

BEFORE THE APPELLATE TRIBUNAL SINDH REVENUE BOARD AT  
KARACHI

DB-I

APPEAL NO. AT- 77/2022

M/s Brigade Security Services (PVT) Ltd.  
Flat No. A-4, SB 12, Bail UI Furqan, Building,  
Block 13-C, Near Ashfaq Memorial Hospital,  
University Road, Gulshane Iqbal, Karachi.....Appellant

**Versus**


Assistant Commissioner, Unit-15,  
Sindh Revenue Board (SRB),  
2<sup>nd</sup> Floor, Shaheen Complex,  
M. R. Kiyani Road, Karachi.....Respondent

Date of Filing of Appeal: 17.06.2022  
Date of hearing: 29.06.2022  
Date of Order: 19.07.2022

Mr. *Asif Khalid Shair*, Advocate for Appellant

Mr. *Rashid Ahmed*, AC-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.36/2022 dated 07.04.2022 passed by the Commissioner (Appeals) in Appeal No. 248/2019 filed by the appellant against the Order-in-Original No. 678/2019 dated 25.09.2019 passed by the Assistant Commissioner (Mr. Amiruddin Kolachi) SRB, Karachi.

02. The facts as stated in the OIO were that the appellant was registered with Sindh Revenue Board (SRB) having SNTN:3913842-9, for providing or rendering the taxable services classified as the "Security Agencies" falling under Tariff Heading 9818.1000 of the Second Schedule

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to Sindh Sales Tax on Services Act, 2011 (hereinafter referred as the Act). The same is chargeable to Sindh Sales Tax (SST) at the reduced rate of 10% on the value of services provided as per the provisions of sections 3, 8 & 9 of the Act read with SRB Notification No.SRB-3-4/6/2013 dated 18.06.2013 & SRB Notification NO.SRB-3-4//2013 dated 01.07.2013 and rule 42D of the Sindh Sales Tax on Services Rules, 2011 (hereinafter referred as the Rules). The appellant was required to deposit the SST with SRB and to file Sindh Sales Tax returns (SST Returns) in the manner prescribed under section 30 of the Act read with rule 12, 13, 14 & 42D of the Rules.

03. It was alleged in the OIO that from the examination of the online SST Profile of the appellant and its service recipients it was revealed that the appellant had provided taxable services to different service recipients valuing Rs.21,372,059/= involving SST of Rs.2,137,306/= out of which service recipients had withheld SST of Rs.426,942/= and passed on the remaining amount of Rs.1,710,364/= to the appellant. However the appellant had only deposited Rs.580,367/= with SRB and thus had short paid SST amounting to Rs.1,129,997/=.

04. The appellant was served with a Show-Cause Notice (SCN) dated 01.04.2019 to explain as to why SST liability of Rs.1,129,997/- may not be assessed and recovered under section 23 (1) and 47(1A) of the Act alongwith default surcharge under section 44 of the Act. The appellant was also required to explain as to why penalties under serial No. 3, 6(d), 11, and 12 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 representative of the appellant appeared before the Assessing Officer (AO) on 29.05.2019 and informed him that the appellant had deposited Rs.117,632/= and would pay SST of atleast three months within two days. The representative of the appellant again appeared on 09.08.2019 and submitted that the appellant would deposit atleast five months SST payment before next date of hearing.

06. The Assessing Officer (AO) passed OIO determining SST of Rs.886,237/= and ordered its recovery under section 23 (1) and 47(1A)

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of the Act alongwith payment of default surcharge (to be calculated at the time of payment) under section 44 of the Act. The AO also imposed penalty of Rs.56,450/- under serial No. 3 of the Table under section 43 of Act, Rs.886,237/= under serial No. 6 (d) of the Table under section 43 of Act, Rs.44,311/= under serial No. 11 of the Table under section 43 of Act and Rs.44,311/= under serial No. 12 of the Table under section 43 of Act.

07. The appellant challenged the said OIO by way of filing of appeal under section 57 (1) of the Act before Commissioner (Appeals), SRB who instead of hearing and deciding the appeal on merits dismissed the same for non-prosecution. The relevant portion of Order in Appeal (OIA) is reproduced as under:-

*"6. The appellant has failed to appear in person or through pleader despite of the hearing Notices as such and sought adjournments for uncertain period of time. Accordingly, the Appeal is hereby dismissed in non-prosecution. The Appellant is directed to pay the adjudged amounts as per the OIO forthwith without fail. Order accordingly".*

Resultantly the appeal was filed against such order before this Tribunal.

08. The learned advocate for the appellant Mr. Asif Khaliq Shar submitted as under:-



- The Commissioner (Appeals) dismissed the appeal for non-prosecution without service of proper notice of date of hearing upon the appellant.
- The appeal was dismissed for non-prosecution without considering the payment made by the appellant after passing of the OIO and during the pendency of appeal before the Commissioner (appeals) and placed such evidence on record.
- iii) The Commissioner (Appeals) failed to supply the copy of the OIA to the appellant and this appeal was filed after obtaining the certified copy of the OIA and filed affidavit in this regard.
  - iv) The Commissioner (Appeals) despite direction of the Tribunal failed to submit the Report regarding supply of

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copy of OIA to the appellant and such copy was conclusively not supplied to the appellant.

- v) The entire liability of SST determined by the AO was paid.
- vi) The penalties invoking different provision of section 43 were imposed without justification and without establishing mensrea, willful default and malafide on the part of the appellant which need to be deleted.

09. The learned AC-SRB submitted as under:-

- i) The appellant at the time of issuance of SCN was found to have made short payment of Rs.1,129,997/= out of which Rs.243,760/= was paid during the OIO proceedings, leaving the balance of Rs.886,237/=.
- ii) The OIO was rightly passed considering the payment made by the appellant during OIO proceedings.
- iii) The appellant despite payment of some amount during the pendency of appeal before the Commissioner (Appeals) had made short payment of Rs.41,383/- which was liable to be paid by it alongwith default surcharge and penalties.
- iv) The default surcharge and penalties were rightly imposed as the appellant had failed to discharge its prescribed obligations.
- v) The appeal was rightly dismissed for non-prosecution as the appellant had failed to appear on the date of hearing.

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

11. The appellant had undisputedly discharged its obligation towards payment of SST. The other issues which required resolution were "Whether the Commissioner (Appeals) had not provided the copy of OIA to the appellant?" "Whether the appeal was rightly dismissed for non-prosecution?" and "Whether the department before imposing default surcharge and penalties established mensrea, willful default and malafide on the part of the appellant?"

12. The appellant alleged that copy of the OIA was not provided to it, and filed affidavit in support of such contention. We have directed the Commissioner (Appeals) to submit Report regarding supply of OIA to the appellant alongwith the courier receipt. However the Commissioner

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(Appeals) has not filed any Report, nor the department has filed any counter affidavit to the affidavit filed by the appellant. The consequence of not filing the rebuttal of the affidavit is that the department has admitted the contention of the appellant that the copy of OIA was not provided/supplied to it.

13. We have noticed that Commissioner (Appeals) instead of following sub-section (4) of section 59 of the Act which mandated him to serve the OIA upon the appellant was acting on his whims, and such attitude was not desirable. In Appeal No. AT-07/2022 M/s Nalco Pakistan (Pvt.) Ltd. Versus The Assistant Commissioner (Unit-21), the Commissioner (Appeals) before supplying the copy of OIA to the appellant disclosed to the AC regarding dismissal of appeal which resulted in attachment of bank account of the appellant and withdrawal of amount even before supply of copy of OIA. All these negative tactics bring bad name to SRB and would open the door of nepotism and corruption which could cause colossal loss to SRB. To save its reputation and in the interest of revenue we advise SRB to take penal action against such delinquent officers. We have been informed that the incumbent Commissioner (Appeals) is an officer of BPS-17 and was assigned the duties to act as Commissioner, which is BPS-20 post. This is itself is an anomaly and should be rectified immediately. The appointment of officer of lower grade on a much higher grade or position is bound to jeopardize the independence of the office of Commissioner (Appeals) and is against the basic norms and the judgments of the Superior Courts of Pakistan.

14. The appeal was dismissed by Commissioner (Appeals) for non-prosecution relying on the decision of the Honorable Supreme Court in the case of Abdul Wahid versus Haji Abdul Wadood, 1997 SCMR, 1338. The Act does not provide any specific provision under which the appeal could be dismissed for non-prosecution. However if a party is negligent and does not appear despite service of notices for the hearing the Commissioner (Appeals) could dismiss the appeal for non-prosecution. It is to be noted that if there is no specific provision permitting the disposal of appeal for non-prosecution there is also no provision prohibiting the disposal of appeal for non-prosecution. It is



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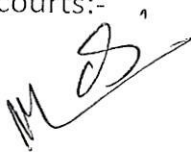
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now well established that the any permissible procedure not prohibited by law could be adopted for dispensation of justice. The discretion available to the Commissioner (Appeals) had to be exercised fairly, justly, reasonably, judicially and not arbitrarily. The purpose of giving discretion to the officials was to dispense justice and not to frustrate the right of the parties.

15. The Commissioner (Appeals) before dismissing the appeal for non-prosecution has to establish that proper notice of hearing of appeal was issued and served upon the appellant in terms of section 75 of the Act. The OIA is silent in this regard. The appeal was fixed on 06.04.2022 for hearing and was dismissed for non-prosecution on 07.04.2022 without any reference whether the notice of hearing was issued and served upon the appellant.

16. The reliance of the Commissioner (Appeals) on the case reported as 1997 SCMR 1338 was not proper. In the Supreme Court the Advocate Supreme Court as well as Advocate on Record for the party are required to appear. Furthermore it is mentioned on the top of the Cause List issued by the Supreme Court that no application through fax would be entertained. The Commissioner (Appeals) could not equate himself with the Honorable Supreme Court, and specially when no such notification was issued by Commissioner (Appeals).

17. The Commissioner (Appeals) before dismissing the appeal should consider the payment made by the appellant and imposition of unjustified penalties by the AO. In the instant case the AO imposed penalties under different provision of section 43 of the Act and default surcharge under section 44 of the Act without establishing mensrea, willfulness and malafide on the part of the appellant. The imposition of penalty and default surcharge which is also penal in nature and require establishing of mensrea. Furthermore the default surcharge could only be imposed where there is a willful evasion of tax, and even if the matter was contentious it could not be said that the default was willful. This view gains support from the following decisions of the superior courts:-



- a) In the reported case of Deputy Collector Central Excise and Sales Tax versus ICI Pak Lahore 2006 PTD 1132 (Supreme Court) it was held that Imposition of default surcharge was not automatic therefore it was to 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 willful and deliberate.
- b) In reported case of Coca cola Beverages Ltd. versus Customs, Excise and Sales Tax, Appellate Tribunal, 2017 PTD 2380 (DB Lahore) it was held as under:-

*"Jurisprudence that has evolved over the years is that penalty can only be imposed where there is willful evasion of duties and taxes. In the Pakistan, through the Secretary, Ministry of Finance, Rawalpindi etc. v. Hardcastle Waud (Pakistan) Ltd. Karachi (PLD 1967 SC 1), while dilating on Item 3-B of Section 167 of the Sea Customs Act, 1878, the Honorable Supreme Court held that it was incorrect to say that the said Item created an offence of absolute liability and was an exception to the general rule that mens rea was an essential element in the commission of a criminal offence. It ruled that even in the case of a statutory offence the presumption is that mens rea is an essential ingredient unless the statute creating the offence by express terms or by necessary implication rules it out. In Ms D.G. Khan Cement Company Ltd., etc. v. The Federation of Pakistan, etc. (PTCL 2004 CL 224), the Apex Court held that in order to impose additional tax it should be seen whether the evasion or non-payment of tax was willful or malafide. Therefore, every case should be decided on its own merits. Every default on the part of the registered person would not ipso facto make him liable for penalty or additional tax/default surcharge. The Revenue must establish that it was dishonest, willful or malafide.*



18. Considering the principles laid down by Superior Courts in the above reported cases it cannot be said that the instant case was of tax evasion. Moreover no determination of willful default and evasion of SST coupled with mensrea was undertaken or established. Therefore it is held that the appellant was not liable for payment of default surcharge

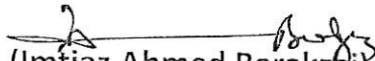
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and penalties which were invoked under different provisions of Section 43 of the Act since the AO has failed to establish of the same.

19. In view of the above discussions the OIO and OIA are maintained to the extent of payment of SST of Rs.886,237/= which was already paid. The appeal is partly allowed to the extent of imposition of default surcharge and penalty and it is held that the same is not payable.

20. The appeal is disposed of in view of para 18 and 19 above. The copy of the order may be provided to the learned representatives of the parties and to the learned Chairman, SRB for enforcing the directions of this Tribunal in letter and spirit.

  
(Imtiaz Ahmed Barakzai)  
TECHNICAL MEMBER

  
(Justice Nadeem Azhar Siddiqi)  
CHAIRMAN

Karachi:

Dated:19.07.2022

Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
- 2) The Chairman, Sindh Revenue Board, Karachi.
- 3) The Assistant Commissioner, (Unit-21), SRB, for compliance

Copy for information to:-

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

Certified to be True Copy

  
REGISTRAR  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD

Order Issued on

  
19/07/2022

Registrar

Order Dispatched on

  
19/07/2022

Registrar