

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

Appeal No.AT-83/2023

M/s. Khamiso Khan & Co.,  
D-5, Bhatti House,  
Ward # 06, Aziz Bhatti Road,  
Gharibabad, Badin. .... appellant

Versus

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

Ghulam Murtaza Khan, advocate for appellant  
Mr.Asif Channa, AC (Unit-34), for respondent.

Date of hearing: 07.08.2023 and 17.08.2023

Date of order: 28.09.2023

ORDER

The appellant has assailed the order dated 03.05.2023 vide Order-in-Appeal (*hereinafter referred to as "the first Appellate Order"*) No.106/2023 passed by the Commissioner (Appeals-I) in Appeal No.47/2022 whereby the penalty, amounting to Rs.90,000/- imposed, in terms of S.No.2 of the Table under section 43 of the Act, 2011<sup>1</sup>, by the Assistant Commissioner (Unit-34) vide Order-in-Original

1. The Sindh Sales Tax on Services Act, 2011.

Appellate Tribunal, SB-II, Sindh Revenue Board.

No.118/2022 (hereinafter referred to as "the Original Order") dated 25.01.2021, has been reduced to the extent of 50% making the same as Rs.45,000/-.

2. Learned counsel for appellant submits that impugned order is bad in law and on facts. He argued that impugned order is passed in haste against the principle of natural justice and fair play. Learned counsel argued that since appellant has filed subject returns prior to passing "the Original Order" no penalty can be imposed on him. He argued that it is the sole responsibility of department to establish *mens rea*. He argued that late filing of return has not caused any loss to the Government exchequer and penalty imposed upon appellant is unjustified. Learned counsel prayed that instant appeal may be allowed and the penalty imposed upon appellant may be waived upto 100%.

3. Assistant Commissioner (Unit-34) vehemently opposed the arguments advanced by learned counsel for appellant. He submits that on account of non compliance of section 30 of the Act, 2011 show-cause notice was served upon the appellant. He contended that appellant replied to such show-cause notice contending therein that on account of unavoidable circumstances, he could not file return for the subject tax periods. He argued that hearing of case was severally fixed providing appellant the opportunity to explain those unavoidable circumstances but neither he appeared nor did he send any of his representatives. Assistant Commissioner (Unit-34) argued that mere stating "unavoidable circumstances" does not fulfill the requirement of law. He contended that appellant never mentioned in his reply



to show-cause notice the details of purported unavoidable circumstances. Assistant Commissioner (Unit-34) supported the impugned 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;

1. Whether appellant is liable to pay any penalty for late filing of returns for the subject months? If yes, to what extent?
2. What should the order be?

**POINT No.1:**

5. Record reveals that Assistant Commissioner (Unit-34) issued show-cause upon the appellant on account of non-compliance of section 30 of the Act, 2011 which was replied by the appellant. Although appellant pleaded that on account of some unavoidable circumstances he could not file return in time but details of such unavoidable circumstances is nowhere mentioned in his reply to show-cause notice. Perusal of reply to show-cause notice shows that appellant has taken the plea of COVID pandemic due to which he could not file returns for subject period in time. Such argument hardly appeals a prudent mind. It is publically known fact that country faced strict lock-down situation since March 2020 till August 2020 and after that entire situation was under control and all social/ commercial activities were back on track, however; subject matter pertains to the year 2021. There is nothing on record as how and in what manner the COVID pandemic restricted/ refrained



appellant from filing returns for the subject matter by the due date. Record reveals that appellant was provided with opportunity to appear before the assessing officer to explain his position but he preferred not to attend the hearing. In such circumstances, following the rule of presumption provided under Article 129(g) of the Order, 1984<sup>2</sup>, the assessing officer was justified to draw an inference that appellant's appearance before the Assistant Commissioner would have caused an unfavorable result to him, therefore; he abstained himself from appearing before the assessing officer. For ready reference Article 129(g) is reproduced as under;

**129. Court may presume existence of certain facts.** Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume--

- (a) .....
- (b) .....
- (c) .....
- (d) .....
- (e) .....
- (f) .....
- (g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;
- (h) .....
- (i) .....

6. It is the matter of record that appellant filed returns for the tax periods Januray-2021 to July-2021, August 2021 and September-2021 on 17.11.2021, 20.12.2021 and 21.01.2022, respectively i.e. after expiry of due date and law prescribes specific penalty for such a situation.

2. The Qanoon-e-Shahadat Order, 1984



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7. Article 18 of the Constitution provides right to freedom of trade, business or profession but such right is not absolute as the same is subject to law which governs such trade, business or profession, therefore; Article 18 has to be read in juxtaposition with Article 5 of the Constitution which envisages the obedience to law as an inviolable obligation of every citizen. For ready reference Articles 18 and 5 of the Constitution are reproduced as under;

**18. Freedom of trade, business or profession.** Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business:

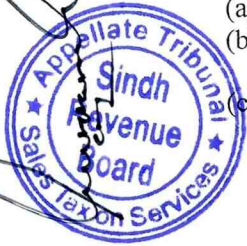
Provided that nothing in this Article shall prevent-

- (a) the regulation of any trade or profession by a licensing system; or  
(b) the regulation of trade, commerce or industry in the interest of free competition therein; or  
(c) the carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons.

**5. Loyalty to state and obedience to Constitution and law.**

- (1) Loyalty to the State is the basic duty of every citizen.  
(2) Obedience to the Constitution and law is the inviolable obligation of every citizen wherever he may be and of every other person for the time being within Pakistan.

8. Appellant is registered with the department i.e. Sindh Revenue Board which is governed under the provisions of Sindh Sales Tax on Services Act, 2011 and Sindh Sales Tax on Services Rules, 2011, therefore; appellant is liable to abide by all the provisions of said Statute. Section 30 of the Act, 2011 requires every registered person to file return by its due date, however; section 43 provides penalties for non-compliance of any of the provisions of the Act, 2011.



Handwritten signature and stamp of the Appellate Tribunal, Sindh Revenue Board.

9. In order to secure fundamental rights, every citizen has to adhere to the relevant Law and Policies issued by the Government, having binding effect under the Doctrine of Sovereignty as held in the case of Mst. Fatima Faryad<sup>3</sup>. There is no cavil to the proposition that rights and duties are two sides of the same coin and they both go side by side. Article 5 of the Constitution categorically envisages the obedience to law and the Constitution. Word "inviolable" used in Article 5 means that it is never to be broken and infringed. Meaning thereby it is the sole responsibility of every citizen to obey law, rather than taking it (the law) for granted. Law provides specific procedure of filing of return and it is not dependent upon the sweet-will of the appellant, which would allow him to file return on any date of his choice/ convenience. To be loyal to the State is the basic duty of all citizens and they have to be obedient to the Constitution and the law, wherever they may be as held in the case of President Balochistan High Court Bar Association<sup>4</sup>.

10. Learned counsel for appellant contended that since appellant has filed subject returns prior to passing "the Original Order" no penalty can be imposed on him. Such argument has no legal force. Section 43(2) of the Act, 2011 is not limited to non-filing of return; rather it deals with late filing of return also. For ready reference said provision is reproduced here;

3. Mst. Fatima Faryad and others v. Government of Punjab and others (2020 CLC 836)
4. President Balochistan High Court Bar Association and others v. Federation of Pakistan and others (2012 SCMR 1784)



43. **Offences and penalties.**--Whoever commits any of the offence described in column (1) of the Table below shall, in addition to and not in derogation of any punishment to which he may be liable under any other law, be liable to the penalty mentioned against that offence in column (2) thereof. The sections referred to in column (3) are meant for illustrative purposes only and the corresponding offence described in column (1) may fall and be prosecuted under other sections of this Act as well.

Offences	Penalties	Section of the Act to which offence has reference
1	2	3
2. Where any person fails to furnish a return within the due date.	Such person shall be liable to a penalty of 10,000 rupees per month or a fraction thereof; provided that if a return is filed within ten days of the due date, a penalty of 300 rupees for each day of default shall be paid.	30



11. Bare reading of above provision shows that on account of either non-filing or late filing of return within the due date, the tax payer shall be liable to the penalty.

12. Term "*mens rea*" refers to the element of deliberate negligence and *mens rea*, being a state of mind, does not exist in any tangible form, therefore; its existence has to be established from the act(s) of the tax payer. It is the matter of record that in reply to show-cause notice appellant pleaded that on account of some unavoidable circumstances, he could not file returns on the due dates but he did not bother to appear before the Assessing Officer to explain such unavoidable circumstances. Appellant's non appearance before the Assessing Officer shows his deliberate negligence towards compliance of law, which itself establish

existence of *mens rea*. In such circumstances, I am of the considered view that appellant is liable to pay penalty for late filing of returns for the subject months.

13. So far as the quantum of penalty is concerned, under the doctrine of proportionality, penalty should correspond to the gravity and it must fit the wrong-done. The quantum of penalty must be determined in consideration of (a) the nature of wrong-done (b) the circumstances in which the wrong was done, (c) the gravity and degree of deliberation shown by the wrong-doer, and (d) and its impact as a whole on society.

14. The crux of the above discussion is that degree of penalty must be proportionate to the wrong committed. Where the wrong was trivial or committed for the first time, mercy and leniency is a rule. In this regard I am guided with the principle laid down in the case of Muhammad Aslam<sup>5</sup>, wherein it was held that;

*"8. ... We may point out that the purpose of sentence is prevention of crime and to discourage the others to turn to crime. It is generally agreed that leniency in the matter of sentence in serious offences is against the object and wisdom of law whereas the rationale behind the deterrent punishment is to eliminate the crime or at least to reduce and discourage the crime in the interest of peaceful atmosphere in the Society. The ultimate purpose of deterrence or the lenient view in the matter of sentence directly or indirectly is the reformation of an individual as well as the Society. The concept of lenient view in the punishment is to bring down an offender to reform himself and restrain from repeating the crime whereas the goal of deterrence in the sentence is reduction in crime in the Society due to fear of law."*

15. On account of late filing of returns for the subject periods, no loss is caused to government exchequer, therefore; gravity of non-compliance of legal

5. Muhammad Aslam versus The State and another (PLD 2006 Supreme Court 465)





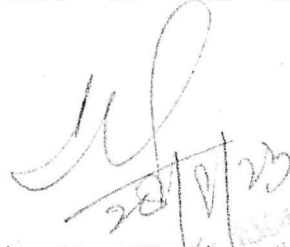
provision is on the lower side. Nevertheless, on account of non filing of return within its due date, the machinery of law came into motion, which cannot be overlooked. In such circumstances, the idea of token penalty comes into operation, which in fact is a step forward towards reformation of the appellant in particular, and society in general. In such circumstances, I feel appropriate to impose "token penalty" upon the appellant, hence; this point is answered in affirmative.

POINT No.2:

16. In view of the above discussion, penalty imposed by the (Commissioner Appeals-I) stands set-aside with direction to the appellant to pay token penalty of Rs.5,000/- (five thousand rupees) to the department, within 15 (fifteen) days of receipt of this order. Let the copy of this order be provided to the learned representatives of the parties.

Certified to be True Copy

  
3/10/2023  
REGISTRAR  
APPELLATE TRIBUNAL  
SINDH REVENUE BOARD

  
28/09/23  
(ALIA ANWER)  
Member Judicial,  
Appellate Tribunal,  
Sindh Revenue Board.

Karachi;  
Dated: 28.09.2023.

Copy supplied to:-

The appellant through authorized representative,  
The Commissioner (Appeals), SRB, Sindh,  
The Assistant Commissioner (Unit-34), SRB, Karachi,  
Office File, and  
Record file.

Order issued on

3/10/2023

  
REGISTRAR

Appellate Tribunal, SB-II, Sindh Revenue Board.

Order Dispatched on

3/10/2023

  
REGISTRAR