

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

Appeal No.AT-47/2023

M/s. Fluro Chemical Industries,
Plot No.C-49, Sector 35/A,
Korangi Industrial Area,
Karachi. appellant

Versus

The Assistant Commissioner Unit-30,
Sindh Revenue Board,
Karachi. respondent

Abdul Razzak Jatoi, appellant's representative
Ms. Shumaila Yar Muhammad, AC Unit-30, for respondent.

Date of hearing: 10.07.2023

Date of order: 31.07.2023

ORDER

The appellant has assailed the order dated 07.12.2020 passed by the Assistant Commissioner (Unit-30) vide Order-in-Original No.303 of 2020 (*hereinafter referred to as "the Original Order"*) whereby the appellant has been directed to pay default surcharge under section 44 of the Act¹.

2. Per "*the Original Order*", the appellant i.e. M/s. Fluro Chemical Industries, registered as the provider of "Indentor's services" under tariff heading 9819.1200 of the Second Schedule of the Act-2011. It transpired that appellant provided taxable services to M/s. Dubai Islamic Bank and received "Foreign Indenting Commission" to the tune of Rs.47,426,477/- liable to be taxed @

1. The Sindh Sales Tax on Services Act, 2011

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Rs.1,422,794/-, which was not deposited in Sindh Government's head of account No.02384, therefore; show-cause notice dated 20.01.2019 was served upon the appellant to explain as to why the taxed amount may not be recovered and the penalties attracted should not be imposed on him.

3. In response to the above show-cause notice, appellant appeared before Assistant Commissioner (Unit-30) and explained his position for non-payment of due tax. Appellant also submitted 4 CPRs showing payment of taxed amount i.e. Rs.1,422,794/-. Considering the submissions made by appellant, the Assistant Commissioner (Unit-30) opined the act of non-payment of tax as not willful, therefore; he waived the penalties prescribed under serial No.2 and 3 of the Table under section 43 of the Act-2011 but imposed the penalty of default surcharge.

4. Being aggrieved by and dissatisfied with the observations of Assistant Commissioner (Unit-30) to the extent of imposition the penalty of default surcharge, appellant filed instant appeal before Commissioners (Appeals), which has been transferred to this Tribunal under section 59(7) of the Act.

5. Learned counsel for appellant submits that imposition of penalty of default surcharge is bad in law and on facts. He argued that learned Assistant Commissioner himself observed that non-payment of tax was not willful, therefore; he waived the penalties prescribed under serial No.2 and 3 of the Table under section 43 of the Act-2011. Learned counsel argued that in such circumstances imposition of penalty of default surcharge

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is not in accordance with law. He prayed that penalty of default surcharge may be waived.

6. Ms. Shumaila Yar Muhammad, AC Unit-30 vehemently denied the arguments advanced by learned counsel for appellant. She submits that word "shall" has been used in section 44 of the Act-2011. She further submits that words "whether willfully or otherwise" denotes that non-existence of willfulness does not exonerate the taxpayer from payment of default surcharge. She supported "the Original Order" and prayed for dismissal of instant appeal.

7. After hearing arguments of both the sides, I have gone through the material available so far. Perusal of record shows that appellant i.e. M/s. Fluro Chemical Industries provided taxable services to M/s. Dubai Islamic Bank and received "Foreign Indenting Commission" to the tune of Rs.47,426,477/- liable to be taxed @ Rs.1,422,794/-, which was not deposited in Sindh Government's head of account No.02384, therefore; show-cause notice dated 20.01.2019 was served upon the appellant to explain as to why the taxed amount may not be recovered and the penalties attracted should not be imposed on him. In response to the above show-cause notice, appellant produced 4 CPRs showing payment of taxed amount i.e. Rs.1,422,794/-. Considering the submissions made by appellant, the Assistant Commissioner (Unit-30) opined the act of non-payment of tax as not willful, therefore; he waived the penalties prescribed under serial No.2 and 3 of the Table under, section 43 of the Act-2011 but imposed the penalty of default surcharge. Appellant has claimed waiver of such default surcharge.

8. Per Assistant Commissioner (Unit-30), words "shall" and "whether willfully or otherwise" used in section 44

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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-30) do not sound convincing and it seems that she has gone through the relevant section in isolation instead of in continuation.

9. The appellant has been charged under the provision of section 44 of the Act-2011. For the ready reference same 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)

10. 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 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.

11. It is the matter of record at the time of passing "the Original Order" the Assistant Commissioner found no liability of tax due. He, furthermore, found non-willingness on the


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part of the appellant in non-payment of tax in time, therefore; he preferred to waive penalties prescribed under serial No.2 and 3 of the Table under section 43 of the Act-2011. At the time of passing "the Original Order" there existed no liability of tax due, therefore; no penalty was imposed under section 43 of the Act-2011. In such circumstances, there remains no justification in imposing the penalty of "default surcharge".

12. In view of the above discussion, instant appeal is hereby allowed and the penalty of "default surcharge" imposed vide "the Original Order" stands set-aside. The copy of this order may be provided to the learned representatives of the parties.


31/7/23
(ALIA ANWER)
Member Judicial
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Sindh Revenue Board.

Karachi;
Dated: 31.07.2023.

Copy supplied to:-

1. The appellant through authorized representative,
2. The Assistant Commissioner (Unit-30), SRB, Karachi,
3. The Commissioner (Appeals), SRB, Sindh,
4. Office File, and
5. Record file.

Certified to be True Copy


03-08-2023
REGISTRAR
APPELLATE TRIBUNAL
SINHDH REVENUE BOARD

Order Dispatched on

03-08-2023


Registrar

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Order Issued on

03-08-2023


Registrar