

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

Appeal No.AT-75/2023

M/s. Friends Marriage Lawn,
Jamshoro Road,
Opposite Honda Palace,
Hyderabad.

..... appellant

Versus

1. The Commissioner (Appeals-I),
Sindh Revenue Board,
Karachi.
 2. The Assistant Commissioner Unit-34,
Sindh Revenue Board,
Karachi.
- respondents

Mr. Rehmat Ali Shaikh, advocate for appellant
Ms. Komal Laghari, AC Unit-34, for respondent.

Date of hearing: 02.08.2023 & 21.08.2023
Date of order: 29.08.2023

ORDER

The appellant has assailed the order dated 12.05.2023 vide Order-in-Appeal (*hereinafter referred to as "the first Appellate Order"*) No.119/2023 passed by the Commissioner (Appeals-I) in Appeal No.345/2018 whereby the penalty amounting to Rs.230,000/-, in terms of S.No.2 of the Table under section 43 of The Act, 2011¹, imposed by the Assistant Commissioner (Unit-34) vide Order-in-Original (*hereinafter referred to as "the Original Order"*) dated 04.12.2018, has been reduced to Rs.172,000/-.

1. The Sindh Sales Tax on Services Act, 2011

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2. Learned counsel for the appellant submits that impugned orders are bad in law and on facts. He contended that Learned Commissioner (Appeals-I) has failed to consider the fact that appellant has been condemned unheard. He argued that no notice prior to passing exparte order has been issued upon the appellant. Learned counsel argued that impugned orders i.e. "the first Appellate Order" and "the Original Order" are passed against the principle of natural justice enshrined in the Constitution². He prayed for setting-aside both the impugned orders.

3. Assistant Commissioner (Unit-34) vehemently opposed the arguments advanced by learned counsel for appellant. She submits that appellant was duly served with the show-cause notice for his appearance on 17.08.2018, 24.09.2018 and 14.11.2018 to explain his position as to why penal action under clause 2 of the table under section 43 of the Act, 2011 should not be taken against him. She submitted that appellant did not respond to such notices and preferred to stay away from the proceedings. Having no other alternate, the then Assistant Commissioner passed "the Original Order" which has been affirmed by learned Commissioner Appeals in the "the first Appellate Order". She contended that the appellant has been allowed reduction of penalty upto 25% by learned Commissioner Appeals. On query regarding production of proof of delivery of subject notices, the Assistant Commissioner (Unit-34) showed her inability to produce the same on account of the matter being old-one. She, however; prayed for dismissal of instant appeal.

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

2. The Constitution of Pakistan, 1973

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1. Whether appellant was duly served with the show-cause notice prior to passing "the Original Order"?
2. Whether "the Original Order" suffers from any illegality or material irregularity requiring interference by this Tribunal?
3. Whether "the first Appellate Order" suffers from any illegality or material irregularity requiring interference by this Tribunal?
4. What should the order be?

POINT No.1:

5. 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 [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 [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)

6. Bare reading of the above provision categorically shows that, prior to passing "the Original Order", the Assessing Officer **MUST** give notice to the tax payer. There is no concept of fair trial without giving an opportunity of hearing and there is plethora of judgments preserving this fundamental right built around the legal maxim of *audi alteram partem*. In the case of *Altaf Ibrahim Qureshi v. Aam Log Ittihad*³ the Hon'ble Supreme Court

3. PLD 2019 Supreme Court 745



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held that right of hearing of a party to a *lis* is one of the fundamental principles of jurisprudence which is guaranteed by Article 10-A of the Constitution as assurance of fair trial and due process of law. Once the Assistant Commissioner comes to the conclusion that the tax payer has committed non compliance of any of the provisions of the Act, 2011, fair trial process as enshrined in Article 10-A of the Constitution is to be followed.

7. There is no denial to the legal proposition that show-cause is not a casual correspondence. Its purpose is to put the person on notice about the allegations for which the authorities intend to proceed against him and to give an opportunity to explain his position. The main object of issuance of a show-cause notice is to intimate the concerned party besides indicating him about nature of allegations, contravention and penal action intended to be taken against him, therefore; it is mandatorily required to be served upon the tax payer under section 75 of the Act, 2011, which reads as under;

75. **Service of orders and decisions.**--(1) Subject to this Act, any notice, order or requisition required to be served on an individual for the purposes of this Act shall be treated as properly served on the individual if:--

- (a) personally served on the individual or, in the case of an individual or under a legal disability the agent of the individual;
- (b) sent by registered post or courier service to the individual's usual or last known address in Pakistan; or
- (c) served on the individual in the manner prescribed for service of a summons under the Code of Civil Procedure, 1908 (No. V of 1908).

(2) Subject to this Act, any notice order or requisition required to be served on any person, other than an individual to whom



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sub-section (1) applies, for the purposes of this Act, shall be treated as properly served on the person if:--

- (a) personally served on the agent of the person;
- (b) sent by registered post or courier service to the person's registered office or address for service of notices under this Act in Pakistan or where the person does not have such office or address, the notice is sent by registered post to any office or place of business of the person in Pakistan; or
- (c) served on the manner prescribed for service of a summons under the Code of Civil Procedure, 1908 (No. V of 1908).

8. Section 75 of the Act, 2011 provides procedure for service of notice, order or requisition on a person named therein either in person, through agent, by registered post, by courier service or in the manner provided for service of a summons under the Code of Civil Procedure. This section is required to be read in juxtaposition of section 27 of the General Clauses Act, 1897 which provides that where ever in a Provincial or a Central Statute the expression "served by post" or any other similar expression is used, then "the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post a letter containing the document". This section provides for raising of a presumption that unless contrary is proved, the service of addressee shall be deemed to have been effected. For ready reference section 27 of the General Clauses Act, 1897 is reproduced here;

"27. Meaning of service by post.---Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."



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9. No doubt, under section 27 of the General Clauses Act, 1897 there is a presumption that the addressee has received the letter sent by registered post but such presumption is rebuttable and it is open to the party concerned to raise objection before the Court to deny the presumption by stating on oath that he never received any notice.

10. It is well settled principle that when law specifies a particular procedure then it is obligatory for the functionary of the State to adhere to the same and comply with it in all respects. Even otherwise, if the law does not provide a hearing to a person before condemning him or deciding the matter in which he becomes an aggrieved party, this principle shall be considered to be as a part of law. Any negligence, failure or omission to follow such procedure invalidates the proceedings on account of which whole superstructure raised on such defective foundation automatically crumbles. In Tax jurisprudence initial burden to prove lies on the department, be it is of the service or the plea raised in show-cause notice. In view of the above I am fortified with the principle laid down in the case of MUHAMMAD BASHIR and others versus ABBAS ALI SHAH (2007 SCMR 1105), wherein it has been held that;

"12. While there is no cavil with the proposition that in terms of Article 129 of the Qanun-e-Shahadat Order read with section 27 of the General Clauses Act, a presumption of service does arise if a notice sent through registered covered acknowledgement due is received back with the endorsement of "refused" by the postal authorities but if the addressee appears in Court and makes a statement on oath disowning receipt of notice, the presumption under the afore-referred provision shall stand rebutted and the onus is on the party which is relying on such an endorsement to prove the same by producing the postman who made the endorsement."

5. Syed Allah Dost v. Haji Muhammad Alam and others PLD 1987 Quetta 235

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11. Admittedly department remained failed to bring on record any document showing valid service of show-cause notice upon appellant. Non-production of proof of service leads to inference that no notice was ever issued upon appellant prior to passing the exparte order. While forming such view I am guided with the principle made in the case of MUNICIPAL COMMITTEE, GUJRAT through Administrator versus DEPUTY ADMINISTRATOR, EVACUEE TRUST PROPERTY, GUJRAT and 3 others (2004 MLD 1170) wherein it has been held that;

"It is settled principle of law that an ex parte decree, in spite of service of notice cannot be passed unless service effected through summons as the law laid down by this Court to Sanaullah Gill v. Mst. Elveena (PLD 1980 Lah. 668). It is also settled principle of law that where service of summons is dented and Process Server has nowhere stated in his report that copy of the summons is delivered to the defendants, presumption would be that defendant is not properly served. In arriving to this conclusion, I am fortified by the law laid down in Syed Mazhar Ali Shah v. Shah Muhammad (1990 MLD 230). Service by post generally would be that summons has duly been served on the addressee by registered post in view of Article 129(e) Qanun-e-Shahadat Order, 1984 read with section 27 of the General Clauses Act, 1897 but this presumption is rebuttable as the law laid down in the following judgments:--

Pehalwan Khan v. Mrs. Najma Mujtaba (1986 CLC 1735); Khair Muhammad v. Akhtar Hussain (1983 CLC 302); L.C. De Souza, Cawnpore, In re Civil Miscellaneous Case No.714 of 1931 (AIR 1932 Allahabad 374); Emirate Bank International v. Dost Muhammad Cotton Mills (1993 MLD 54); Muhammad Sulaiman Malik and another v. Royal Trust Corporation of Canada and others (1979 CLC 48) and Mst. Afzal Begum v. Y.M.C.A. through General Secretary (PLD 1979 SC 18).

As mentioned above, in the present case, service of the petitioner-defendant is not effected in terms of Order 5 of C.P.C. read with section 21 of Evacuee Trust Properties (Management and disposal) Act, 1975, therefore, impugned order is not valid as the law laid down by the Superior Courts in the following judgments:--

University of Dacca v. Zakir Ahmad (PLD 1965 SC 90) and Pakistan Chrome Mines v. The Enquiry Officer (1983 SCMR 1208).

It is settled principle of law that principle of natural justice must be read in each and every Statute unless and until it is prohibited by the wording of the statute itself as per law laid down by the Honourable Supreme Court in Commissioner of Income Tax v. Fazal-ur-Rehman (PLD 1964 SC 410).



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In view of what has been discussed above, the impugned order is set aside and the Constitutional petition is accepted. It is settled principle of law that when the basic order is without lawful authority, then superstructure shall fall on the ground automatically as the law laid down in Crescent Sugar Mills and Distillery Ltd. Faisalabad v. Central Board of Revenue, Islamabad and 2 others (PLD 1982 Lah. 1), and Yousaf Ali v. Muhammad Aslam Zia and 2 others (PLD 1958 SC 104), therefore, notification dated 3-6-1999 is also set aside. Since the basic order is set aside on technical point, therefore, parties are directed to appear before respondent No.2 on 6-5-2004, who is directed to decide the case afresh as expeditiously as possible. In case the parties fail to appear before respondent No.2 on the said date then respondent No.2 is well within his right to proceed in accordance with law."

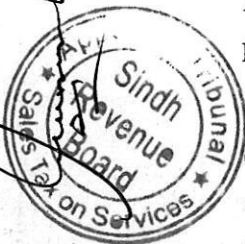
12. On the basis of above discussion I am of the considered view that appellant was not duly served with show-cause prior to passing "the Original Order", hence; this point is answered in negative.

POINTS No.2 & 3:

13. In view of the findings on point No.1, I am of the considered view that non-compliance of mandatory provision of section 23(2) of the Act, 2011 make the entire proceedings and superstructure built thereon as illegal, requiring interference by this Tribunal, hence; these points are answered in affirmative.

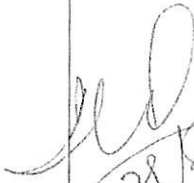
POINT No. 4:

14. In view of the above discussion instant appeal is hereby allowed. Resultantly, both the impugned orders i.e. "the first Appellate Order") dated 12.05.2023 and the "the Original Order" dated 04.12.2018 stands set-aside. The matter is accordingly remanded to the Assistant Commissioner (Unit-34) to initiate proceedings afresh after according the appellant



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with an opportunity to plead his defence. The copy of this order may be provided to the learned representatives of the parties.

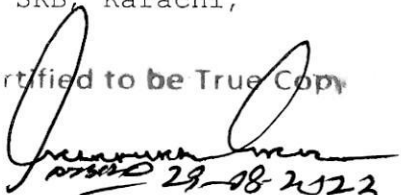

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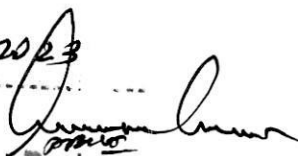
Karachi;
Dated: 29.08.2023.


Copy supplied to:-

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

Certified to be True Copy


29-08-2023
REGISTRAR
APPELLATE TRIBUNAL
SINDH REVENUE BOARD

Order Dispatched on 29.08.2023

Registrar

Order issued on 29-08-2023

Registrar