

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

Appeal No.AT-59/2023

M/s. M/3 Technologies Pakistan (Pvt.) Ltd.,
6th Floor, Continental Trade Centre,
Clifton,
Karachi. appellant

Versus

1. The Commissioner (Appeals-I),
Sindh Revenue Board,
Karachi.
2. The Assistant Commissioner (Unit-01),
Sindh Revenue Board,
Hyderabad. respondents

Mr.Ammar Athar, advocate for appellant
Mr.Imran Ali, AC (Unit-01), for respondent.

Dates of hearing: 22.05.2023, 02.08.2023 and 16.08.2023
Date of order: 28.09.2023

ORDER

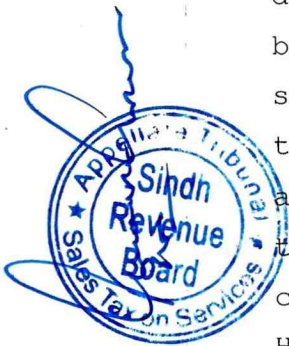
The appellant has assailed the order dated 19.04.2023 vide Order-in-Appeal (hereinafter referred to as "*the first Appellate Order*") No.98/2023 passed by the Commissioner (Appeals-I) in Appeal No.454/2022 whereby the penalty amounting to Rs.524,085/- imposed, in terms of S.No.3 of the Table under section 43 of the Act, 2011¹, by the Assistant Commissioner (Unit-01) vide



¹ The Sindh Sales Tax on Services Act, 2011.

Order-in-Original No.2293/20221 (hereinafter referred to as "the Original Order") dated 25.10.2022, has been reduced to the extent of 25% and the penalty of default surcharge under section 44 of the Act, 2011 has been maintained.

2. Learned counsel for appellant submits that impugned order is bad in law and on facts. He argued that tax collected from appellant was not being deposited by M/s. Telecom (service provider) with the department due to which adjustment of input tax was being disallowed by the system, while filing e-return by the appellant. He argued that to handle the situation, appellant managed to re-pay the amount of tax (which had already been charged by service provider) with intention to get it adjusted in future, but this practice caused a cash flow resistance to the company, which the appellant had to stop. Learned counsel argued that having no other alternate, appellant filed C.P. bearing No.3239/2020 whereby the department was restrained from penalizing the appellant for non-filing of return in time. Learned counsel argued that after settlement of dispute between M/s. Telecom and department, appellant filed all pending returns along with tax due but department imposed penalty on such late deposit of tax. He contended that appellant's filing of return and payment of tax is dependent upon filing of return so also deposit of tax by M/s. Telecom, the service provider, and entire situation was beyond the control of appellant, therefore; late payment of tax does not make the appellant liable to any penalty. Learned counsel argued that by penalizing appellant, department has committed contempt of court of the order passed by the Hon'ble High Court. Learned counsel further raised objection to

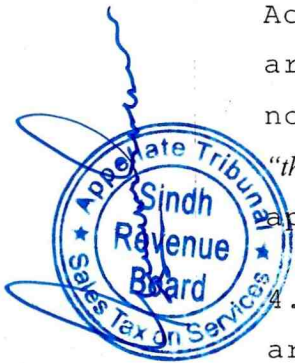


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imposition of default surcharge. He argued that words "whether willfully or otherwise" are used in same meaning. Learned counsel submits that since there was no *mens rea* in late payment of tax, default surcharge cannot be imposed. He prayed that instant appeal may be allowed and the penalty imposed upon appellant may be waived upto 100%.

3. Assistant Commissioner (Unit-01) vehemently opposed the arguments advanced by learned counsel for appellant. He submits that appellant has been charged on account of late payment of tax rather than for non-filing of return in time. He argued that Hon'ble High Court restrained department from penalizing the appellant to the extent of non-filing of return. He contended that since there were no restriction by the Hon'ble High Court, for penalizing the appellant, for late payment of tax, department has not committed any contempt of court. Assistant Commissioner (Unit-01) argued that words "whether willfully or otherwise" denote that non-existence of willfulness does not exonerate the taxpayer from payment of default surcharge. He submits that word "shall" has been used in section 44 of the Act-2011, which has to taken as mandatory. He further argued that these two words are used in contrast and not analogously. He supported "*the Original Order*" as well as "*the first Appellate Order*" and prayed for dismissal of instant appeal.

4. After hearing arguments of both the side, following are the points for determination before this Tribunal;



A JUDICIAL
MEMBER
REVENUE BOARD

1. Whether penalty imposed under Sr.3 of the Table under section 43 of the Act, 2011 upon the appellant is justified?
2. Whether penalty imposed under section 44 of the Act, 2011 upon the appellant is justified?
3. What should the order be?

POINT No.1:

5. I have heard both the sides at length and have also perused the record. Before proceeding further, I feel necessary to reproduce herein below the relevant provisions of the Act, 2011 and the Rules, 2011;

Section 2(71) "registered person" means a person who is registered or is liable to be registered under this Act or any other person or class of persons notified by the Board in the official Gazette.

Provided that a person liable to be registered but not registered under this Act shall not be entitled to any benefit available to a registered person under any of the provisions of this Act or the rules made thereunder.

Section 3. Taxable Service.--(1) A taxable service is a service listed in the Second Schedule to this Act, which is provided:--

(a) by a registered person from his registered office or place of business in Sindh;

(b) in the course of an economic activity, including in the commencement or termination of the activity.

*Explanation.--*This sub-section deals with services provided by registered persons, regardless of whether those services are provided to resident persons or non-resident persons.

(2) A service that is not provided by a registered person shall be treated as a taxable service if the service is listed in the Second Schedule to this Act and is provided to a resident person by a non-resident person in the course of an economic activity.

*Explanation.--*This sub-section deals with services provided by non-resident persons to resident persons whether or not the said resident person is an end consumer of such services.

(3) For the purposes of sub-section (2), where a person has a registered office or place of business in Sindh and another outside Sindh, the registered office or place of business in Sindh and that outside Sindh shall be treated as separate legal persons.

(4) The Board may, by notification in the official Gazette, prescribe rules for determining the conditions under which a particular service or class of



services will be considered to have been provided by a person from his registered office or place of business in Sindh.

Section 9. Person liable to pay tax.--(1) Where a service is taxable by virtue of sub-section (1) of section 3, the liability to pay the tax shall be on the person providing the service.

(2) Where a service is taxable by virtue of sub-section (2) of section 3, the liability to pay the tax shall be on the person receiving the service.

(3) Notwithstanding anything contained in sub-sections (1) and (2), Board may, by a notification in the official Gazette, specify the services or class of services in respect of which the liability to pay tax shall be on the person providing the taxable service, or the person receiving the taxable service or any other person.

(4) Nothing contained in sub-sections (1) and (2) shall prevent the collection of tax from a different person if that person is made separately or jointly or severally liable for this tax under section 18.

Section 13. Special procedures and tax withholding provisions.--(1) Notwithstanding anything contained in this Act, the Board may, by notification in the official Gazette, prescribe special procedure for the payment of tax, valuation of taxable services, registration, record keeping, invoicing or billing requirements, returns and other related matters in respect of any service or class of services and subject to such limitations and conditions as may be specified in the notification.

(2) Notwithstanding anything contained in this Act, the Board may, by notification in the official Gazette, require any person or class of persons, whether registered or not, to withhold full or part of the tax charged from or invoiced to such person or class of persons on the provision of any taxable service or class of taxable services and to deposit the tax, so withheld, with the Government, within such time and in such manner as may be specified in the notification.

Rule 26. Levy and collection of sales tax.--A service provider, providing or rendering taxable services to customers, clients or members or the recipient of the service shall charge, collect and pay sales tax at the rate, as prescribed in Second Schedule of the Act.

Rule 27. Filing of return and deposit of sales tax.--(1) A service provider, providing or rendering taxable services shall file return in accordance with the procedure laid down in Chapter III of these rules read with section 30 of the Act.

(2) The tax due shall be deposited in the designated branches of National Bank of Pakistan or any other designated banks under the relevant head "B-02384--Sindh Sales Tax on Services", in the prescribed manner.

(3) In case a service is provided or rendered over a period of time and bill is to be issued on completion of service, time of supply shall be the time when service is completed or the payment, or consideration partly or fully in money, in respect thereof is received, whichever is earlier.



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(3) Where a person or class of persons is required to withhold or deduct full or part of the tax on the provision of any taxable service or class of taxable services and either fails to withhold or deduct the tax or, having withheld or deducted the tax, fails to deposit the tax in the Government treasury, such person or class of persons shall be personally liable to pay the amount of tax and the default surcharge thereon in the prescribed manner.

(Underlining is emphasized)

6. Bare reading of above provisions makes it clear that whenever a registered person, in the course of an economic activity, provides or renders taxable service, he shall be liable to charge/ collect sales tax at the prescribed rate, from the service recipient. Said registered person is further liable to file return in compliance of section 30 of the Act so also deposit, the amount so charged/ collected, in the National Bank of Pakistan under the relevant head "B-02384-Sindh Sales Tax on Services". Failure to transmit to the Government treasury, the amount of tax so collected, makes the service provider liable to pay the amount of tax and the default surcharge. Law, however; does not cater any solution to the service recipient to deal with such a situation nor does it provide any penalty upon the service recipient.

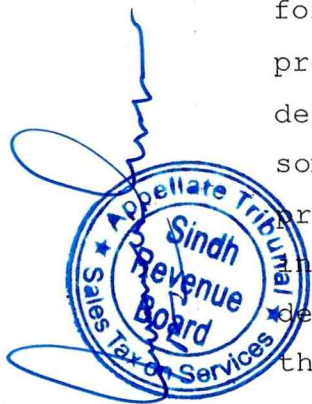
7. It is an admitted position that M/s. Telecom, while providing services to the appellant, charged/ deducted from appellant the tax but on account of their dispute with the department, M/s. Telecom did not file return. Ultimately the amount of tax so charged/ collected from the appellant did not come on record nor did it reach the Government treasury in its account i.e. "B-02384--Sindh Sales Tax on Services". This caused disallowance of input tax adjustment to the appellant.



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8. The provisions of Act, 2011 are tax payer friendly, especially section 23, which provides both sides a forum to get resolved any of the issues coming under the way of compliance of the subject provision of law. Record reveals that in compliance of section 23 of the Act, 2001, department issued show-cause notice dated 29.09.2021. To clarify its position, appellant brought on record the above facts but same were not considered by the Assessing Officer nor by the Commissioner Appeals and the penalties so imposed upon appellant, were maintained.

9. There is no cavil to the proposition that *mens rea* is the basic ingredients to impose any of the penalties prescribed under the law. While attributing *mens rea* against any person, great responsibility is cast upon the Assessing Officer to establish the same either on the face of record, or through some concrete and undisputed material, convincing enough to believe existence of *mens rea*. In the absence of any factual or lawful basis, bald allegation of *mens rea*, cannot be considered as a sole ground for penalizing a taxpayer for mere non-compliance of any of the statutory provision. Term "*mens rea*" refers to the element of deliberate negligence or willful default which is something more than mere non-compliance of statutory provisions. *Mens rea*, being a state of mind, does not exist in any tangible form, therefore; its existence has to be deduced and inferred from the facts and circumstances of the case and if some hints to that effect are available, same would validly constitute the element of "*mens rea*". To discharge such burden, the department has to bring on



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record that non-compliance of statutory provision is committed deliberately to defraud the Government. Imposition of penalty can only be treated as legal when evasion or non-payment of tax by the taxpayer is willful or mala fide. "The Original Order" dated 25.10.2022 so also "the first Appellate Order" dated 19.04.2023 do not show any event or series of acts on the basis of department opined the existence of "mens rea". I do not even find therein any allegation against the appellant in respect of deliberate or willful default with intention to defraud the Government. There is no cavil to the proposition that imposition of penalty can only be treated as legal when evasion or nonpayment of tax by the taxpayer is willful or mala fide. In case the party did not act mala fide with intention to evade the tax, imposition of penalty is not justified. In this regard I am guided with the principle laid down in the case of COLLECTOR OF CUSTOMS, SALES TAX AND CENTRAL EXCISE APPEAL, KARACHI versus Messrs NIZAM IMPEX (PVT.) LTD. (2014 PTD 498), wherein it was held as under;

"9. It is well settled law that provisions of Section 34 are attracted when there is a deliberate failure to pay the sales tax. In the present reference the perusal of the show-cause notices, order-in-original and order in appeal reveal that there was no allegation against the present respondent in respect of deliberate or willful default, or to defraud the Government. We are, in agreement with the learned counsel for respondent that ample law is available on the point that imposition of penalty was illegal where the evasion of duty was not willful as held by the Hon'ble Supreme Court of Pakistan in the case of D.G. Khan and others. Further reliance is placed upon the case of Messrs Lone China (Pvt.) Ltd. v. Additional Secretary, Government of Pakistan decided by the Hon'ble Lahore High Court, reported as PTCL 1995 CL 415 wherein it has been held that if the party did not act mala fide with intention to evade the tax, the imposition of penalty of additional tax and surcharge was not justified. In another case Additional Collector Sales Tax Collectorate of Sales Tax Multan v. Messrs Nestle Milk Pak Ltd., Kabirwala and another, 2005 PTD 1850, it has been held that in such circumstances the Tribunal has discretion to waive/remit additional tax and penalties.



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10. Thus in the light of case-law discussed above it is clear that imposition of penalty or additional tax under section 34 is not mandatory and the authorities have discretion to allow such concession. The important issue which needs to be examined is as to whether the evasion or nonpayment of tax by the respondent was willful or mala fide.

11. As mentioned earlier, no where it is case of department that the respondent had mala fide intention, or that default was willful and that too to defraud the government. In such circumstances when the imposition of sales tax has been made, the demand of additional tax appears to be harsh and unjustified.

12. As a sequel of above discussion, we are of the considered view that the Tribunal has rightly held that the Department has failed to show that the default was willful or to defraud the Government, therefore, has justifiably remitted the payment of additional tax."

10. Such principle was followed in the case of ASSISTANT COMMISSIONER, SRB, KARACHI versus Messrs FALCON-I (PVT.) LTD., (2020 PTD (Trib.) 141) wherein it has been held that;

"17. The imposition of penalty is quasi criminal and presence of mens rea is mandatory as held in the reported judgment of Commissioner Income Tax v. Habib Bank Limited 2007 PTD 901 (DB SHC). It has been held that "13. There can be no cavil to the arguments of the learned counsel for the respondent that the penal provisions under the Income Tax Act are quasi-criminal in nature and mandatory condition required for the levy of penalty under section 111 is the existence of mens rea and, therefore, it is necessary for the department to establish mensrea before levying penalty under section 111. There is plethora of judgments of the superior courts of India and Pakistan from the very inception of Income Tax Act, 1922, on this point"..... In the reported judgment of Pakistan through Secretary Ministry of Finance v. Hard Castle Waud (Pakistan) PLD 1967 SC 1 it has been held that even in statutory offence the presumption is that mens rea is an essential ingredient for imposing penalty."

It is the matter of record that the tax due towards appellant was out of his pocket, after having been deducted by the service provider. Non-compliance of section 13(3) of the Act, 2001 by the service provider caused problem to the appellant due to which he could not file its subsequent return and his adjustment of



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input tax was disallowed. Apparently there seems to be no intention on the part of appellant to evade the tax. In such circumstances imposition of penalty imposed in terms of S.No.3 of the Table under section 43 of the Act, 2011 upon the appellant is unjustified, hence; this point is answered in negative.

POINT No.2:

12. Learned counsel of appellant argued that word "otherwise" used in section 44 of the Act, 2001 has not been defined in the Act, 2011, therefore, it has to be given analogous meaning to word "willful" which is used in the said section in same sense. He argued that term willful refers to deliberate non-compliance of any of the provisions of the Act, 2011. Per learned counsel maxim '*noscitur a sociis*', emphasizes upon construing same meaning as of words or phrases used in the same line, therefore; word "otherwise" should be read in the context of willful. In support of his arguments learned counsel placed reliance upon PLD 1993 Karachi 656, 2004 PTD 1179 and 2017 PTD 2456.

13. Such argument does not sound appealing. In my humble view maxim '*noscitur a sociis*' is applicable where meaning of any word is ambiguous. It is, however; not applicable where meaning of a word or phrase is clear and unambiguous. With all due respect, regard and full agreement to the principle laid down in the case of Muhammad Amjad² I am of the humble view that said case law is of no help to the appellant being distinguishable to the facts of instant case. In the cited *supra* case,

² Muhammad Amjad versus Government of Pakistan and others (PLD 1993 Karachi 656)

section 43-B of the Merchant Shipping Act was the point under discussion, however; instant matter pertains to section 44 of the Act, 2011. For ready reference both the provisions are reproduced here;

Section 43-B of Merchant Shipping Act, 1923

43-B.--(1) Notwithstanding anything contained elsewhere in this Act, the shipping master may suspend, cancel or confiscate the certificate of discharge of any seaman who is certified under subsection (1) of section 107 to have deserted His ship or is found guilty of smuggling, theft, misbehaviour or such other offence as may, in the opinion of the shipping master, make him unsuitable for employment on board a ship.

- (2)
- (3)

Section 44 of the sindh Sales Tax on Services Act, 2011

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)

(Underlining is emphasized)

14. Bare reading of above provisions shows a clear difference. In section 43-B of Merchant Shipping Act, 1923 words "smuggling, theft, misbehaviour or such other offence", have been used in same company, however; words "whether willfully or otherwise" are used in contrast in section 44 of the Act-2011. Same is the ratio *decidendi* in the case of Muhammad Amjad, which reads as under;



"The main question, that requires consideration, is whether the misconduct alleged against the petitioners tantamounts to "misbehaviour" as contemplated by section 43-B of the said Act. The said word has not been defined by any of the provisions of the said Act but Mr. Kazi Faiz Isa has referred to the meaning of the said term given in the Ballentine's Law Dictionary, according to which "misbehaviour" means "improper conduct, intentional wrongdoing rather than mere error in judgment Smith v. Cutler (NY) 10 Wend 589." Similar meaning is given in Corpus Juris Secundum, according to which the word "misbehaviour" means "ill-conduct; improper or

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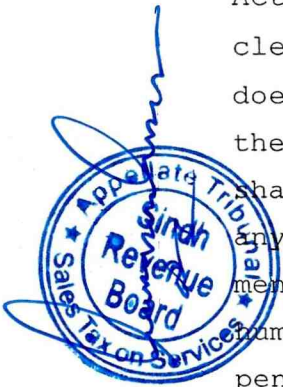
unlawful behaviour. It has been held to be synonymous with 'misconduct.'" Learned counsel for the petitioners has also invited our attention to the meaning of the word "misconduct" given in Corpus Juris Secundum. The said word implies "bad or wrong behaviour, improper behaviour, unlawful behaviour or conduct or improper or wrong conduct". In our opinion since the word "misbehaviour" has been used in the company of the words "smuggling" and "theft", it must also take its colour from the said words. Maxwell on the Interpretation of Statutes, Twelfth Edition at page 289 says:

"Where two or more words which are susceptible of analogous meaning are coupled together, noscitur a sociis. They are understood to be used in their cognate-sense. They take, as it were, their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general."

Similar observations appear in "The Interpretation of Statutes and General Clauses Act" by N.S. Bindra, Second Edition, at page 189. In Crawford's Statutory Constructions, 1940 Edition at page 325, the rule has been stated thus:

"In order to ascertain the meaning of any word or phrase that is ambiguous or susceptible to more than one meaning, the Court may properly resort to the other Words with which the ambiguous word is associated in the statute. Accordingly, if several words are connected by a copulative conjunction, a presumption arises that they are of the same class, unless, of course, a contrary intention ' is indicated. On the other hand, the maxim 'noscitur a sociis', is not to be applied where the meaning of a word or phrase is clear and unambiguous. Nor is it to be used so as to render general words useless. Like all other principles of construction, it is to be used only as an instrumentality for determining the intent of the legislature where it is in doubt."

15. So far as the applicability of section 44 of the Act, 2011 in the instant matter is concerned, it is clear from the said provision 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. In my humble view 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 denotes that default surcharge should be coupled with (in addition




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to) the liability of tax due and any penalty imposed under section 43 of the Act-2011, meaning thereby that default surcharge under section 44 of the Act, 2011 shall only be imposed when any of the penalties have been imposed upon tax payer on account of existence of tax liability, not otherwise. Admittedly no tax is due towards appellant. As discussed in preceeding point, since appellant is not liable to pay penalty, there remains no justification in imposing the penalty of "default surcharge", hence; this point is answered in negative.

POINT No.3:

16. With the above observations, instant appeal is hereby allowed. Resultantly, impugned orders i.e. "the first Appellate Order" dated 19.04.2023 and "the Original Order" dated 25.10.2022 stand set-aside. Let the copy of this order be provided to the learned representatives of the parties.


(ALIA ANWER)
Member Judicial,
Appellate Tribunal,
Sindh Revenue Board.

Karachi;
Dated: 28.09.2023.

Copy supplied to:-

The appellant through authorized representative,
The Assistant Commissioner (Unit-01), SRB, Karachi,
The Commissioner (Appeals-I), SRB, Sindh,
Office File, and
Record file.

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28/09/2023
REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order issued on

28/09/2023


Registrar

Appellate Tribunal, SB-II, Sindh Revenue Board.

Order Dispatched on

28/09/2023


Registrar