

BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD.
(Before: Mrs. Alia Anwer, Member Judicial)

Appeal No.AT-83/2022

M/s. Mecon Engineers & Contractors,
Qasar-e-Majeed,
Umerkot Road,
District Mirpukhas. appellant

Versus

The Assistant Commissioner Unit-34,
Sindh Revenue Board,
Karachi. respondent

Muhammad Din Qazi, advocate for appellant
Mr. Nabi Bux Shar, AC Unit-34, for respondent.

Date of hearing: 27.07.2023

Date of order: 10.08.2023

ORDER

The appellant has assailed the order dated 11.12.2019 passed by the Assistant Commissioner (Unit-34) vide Order-in-Original No.814 of 2019 (*hereinafter referred to as "the Original Order"*) whereby the appellant has been directed to pay as under;

- a. Sales Tax amounting to Rs.927,603/- along with default surcharge (to be calculated at the time of payment) under section 44 of the Act, 2011¹,
- b. Penalty amounting Rs.46,380/- under serial No.3 of the Table in section 43 of the Act, 2011,

1. The Sindh Sales Tax on Services Act, 2011

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c. Penalty amounting Rs.10,000/- under serial No.1(A) of the Table in section 43 of the Act, 2011, and

d. Penalty amounting to Rs.10,000/- under serial No.5 of the Table in section 43 of the Act, 2011.

2. Being aggrieved by and dissatisfied with the order of Assistant Commissioner (Unit-34), appellant filed instant appeal before Commissioners (Appeals), which has been transferred to this Tribunal under section 59(7) of the Act.

3. Learned counsel for appellant submits that "the Original Order" is bad in law and on facts. He argued that appellant produced all the relevant record before the Assistant Commissioner (Unit-34) but he did not consider the same. Learned counsel argued that learned Commissioners (Appeals) referred the matter for reconciliation and the then Assistant Commissioner (Unit-34) submitted his report, according to which no due were outstanding towards appellant. Learned counsel prayed for setting-aside "the Original Order".

Assistant Commissioner (Unit-34) conceded the reconciliation report submitted by the then Assistant Commissioner. He admitted his mistake of calculation in "the Original Order". Assistant Commissioner (Unit-34) consented to waiver of penalty amounting Rs.66,380/- (i.e. Rs.46,380/-, Rs.10,000/- and Rs.10,000/- imposed under serial No.3, No.1(A) and No.5 of the Table in section 43 of the Act, 2011, respectively). He, however; supported the imposition of default surcharge imposed under section 44 of the Act, 2011. Per Assistant Commissioner (Unit-34) words "shall" and "whether willfully or otherwise" denote that non-existence of willfulness does not exonerate the taxpayer from payment of default surcharge. He argued that penalty of default surcharge under section 44 of the Act, 2011 is must and cannot be waived in any condition. He prayed that

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imposition of penalty of default surcharge may be maintained.

5. After hearing arguments of both the sides, I have gone through the material available so far. Perusal of record shows that vide show-cause notice dated 15.09.2019 appellant was required to explain as to why the due SST amount of Rs.1,000,578/- should not be assessed in terms of section 23(1) and 28(5) of the Act, 2011 so also as to why the assessed amount should not be recovered and the penalties attracted should not be imposed on him.

6. Per appellant, he produced entire relevant documents showing payment of tax liability due towards him, but the same were not considered by the Assessing Officer. However; as per the Assistant Commissioner (Unit-34), the appellant produced only two CPRs dated 11.09.2019 amounting to Rs.111,606/- (i.e. CPR No.S1-20190911-0036-1096600 of Rs.49,336/- and CPR No.S1-20190911-0036-1100431 of Rs.62,270/-). Be that as it may, the Assistant Commissioner (Unit-34) would have assessed the Sales Tax @ of Rs.888,972/- (Rs.1,000,578/- minus Rs.111,606/-) instead of Rs.927,603/- (as assessed in "the Original Order").

Record reveals that Commissioner (Appeals) referred the matter for reconciliation. During reconciliation proceedings it transpired that besides above, the appellant had also made three payments amounting to Rs.526,432/- (i.e. Rs.282,653/-, Rs.62,482 and Rs.181,297/-) which were accordingly reconciled vide report dated 02.06.2020. Surprisingly the reconciling authority also did not notice that the Principal amount i.e. Rs.927,603/- (as per in "the Original Order") must be Rs.888,972/-. This fact supports appellant's version that entire record showing payment of tax liability, produced by appellant was not considered by the Assessing Officer. Since the appellant

had paid an amount of Rs.526,432/-, such amount deserved its exclusion from the actual assessed amount of tax i.e. Rs.888,972/-. In such circumstances, at the most the Principal amount of SST could be assessed @ Rs.362,540/- (i.e. Rs.888,972/- minus Rs.526,432/-).

8. The appellant further claimed to have paid voluntarily, two payments amounting to Rs.278,697/- and Rs.121,934/- (i.e. Rs.400,631/- altogether), which have also been approved by the reconciling authority in his report dated 02.06.2020. Learned counsel for appellant submits that the reconciling authority asked the appellant to pay an additional payment of Rs.23,000/- towards full and final adjustment, which was duly paid by the appellant vide CPR No.S1-20210429-0036-1537839 dated 29.04.2021.

9. Section 23 of the Act, 2011 prescribes procedure for assessment of tax and its subsection (2) prescribes the procedure to be adopted by the Assessing Officer prior to determining the tax liability and it reads as under;

23. Assessment of Tax.--(1)

(2) No order under ¹[sub-sections (1) or (1A)] shall be made by an officer of the SRB unless a notice to show cause is given to the person in default within ²[eight years] from the end of the tax period to which the order relates specifying the grounds on which it is intended to proceed against him and the said officer shall take into consideration the representation made by such person and provide him with an opportunity of being heard if the person so desires.

(Underlining is emphasized)

10. Bare reading of the above provision categorically shows that, prior to passing "the Original Order", the Assessing Officer **MUST** take into consideration with due diligence, the representation made by the tax payer. Wisdom behind insertion of such provision is to resolve issues amicably before the initial forum to minimize litigation rather than to over

burdening the Courts/ Tribunals. In the instant case the conduct of Assistant Commissioner (Unit-34) seems to be extremely negligent in performing his duty. On the other hand appellant's conduct of making payments apparently seems to be of a compliant tax payer and such conduct deserves appreciation. Had the Assistant Commissioner (Unit-34) dealt with the case diligently, appellant would have cleared the dues even prior to passing of "the Original Order" and instant case would have had been finalized at its initial stage in the year 2019. The Assistant Commissioner (Unit-34), however; while admitting his mistake of calculation waived the penalties imposed under serial No.1(A), No.3 and No.5 of the Table in section 43 of the Act, 2011.

11. Per Assistant Commissioner (Unit-34), words "shall" and "whether willfully or otherwise" used in section 44 of the Act, 2011 make the taxpayer liable to pay default surcharge, in case he does not pay tax due or any part thereof in time or in the prescribed manner. Arguments advanced by the Assistant Commissioner (Unit-34) do not sound convincing and it seems that he has gone through the relevant section in isolation instead of in continuation. For the ready reference section 44 of the Act, 2011 is reproduced as under;



44. Default Surcharge.--(1) Notwithstanding the provisions of section 23, if a registered person does not pay the tax due or any part thereof, whether willfully or otherwise, in time or in the manner specified under this Act, rules or notifications issued there under, he shall, in addition to the tax due and any penalty under section 43, pay default surcharge at the rate mentioned below:--

- (a)
- (b)

12. Bare reading of the above provision shows that in case a tax payer does not pay the tax due or any part thereof in time or in the prescribed manner, whether willfully or otherwise, he shall pay default surcharge in addition to the

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tax due and any penalty under section 43 of the Act, 2011 at the rate mentioned in clause (a) or (b) of the said section. Words "in addition to the tax due and any penalty under section 43, pay default surcharge at the rate mentioned below" used in section 44 of the Act, 2011 categorically denotes that liability of default surcharge will be coupled with (in addition to) the liability of tax due and any penalty imposed under section 43 of the Act, 2011.

13. It is an admitted fact that while proceeding under section 23 of the Act, 2011, the Assistant Commissioner (Unit-34) made arithmetical mistake due to which the Principal amount of SST was assessed as Rs.927,603/- instead of Rs.888,972/-. The Assistant Commissioner (Unit-34) further made gross negligence by not reconciling three payments amounting to Rs.526,432/- and in such circumstances the Principal amount of SST could be assessed @ Rs.362,540/- (i.e. Rs.888,972/- minus Rs.526,432/-). It is well settled principle that no one should suffer on account of the act of the decision giving authority. In the instant case it stands established that the Assistant Commissioner (Unit-34) has committed mistake in calculation while passing "the Original Order". In such circumstances, appellant is entitled to be restored to the same position as of right to the maximum possible extent i.e. the stage of proceedings under section 23(2) of the Act, 2011. In this regard I am fully guided with the principle laid down in the case of AHMAD LATIF QURESHI versus CONTROLLER OF EXAMINATION, BOARD OF INTERMEDIATE AND SECONDARY EDUCATION, LAHORE (PLD 1994 Lahore 3) wherein it has been held that;

"7. It is an established proposition of law that no one can suffer on account of the act of the authority, who has to pass an order or who has taken some action. In the case in hand, it stands established that it is the respondents who are at fault and if the petitioner would not have illegally been proceeded against and the paper would not have been



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snatched away from him if successful he could have been declared to have passed the said examination in the first attempt, and, therefore, depriving the petitioner of the opportunity of passing in the 1st Annual Examination is, definitely an act which is illegal and without a lawful authority. Therefore; the petitioner is entitled to be restored to the same position as of right to the maximum possible extent and hence is entitled to be given a full opportunity to appear in the subject of Maths and on the basis of result thereof is also entitled to be declared to have passed the examination in the 1st Annual Examination and not in parts. There is no doubt that the loss or the injury which the petitioner has suffered cannot be 100% compensated but this Court has jurisdiction to put the petitioner to the same position in which he was entitled to be put to whatever extent it is now possible. "

14. It is the matter of record that after passing "the Original Order" the appellant made further payments of Rs.278,697/-, Rs.121,934/- and Rs.23,000/- and entire payments are lying with the department and the details are as under;

Show-caused amount	1,000,578/-
Reconciled by AC (Unit-34)	-111,606/-
Total	888,972/-
Reconciled by Reconciliating Authority	-526,631/-
Principal amount of SST	326,540/-
Paid voluntarily	-400,631/-
Total	-38,091/-
Paid upon the directives of Reconciliating Authority	-23,000/-
Total	-61,091/- (paid in excess)


It is pertinent to mention that considering non-existence of *mens rea* on the part of the appellant in non-payment of tax in time, the Assistant Commissioner (Unit-34) preferred to waive penalties prescribed under serial No.1(A), No.3 and No.5 of the Table in section 43 of the Act, 2011. Since there exists no liability of tax due and no penalty is imposed under section 43 of the Act, 2011, there remains no justification in imposing the penalty of "default surcharge" prescribed under section 44 of the Act.

16. In view of the above discussion, instant appeal is hereby allowed and the "the Original Order" is hereby set-aside

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with directions to the department to refund an amount of Rs.61,091/- to the appellant The copy of this order may be provided to the learned representatives of the parties.


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Karachi;
Dated: 10.08.2023.

Copy supplied to:-

1. The appellant through authorized representative,
2. The Assistant Commissioner (Unit-34), SRB, Karachi,
3. The Commissioner (Appeals), SRB, Sindh,
4. Office File, and
5. Record file.

Certified to be True Copy


10-08-2023
REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on

10-08-2023


Registrar

Order Disposed on

10-08-2023


Registrar