

(Guard file)

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

**DOUBLE BENCH-I**  
**APPEAL NO. AT-23/2023**

Assistant Commissioner, (Unit-32)  
Sindh Revenue Board (SRB)  
02<sup>nd</sup> Floor, Shaheen Complex Building,  
M.R. Kiyani Road Karachi..... Appellant

**Versus**

M/s Gulf Sugar Mills Limited  
(SNTN: 1512421-5)  
64-E-1, Gulberg-III, Lahore..... Respondent

Date of filing of Appeal: 21.02.2023  
Date of hearing: 05.09.2023  
Date of Order: 12.09.2023

Mr. Shareef Malik, DC-DR, SRB and Mr. Ghulam Mustafa Kathio, AC-SRB for the  
appellant.

Mr. Nadeem Ahmed Qureshi, advocate for the respondent.

**ORDER**

**Justice Nadeem Azhar Siddiqi**: This appeal has been filed by the Assistant  
Commissioner (Unit-32), SRB Karachi challenging the Order-in-Appeal (hereinafter  
referred to as the OIA) No. 26/2023 dated 19.01.2023 passed by the Commissioner  
(Appeals) in Appeal No. 42/2020 filed by the appellant against the Order-in-Original  
(hereinafter referred to as the OIO) No. 22/2020 dated 19.02.2020 passed by Mr.  
Awais Raza, Assistant Commissioner, (Unit-24) SRB Karachi.

02. The facts as stated in the SCN/OIO are that the appellant having NTN:  
4140527-7, is covered by the definition of "Withholding Agent", as provided under  
sub-rule 1 of the Sindh Sales Tax Special Procedure (Withholding) Rules, 2014  
(hereinafter referred to as the Rules). Accordingly the appellant was required to e-  
sign up as Withholding Agent in terms of sub-rule (2) of rule 3 of the Rules and was

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required to withhold the due amount of Sindh Sales Tax (SST) and deposit the same in Sindh Government account.

03. It was alleged that it was evident from the payment record of the appellant that they had not deposited the SST amount against the receipt of taxable services from Technical Associate Pakistan (Pvt.) Limited (TAPL), an unregistered person and information, as gathered from third party sources, revealed that appellant during the tax periods from August-2016 to November-2018 had received taxable services of construction (Tariff Heading 9824.0000) in Sindh, valuing to Rs.493,588,384/-. The appellant vide SRB letter dated 10.01.2019 was required to deposit the un-paid SST with SRB. However, the appellant has failed to comply with the said letter despite providing of sufficient opportunities/time to them.

04. The appellant was served with Show-Cause Notice (SCN) dated 10.06.2019 to explain as to why SST of Rs.64,166,490/= should not be recovered from them under section 47(1) (1B) of the Sindh Sales Tax on Services Act, 2011 (hereinafter referred to as the Act) alongwith default surcharge under section 44 of the Act. The appellant was also called upon to explain as to why penalties under Serial No. 3 and 11A of the table under section 43 of the Act should not be imposed for contravention of the Withholding Rules.

05. The appellant submitted its Reply dated 24.06.2019 wherein it was stated that the amount confronted in the SCN was erroneously calculated at the rate of 13% of the value of service instead of 8% as notified vide SRB Notification dated 01.07.2013. It was also stated that the impugned demand includes the purchase of supplies and profit paid on debt which were outside the scope of the Act.

06. The Assessing Officer (AO) passed OIO determining the SST at Rs.39,487,071/= and ordered its recovery alongwith default surcharge under section 44 of the Act. The AO also imposed the penalties of Rs.1,974,354/- (5% of Rs.39,487,071/-) and Rs.39,487,071/- (50,000 rupees or an amount equal to the amount of tax involved, whichever is higher) under Sr. No.3 and 11A, respectively, of the Table under section 43 of the Act for non-payment of due amount of SST.

07. The appellant challenged the said OIO before Commissioner (Appeals), SRB under sub-section (1) of section 57 of the Act. The Commissioner (Appeals) allowed the appeal. The operative part of the Order is reproduced below.



"06. Considering the facts and circumstances of the case and also applying the ratio of the Hon'ble High Court of Sindh judgment in case of Fatima Fertilizers (supra) and my view in this regard in paragraph 5.1 above, the appeal is allowed as Appellant's liability to pay sales tax arise from the insertion of section 13(3) in the Sindh Sales Tax on Services Act, 2011.

07. This order is subject to the decision of the Hon'ble Supreme Court of Pakistan in CPLA No.705 of 2021 filed by the Respondent's department against the decision of the Hon'ble High Court of Sindh in the case of Fatima Fertilizers (supra). If, above CPLA is decided in favor of the Respondent's department, the Appellant shall act as per this submissions in paragraph 5.3 of this order".

08. The department challenged the above OIA before this forum and the learned AC-SRB submitted that this appeal has been filed against the portion of OIA by which the Commissioner (Appeals) SRB has waived the penalties imposed by the Adjudicating Officer in the OIO.

09. The learned AC submitted as under.

The Commissioner (Appeals) was not justified to annul the penalties which were imposed for non-compliance of Withholding Rules.

The appellant being a withholding agent was liable to withhold the whole SST on receipt of taxable services from the unregistered service provider.

iii. The penalties imposed in the OIO were not the subject matter of Fatima Fertilizer case.

iv. The Commissioner (Appeals) failed to appreciate that the Withholding Rules were framed under section 13 read with section 72, 9 (3) and 3(4) of the Act having overriding effect over the other provisions of the Act.

v. The Commissioner (Appeals) instead of waving penalties should have linked the same with the outcome of the judgment of the Supreme Court in case of Fatima Fertilizer (Pvt.) Limited.

10. The learned Advocate for the respondent submitted as under:-

i. The Commissioner (Appeals) has not levied any SST and in absence of levy of SST penalties cannot be imposed.



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ii. The imposition of penalty under serial No.3 of the Table under section 43 of the Act is five percent of the total tax payable and unless the SST is levied the penalty could not be imposed.

iii. The imposition of penalty under serial No.11A of the Table under section 43 of the Act is Rs.50,000/= or an amount equal to the amount of tax involved, whichever is higher. Again in absence of levy of SST the penalty could not be imposed.

iv. The Commissioner (Appeals), SRB is vested with the power to waive the penalties which were waived on sound reasoning.

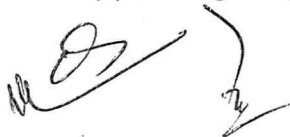
v. The Commissioner (Appeals) has erroneously linked the OIA with the outcome of the appeal of SRB pending in the Supreme Court of Pakistan against the judgment of the High Court of Sindh in the case of Fatima Fertilizer versus Commissioner II, SRB, 2021 PTD 484

vi. The effect of the judgment of the Supreme Court is always prospective and will not be applicable on past and closed transaction.

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

12. The case was non-withholding of SST and its deposit with SRB by the appellant which was determined at Rs.39,487,071/- along with default surcharge under section 44 of Act and penalties of Rs.41,461,425/- under serial No. 3 and 11 (A) of the Act. The Commissioner Appeals, SRB while linking the appeal with the outcome of the judgment of the Supreme Court of Pakistan in CPLA No. 705 of 2021 has also linked the payment of default surcharge with such judgment of the Supreme Court of Pakistan and in view of the admission of the appellant recorded in Para 5.3 of the OIA waived the penalties imposed in the OIO.

13. The appellant has agreed to pay the SST subject to the decision of Supreme Court in Fatima Fertilizer case except item appearing on Serial No. 5, 8 and 9 of the Table appearing on page 2 of the OIA.



14. The Commissioner (Appeals) is vested with the discretion to impose or to waive the penalties. The discretion has been properly and legally exercised by Commissioner (Appeals) on reasonable and sound grounds and we do not found any infirmity in the same. The appellant by accepting to pay the SST subject to the outcome of the Fatima Fertilizer Case has shown a compliant attitude and is entitled to concession. The AO imposed excessive penalties without establishing mensrea on the part of the appellant, which was uncalled for.

15. The words used in the second column of section 43 of the Act are "such person shall be liable to pay a penalty" was considered by a DB of Sindh High Court in the case of Assistant Collector, Customs versus Mari Gas, 2003 PTD 818 and held as under:-

*"In view of the wordings of the provision, according to Mr. Moton, if a person fails to pay the duty within the time prescribed by law, he is bound to pay additional duty at the rate specified in the provision. We are afraid we cannot agree with the arguments advanced by Mr. Moton because there is a clear distinction between the phrases "shall pay" and "shall be liable to pay". The use of the phrase "shall pay" makes it mandatory on the person to pay the amount while the use of the words "he shall be liable to pay" gives a discretion to the concerned officer of the Excise Department to impose additional tax or waive it totally if, in his opinion, the circumstances so require. In the case of Shamroze Khan and another v. Muhammad Ameen PLD 1978 SC 89, the Honourable Supreme Court after an exhaustive discussion about the meaning of the phrase "he shall be liable" used in Order VII, rule 21 and Order VIII, rule 12, Civil Procedure Code concluded that the words "shall be liable" does not bind the Court to impose a penalty on a defaulter in every case but vests a discretion in the Court to impose the stated penalty or excuse the defaulter, if the circumstances of the case so require. In the present case, the use of the words "he shall be liable to pay" in section 3-B of the Act also vests in the Adjudicating Officer, the discretion to levy or forego the Additional Sales Tax in case of failure of a person to pay the sales tax keeping in view the facts and circumstances of the case and the reason for non-payment".*

*MOS*

*[Signature]*

16. The above case is related to section 3-B of Central Excise Act, 1944 (levy of additional duty), wherein the phrase used was "if a person failed to pay the duty within the prescribed time, he shall, in addition to the duty payable under section 3, be liable to pay additional duty at the rate of two percent per month. In view of similarity between the languages used in the two provisions the ratio held in the above case can be used in interpreting the provision of the Act.

17. In view of the above discussion we hold that the Commissioner (Appeals), SRB has rightly waived the penalties imposed in the OIO, resultantly the appeal is dismissed. The copy of the Order may be provided to the learned representatives of the parties.

  
(Syed Tahir Raza Zaidi)  
Member Technical

Karachi

Dated: 12.09.2023

Copy for compliance:-

1. The Assistant Commissioner, (Unit-32), SRB, Karachi.
2. The respondent through Authorized Representative.

Copy for information to:-

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

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

  
Certified to be True Copy  
15/09/2023  
REGISTRAR  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD

Order Issued on 15/09/2023

  
Registrar

Order Dispatched on 15/09/2023

  
Registrar