

**BEFORE THE APPELLATE TRIBUNAL, SINDH REVENUE BOARD, AT
KARACHI**

SB-III

APPEAL NO: AT-104/2023

M/s National Logistics Cell.

(SNTN: S9013102-9)

Harding Road, General Headquarters, Rawalpindi..... Appellant

Versus

The Assistant Commissioner (Unit-32), SRB

Sindh Revenue Board, 2nd Floor,

Shaheen Complex, M.R. Kayani Road

Karachi..... Respondent

Date of filing of Appeal: 31.07.2023

Date of hearing: 10.08.2023

Date of Order: 22.08.2023

Mr. Muhammad Raza, (FCA) for the appellant.

Mr. Shareef Malik, DC-DR and Mr. Awais Raza, AC-SRB, Karachi for the respondent.

ORDER

Syed Tahir Raza Zaidi: This appeal has been filed by the appellant challenging the Order-in-Appeal (hereinafter referred to as the OIA) No. 144/2023 dated 31.05.2023 passed by the Commissioner (Appeals) in Appeal No. 394/2022 filed by the Appellant against the Order-in-Original (hereinafter referred to as the OIO) No. 2591/2022 dated 14.11.2022 passed by Mr. Awais Raza, Assistant Commissioner, (Unit-32) SRB Karachi.

02. Brief facts of the case are that M/s National Logistics Cell bearing SNTN: S9013102 (hereinafter referred to as "registered person") is registered in the services category of Terminal Operator, classified under tariff heading 9819.9090 of the Second Schedule to the Sindh Sales Tax on Services Act, 2011 (hereinafter called "the Act"), in Province of Sindh and are subject to levy of Sindh Sales Tax at the statutory rate. Accordingly, M/s National Logistics Cell are required to:

a) Charge, collect and to pay Sindh Sales Tax in terms of the provision of section 8, 9 and section 17 of the Act:

b) Deposit the amount of Sindh Sales Tax in the Sindh Government's head of account "B-02384" in a SRB authorized branch of National Bank of Pakistan or any other designated bank against PSID/ Challan in SST-

- 04 and obtain SRB-related CPR as token of having paid that amount as prescribed in rule 14 of rule 30 of the Rules-2011; and
- c) furnish their tax return form "SST-03" as required under section 30 of the Act read with rule 12 and 13 of the Rules, 2011.

03. M/s National Logistics Cell failed to deposit the amount of Sindh Sales Tax and failed to e-file the prescribed tax (SST-03) for the tax period of September, 2022. Despite issuance of notices regarding non-payment and non-filing, M/s National Logistics Cell neither submitted any response nor deposited amount of Sindh Sales Tax dues nor e-filed the prescribed tax return (SST-03) for the tax period of September, 2022. Considering the foregoing facts and in view of the appellant's persistent late payment it was held that the delay in payment of sales tax due and filing of tax returns was without any reasonable explanation.

04. Therefore, after reviewing the case record the Assessing Officer concluded the case by imposing penalties as there exist an element of *mens-rea* against the registered person on account of non-depositing the due SST payment and not filing the monthly sales tax return for the tax period of September, 2022 as prescribed under law and rules made thereunder. Penalties under section 43 of the Act and default surcharge under section 44 of the Act were imposed upon the registered person, M/s National Logistics Cell (SNTN: S9013102) as under:-

- i. Non-payment of monthly sales tax due (Violation of section 8, 9 and 17 of the Act):

Under section 43 (Sr. No.3) of the Act.....Rs.907,384/0

(Being 5% of Tax payable)

Failed to declare the Return (Violation of Section-03)

Under section 43 (Sr. No.2) of the Act.....Rs.4,667/-

(Being each day default)

- iii. Default surcharge

iv. Under section 44 of the Act.....Rs.157,395/-

05. M/s National Logistics Cell was accordingly directed to deposit a total amount of Rs.1,159,446/- (997,384 + 4,667 + 157,395), as calculated in the foregoing terms, in the SRB head of account (Sindh Sales Tax on Services---- B-02384), within 30 days from the date of OIO under the proviso of section 66 of the Act, 2011. The appeal against the OIO before the Commissioner (Appeals), SRB also failed hence the instant appeal before this forum.

06. In the above back drop and facts of the case narrated supra, hearing notice was issued to rival parties for 10-08-2023, Mr. Mohammad Raza and Mr. Awais

Tha

Raza, FCA, from M/s. A.F. Ferguson & Company appeared on behalf of the Appellant whereas Mr. Mehboob Bikia, AC SRB represented the department.

07. The AR for the appellant reiterated the arguments put forth in the memo of appeal and stated that the appellant being a state owned organization cannot be burdened with penalties and default surcharge as there exists no *mens rea* or willful act to avoid payment of due taxes. However he could not offer any plausible reason for delayed payment and attributed the same to the cumbersome business processes adopted by the appellant.

08. On the other hand the AC SRB furnished a statement showing 59 instances of default on the part of the appellant and stated that such repeated defaults are nothing but willful and should not go un noticed. The learned AR of the appellant when confronted with the accusation of repeated defaults in payment of due taxes was unable to satisfy this Tribunal with any plausible reason.

09. I have gone through the record of the case comprising of SCN, OIO, and OIA, oral and written submission by the rival parties and has also perused the case laws referred during the currency of proceedings. As a matter of fact the superior judiciary has time and again held that presence of *mens rea* and willfulness are pre requisite for imposition of penalty and default surcharge meaning thereby the tax officials are now burdened with an additional duty of establishing mensrea and willfulness although the language and spirit of the concerned section of the Act does not embodies any such requirement.

10. The relevant section of the Act is reproduced here under for ease of reference:-

Section 44(1) of the Act, 2011:

"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."

11. Bare perusal of the above section suggest that the assessing officer is not under any obligation to look for the element of willfulness or mensrea in the conduct of the tax payer and the provision of above section would come into operation automatically leaving no discretion at the hands of the assessing officer to remit the default surcharge.

12. The question of waiver of default surcharge/additional tax was considered by Superior Courts in various judgments relating to section 34 of the Sales Tax Act, 1990 which read as follows:-



34. Default surcharge.- (1) Notwithstanding the provisions of section 11, if a registered person does not pay the tax due or any part thereof, **whether wilfully or otherwise**, (emphasis supplied) in time or in the manner specified under this Act, rules or notifications issued thereunder or claims a tax credit, refund or makes an adjustment which is not admissible to him, or incorrectly applies the rate of zero per cent to supplies made by him, he shall, in addition to the tax due, pay default surcharge at the rate mentioned below:-

13. Section 44 of the Act and Section 34 of the Sales Tax Act, 1990 are not materially different in scope, and both deal with imposition of default surcharge. Both the provisions provide "**willfully or otherwise**", therefore, in view of the similarity of language of two statutes, the case law pertaining to section 34 of the Sales Tax Act, 1990 can also be relied upon instantly. A few citation from reported cases are reproduced here-under:-

14. In 2004 SCMR 456, D.G. Khan Cement Company Limited versus Federation of Pakistan the Full Bench of Supreme Court of Pakistan it was held as under:-

"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** (emphasis supplied) 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** (emphasis supplied) 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** (emphasis supplied).

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 (emphasis supplied). 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 (emphasis supplied).



7/11

29.The appeals as regards acceptance of the Constitutional petitions of the respondents against the recovery of additional tax for the foregoing reasons are hereby dismissed. The connected Civil Appeals Nos. 1866 of 1996 and 1288 of 2000 stand disposed of in the above terms”.

15. In 2006 SCMR 626 (DB-Supreme Court of Pakistan) Deputy Collector Central Excise & Sales Tax versus ICI Pakistan Limited, Lahore, relying upon the decision of the full bench of Supreme Court of Pakistan it was held as under:-

“6. We have heard the learned counsel for the parties and have also perused the available record. We find that judgment, dated 30-10-1994 passed by the High Court in Writ Petition No.4876 of 1994 was set aside by this Court in Civil Appeal No.1441 of 1995 by consent of the learned counsel for the parties and not on merits. Therefore, the impugned judgment may not be interfered with merely on that score. 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 requiring no determination at all. (Emphasis supplied)** The respondent had taken a categorical position that it had charged and paid sales tax on the basis of discounted prices which was the same as the prevalent retail prices and that there was no evasion in the payment of sales tax in terms of S.R.O. dated 1-11-1990.

“The above provisions would clearly indicate 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 B 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 willful and deliberate. (Emphasis supplied)** Shamroz Khan and another v. Muhammad Amin and others PLD 1978 SC 89, it was held that the expression "he shall be liable to have his defence, if any, struck off" used in Order XII, rule 8, C.P.C., would mean that the Court might strike off defence in an appropriate case and it was not incumbent upon the Court to strike off the defence on failure to supply address. In Haji Abdul Razzak v. Pakistan through Secretary, Ministry of Finance, Islamabad and another PLD 1974 SC 5 by section 168 of the Sea Customs Act No. VIII of 1878, it was provided that conveyance used in removal of contrabands would be liable to be confiscated. It was held that the provision still gave discretion to the authorities to confiscate the conveyance and that discretion had to be exercised on sound judicial principles. In Muhammad Musa v. Settlement and Rehabilitation Commissioner and 2 others 1974 SCMR 352, the expression "shall be liable to cancellation" was examined. It was held that expression envisaged application of



mind by appropriate authority and that failure of auction-purchaser to pay price or installment did not operate as automatic cancellation of auction sale. In the case of D.G. Khan Cement Factory (supra), it was observed by reference to section 34 of the Act that each and every case had to be decided on its merits as to whether the evasion or non-payment of tax was willful or mala fide, decision of which would depend upon the question of recovery of additional tax. **There is no material available on record that the short payment of sales tax was mala fide or willful act of omission the respondent-Company. In the facts and circumstances of the case, the High Court had justifiably allowed the writ petition of the respondent-Company by the impugned judgment dated 6-8-2001 to which no exception could be taken" (emphasis supplied).**

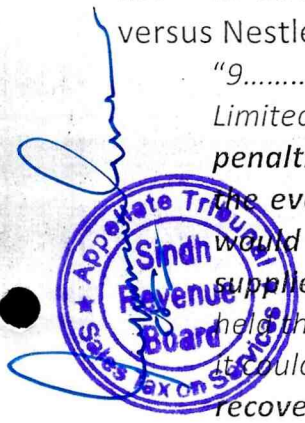
16. The perusal of above two judgments of the Supreme Court of Pakistan clearly established that for imposing default surcharge under section 44 of the Act the department has to establish that the non-payment of SST was *willful or mala fide*, the decision on which would depend upon the question of recovery of additional tax. The clear findings of the Supreme Court was that *"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"*.

17. In 2005 PTD 1850 (DB-Lahore High Court) Additional Collector Sales tax versus Nestle Milk Pakistan.

"9.....Their Lordships of the Supreme Court in re: D.G. Khan Cement Company Limited (supra) also found that with regard to the levy of **additional tax or penalties each and every case had to be decided on its own merits as to whether the evasion or payment of tax was willful or mala fide. The decision on which would depend upon the question of recovery of additional tax. (Emphasis supplied)** The Hon'ble Court in the facts and circumstances of the case before it held that non-payment of the sales tax within the tax period was neither willful nor it could be construed to be mala fide evasion or payment of duty. **Accordingly the recovery of additional tax as penalty or otherwise was found to be unjustified in law (emphasis supplied).** As noted above, the Tribunal found as a fact that in the given situation including prevailing uncertainty in application of the charging provisions of the Act the imposition of additional tax and penalties was unjustified. The use of that discretion based upon their appreciation of facts as well as the legal proposition, their finding for remitting/waiving additional tax and penalties is not open to exception.

18. In PTCL 1995 CL 415 (SB-Lahore High Court) Lone China Private Limited versus Additional Secretary. Ministry of Finance it was held as under:-

"11. According to Section 12(1) of the Sales Tax Act, 1951, it is necessary for the authorities to determine the amount of additional tax on the basis of criteria given



therein which the petitioner was to pay as penalty and time is also to be specified within which the same should be paid. It is only on the failure of the petitioner to pay this additional tax within the period fixed that he could be visited with the further penalty of payment of further additional tax whereas in the relevant provisions of Sales Tax Act, 1990 this further penalty has been described as surcharge. The impugned orders as regards determination of penalty etc., for the period from 1989 to June 1990 are not sustainable and a fresh decision is to be made as observed above.

12. For the foregoing reasons, the writ petition is partly accepted. **The impugned orders as regards imposition of penalty in the form of additional tax and surcharge as regards period from November 1990 to June, 1991 are hereby declared to be without lawful authority and of no legal effect. The said additional tax and surcharge shall not be recovered from the petitioner (emphasis supplied).**

As regards imposition of penalty for the period from June 1989 to October, 1990 the same are also declared to be without lawful authority and the case is remitted to the Deputy Collector to determine the same as directed in paragraph 11 above. The parties are left to bear their own costs.

19. In 2018 PTD 900 (DB-Sindh High Court) Commissioner Inland Revenue, Karachi versus Tianshi International Pakistan Co. Pvt. Ltd. it was held as under.

"7. Learned counsel for the applicant was confronted to assist the Court as to whether the provisions of Section 34 of the Sales Tax Act, 1990 in its scope, are materially different from the provisions of sections 161/205 of the Income Tax Ordinance, 2001 relating to the terms default, and willful default, in response to which, learned counsel for the applicant could not point out any material different in the scope and application of the aforesaid provisions, nor could assist the Court as to how the ratio of the aforesaid judgment of the Supreme Court would not apply to the facts of the instant case. Accordingly, we are of the considered opinion that the order passed by the Appellate Tribunal to this effect does not suffer from any factual error or legal infirmity; on the contrary, the same depicts correct legal position, which is duly supported by the judgment of the High Court and the Hon'ble Supreme Court, as referred to hereinabove.

20. Imposition of penalty and default surcharge will depend on the circumstances of the case. This view gain strength in the light of the judgments by honorable Islamabad High Court reported in 2021 PTD 1680 in case of M/s Attock Refinery Limited V/s Collector of Sales Tax wherein there Lordships held as under:-

"From the language of the aforementioned provisions, it is patent that the legislature has not vested the learned Tribunal with any authority to create a window period for the taxpayer, to pay any tax due that has not been paid willfully or inadvertently, without attracting a default surcharge".

"Once the Tribunal had held that payment of tax was due it could not have carved out a period of sixty days for payment of principal amount within which no default surcharge would be payable".

"The application of default surcharge under section 34 of the Act is automatic and is triggered even in case, such the instant one where non-payment of tax due is not deliberate but inadvertent".

21. Be that as it may, I am of the considered opinion that tax money is a sacred trust in the hands of the withholding agent which should be deposited in the national exchequer in the prescribed manner and time without fail and delay. If the repeated defaulters are allowed the concession of remission of default surcharge, it would tantamount to extending interest free loan to the defaulter at the expense of government exchequer.

22. Having due regards and respect for the decisions by the superior judiciary cited herein above, the instant case is distinguishable as it involves repeated failures of the Appellant to discharge his obligation on time i.e. 59 times to be accurate.

23. I therefore find no reason the interfere with the findings of the AC SRB later upheld by the Commissioner Appeals, The instant appeal is thus rejected being devoid of merit.

24. The appeal and stay application is disposed of in the above terms. The copy of this order be provided to the learned representatives of the parties.

Karachi: -

Dated: 22.08.2023

Copy Supplied for compliance:

- 1) The Appellant through Authorized Representative.
- 2) The Deputy Commissioner, (Unit-32), SRB, for compliance

Copy for information to:-

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


(Syed Tahir Raza Zaidi)

MEMBER TECHNICAL

Certified to be True Copy


APPR. REGISTRAR
SINDH REVENUE DEPT.

Order Issued on 25/08/2023


Registrar

Order Dispatched on 25/08/2023


Registrar