appellant and relied upon the reported cases a) M/s DG Khan Cement versus FOP, 2004 SCMR 456 and b) Collector of Customs, Sales Tax and Central Excise versus s M/s Nizam Impex (DB-Sindh High Court).

09. The learned Assistant Commissioner (AC) submitted written submissions and relied upon the same.

- i. The OIO was passed after providing sufficient opportunities of hearing to the appellant who remained absent.
- ii. The OIA was also passed after providing sufficient opportunities of hearing to the appellant who failed to avail the same.
- iii. The appellant has deposited the determined SST and is required to deposit the default surcharge and penalties, which were rightly imposed as the appellant by not depositing the SST as prescribed cause monitory losses to the exchequer.
- iv. The mensrea is established by the conduct of the appellant who knowingly failed to deposit due tax.



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10. I have heard the learned representative of the parties and perused the record made available before us.

11. The AO while passing the OIO determined the SST at Rs.717,062/- alongwith payment of default surcharge (to be calculated at the time of payment) and imposed penalties of Rs.1,657,062/-. The penalty imposed was more than the double of the SST charged.

12. The appellant deposited the determined SST of Rs.7817,062/- with SRB and the same was confirmed by the AC and the only controversy remains the imposition of penalties under section 43 of the Act and default surcharge under section 44 of the Act.

13. I have carefully gone through the OIO and OIA and of the opinion that the harsh penalties and default surcharge was imposed without establishing mensrea, willfulness and malafide on the part of the appellant. The Superior Courts of Pakistan all ways ruled that the penal provisions cannot be invoked without establishing mensrea. In the reported case of Commissioner Income Tax versus Habib Bank Limited, 2007 POTD 901 a learned DB of Sindh High Court held as under:-

*"13. There can be no cavil to the arguments of the learned counsel for the respondent that the penal provisions under the Income Tax Act are quasi-criminal in nature and mandatory condition required for the levy of penalty under section 111 is the existence of mens rea and, therefore, it is necessary for the department to establish mens rea before levying penalty under section 111. There is a plethora of judgments of the superior Courts of India and Pakistan from the very inception of Income Tax Act, 1921, on this point. The judgments relied on by he learned counsel for the respondents also supported this proposition. The reliance of the learned counsel for the applicant on the judgment of the Tribunal authored by the then Chairman or the Income Tax Appellate Tribunal in which the learned Chairman has held that the penalties levied under the Income Tax Ordinance are in nature of civil liabilities, is ill founded as the order of the Tribunal cannot overrule the judgments of the apex Court and this Court. Therefore, we have no hesitation in answering the question framed by this Court with the consent of the parties on 5-5-2006, in negative".*

14. In the reported case of DG Khan Cement v. FOP, SCMR 2004 456 relating to Sales Tax Act 1990 a full Bench of the zhonorable Supreme Court has held as under:-

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“26. In the case reported as PLD 1991 SC 963, this Court held that imposition of penalty was illegal where the evasion of duty was not willful. The Lahore High Court in the case reported as PTCL 1995 CL 415 held that where the petitioner did not act mala fide with the 'intention to evade the tax, the imposition of penalty of additional tax and surcharge was not justified. It was held by the Sales Tax Tribunal in the case of 2002 PTD (Trib) 300 that where the controversy between the department and the appellants related to interpretation of different legal provisions, the imposition of additional tax and penalty had no justification. In other case, the appellant's own Tribunal held that additional tax was punitive in nature as such unless default was willful or mala fide, the recovery of the same was unwarranted.

27. In view of these decisions, it could not be argued by the appellants that imposition of penalty or additional tax under section 34 was mandatory and there was no discretion left with the Authorities to allow any concession.

28. Each and every case has to be decided on its own merits as to whether the evasion or payment of tax was willful or mala fide, 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 willful nor it could be construed to be mala fide evasion or payment of duty, therefore, the recovery of additional tax as penalty or otherwise was not justified in law”.

15. In the reported judgment of Collector of Customs versus Nizam Impex, 2014 PTD 498 a learned DB of Sindh High Court has 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 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 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 default surcharge was not justified. In another case Additional Collect-orate of Sales Tax Multan v. Messrs Nestle Milk Pak Ltd., Kabirwala and



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another, 2005 PTD 1850, it has been held that in such circumstances the Tribunal has discretion to waive / remit additional tax and penalties”.

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 nonpayment 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”.

16. Considering the facts of the case, above discussions and the above quoted reported judgments of our Superior Courts the appeal is allowed and consequently the penalty and default surcharge imposed by the AO is waived/ deleted.

17. The copy of this order may be provided to the learned representatives of the parties.

Karachi:

Dated: 19.12.2022

(Justice® Nadeem Azhar Siddiqi)

CHAIRMAN

Copy Supplied for compliance:

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

Copy for information to:-

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

Certified to be True Copy

  
02/01/2023  
REGISTRAR  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD

Order Dispatched on

02/01/2023

  
Registrar

Order issued on

02/01/2023

  
Registrar

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